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# Life After *Lassiter*: An Overview of State-Court Right-to-Counsel Decisions

By Clare Pastore

An examination of the right to counsel in civil cases in American courts must begin, alas, with *Lassiter v. Department of Social Services of Durham County*. According to the U.S. Supreme Court's decision in the case, an indigent parent facing termination of her parental rights in a state-initiated proceeding has no categorical due process right to counsel.<sup>1</sup> Instead, the Court held, there is a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."<sup>2</sup> When physical liberty is not at stake, the Court held, whether due process requires the appointment of counsel depends on the relative weight of the familiar factors enunciated in *Mathews v. Eldridge*: the private interest at stake, the government's interests, and the risk of erroneous decision in the absence of the desired safeguard.<sup>3</sup> This determination, said the Court, is "to be answered in the first instance by the trial court, subject, of course, to appellate review."<sup>4</sup>

Determining how, and how often, the trial courts actually perform this due process analysis is a remarkably difficult task, however. Although an enormous number of unrepresented litigants are in every state, determining how many request counsel in the trial court is almost impossible in part because, as a rule, only appellate decisions (and not all of those) get published or are available on Westlaw or Lexis.<sup>5</sup> Even when a litigant pursues a request for counsel all the way to an appeal, telling precisely what the trial judge decided can be difficult.

Without a detailed analysis of trial court minute orders, records, and perhaps even transcripts, how often *pro se* litigants request counsel, much less how courts handle such requests in the vast bulk of unappealed cases, is impossible to tell. While approximately five hundred published and unpublished state appellate court decisions cite *Lassiter* and address the appointment of counsel in some way, this number seems rather small in light of the volume of *pro se* litigants and the frequency with which courts seem (by observation and anecdotally) to deny requests for counsel. Even among the cases that our survey (described below) marked as relevant to the

<sup>1</sup>*Lassiter v. Department of Social Services of Durham County*, 542 U.S. 18 (1981).

<sup>2</sup>*Id.* at 26–27.

<sup>3</sup>*Id.* at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>4</sup>*Id.* at 32.

<sup>5</sup>E.g., the Judicial Council of California's Task Force on Self-Represented Litigants estimated in 2004 that over 4.3 million of California's court users are self-represented, and that the mean rate of unrepresented litigants ranged from 16 percent in general civil cases, to 34 percent in unlawful detainers, to 67 percent in family law (72 percent in the state's largest counties). JUDICIAL COUNCIL OF CALIFORNIA, TASK FORCE ON SELF-REPRESENTED LITIGANTS, STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 2 (2004), available at [www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full\\_Report.pdf](http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report.pdf). See also PAULA HANNAFORD, NATIONAL CENTER FOR STATE COURTS, ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS 2 n.2 (2002) (reporting findings that *pro se* litigants often constitute a majority in limited jurisdiction courts, especially in domestic relations).

right to counsel, *why* courts rule as they do, even when they appoint counsel, is often very difficult to tell.<sup>6</sup>

Nonetheless, we can glean some patterns from examining the state appellate decisions. Paul Marvy of the Northwest Justice Project and I, with law student assistance, reviewed each of the approximately one thousand state decisions citing *Lassiter*, and we categorized the nearly five hundred that are relevant to the right to counsel. While a detailed analysis of all the trends, patterns, and doctrinal development we observed is beyond the scope of this overview, a number of general themes emerge. Some of these themes point the way to useful future inquiry, and some suggest potentially productive litigation strategies.

### How State Courts Have Treated *Lassiter*

Courts considering claims for appointed counsel vary significantly in the propo-

sitions for which they cite *Lassiter*. Many cite it for the presumption against the constitutional necessity for appointed counsel when physical liberty is not at stake, in some cases using that proposition as the entire analysis.<sup>7</sup> Some, especially when denying appointed counsel, cite the high Court's remark that the presence of counsel "could not have made a determinative difference" for Ms. *Lassiter*, and likewise find that counsel could not have affected the outcome of the cases before them.<sup>8</sup> Even when they do not cite *Lassiter* specifically for that point, when they deny counsel courts frequently state that counsel could not have affected the result and often dwell on unsavory aspects of the respondent's history.<sup>9</sup> Some courts refuse to reach the counsel issue because unrepresented litigants fail to request appointment of counsel or otherwise present the issue directly and do not preserve the issue properly for appeal.<sup>10</sup> Unsurprisingly, perhaps, courts that

<sup>6</sup>Not every court is as frank as the Michigan Court of Appeals, which stated bluntly in 1998 that "the Michigan courts have never resolved the nature of the doctrinal foundation for the appointment of counsel for indigent respondents . . . ." *In re Osborne*, 584 N.W.2d 649, 652 n.2 (Mich. Ct. App. 1998), vacated on other grounds, 589 N.W.2d 763 (Mich. 1999).

<sup>7</sup>See, e.g., *Lyon v. Lyon*, 765 S.W.2d 759, 763 (Tenn. Ct. App. 1988) (dissolution); *Hughen v. Highland Estates*, 48 P.3d 1238 (Idaho 2002) (unemployment benefit appeal); *Franks v. Mercer*, 401 So. 2d 470 (La. Ct. App. 1985) (paternity actions); *Reynolds v. Blackmond*, 2004 WL 136667, at \*2 (Mich. Ct. App. 2004) (property disputes); *Archuleta v. Goldman*, 761 P.2d 425, 431 (N.M. Ct. App. 1987) (Eighth Amendment claim); *Black v. Miami Valley Hospital*, 1995 WL 558794, at \*1 (Ohio Ct. App. 1995) (damages case).

<sup>8</sup>*Lassiter*, 542 U.S. at 33. E.g., the Mississippi Supreme Court held that whether counsel could have made a determinative difference is "one of the most important factors" in determining whether counsel is required in a termination-of-parental-rights action. *K.D.G.L.B.P. v. Hinds County Department of Human Services*, 771 So. 2d 907, 910 (Miss. 2000). The opinion does not mention *Mathews v. Eldridge*, does not apply its factors, and effectively treats only the "determinative difference" factor as relevant in refusing to reverse the termination of an unrepresented indigent mother's parental rights. See also *In re R.S.*, 2001 WL 1464540, at \*3 (Mich. Ct. App. 2001) (respondent in parental rights termination did not show reasonable likelihood of different result had counsel been appointed earlier); cf. *In Re Claudia S.*, 31 Cal. Rptr. 3d 697, 706-7 (Cal. Ct. App. 2005) (reversing parental rights termination where presence of counsel "would have made a determinative difference"); *Battishill v. Arkansas Department of Human Services*, 82 S.W.3d 178 (Ark. Ct. App. 2002) (termination reversed where no knowing and voluntary waiver of statutory right to counsel and presence of counsel would have made a determinative difference).

<sup>9</sup>See, e.g., *In re H.K.*, 2004 WL 2667135, at \*1 (Cal. Ct. App. 2004) (no error in failing to appoint counsel before a jurisdiction hearing prejudiced mother); *Schieb v. Morris*, 1989 WL 98517, at \*1 (Ohio Ct. App. 1989) (counsel not required in habeas action because it could not have succeeded); *Hughes v. Division of Family Services*, 836 A.2d 498, 500 (Del. 2003) (failure to appoint counsel was harmless error where parental rights would have been terminated anyway). *Lassiter* itself, of course, dwells at some length on the lurid facts of the stabbing for which Ms. *Lassiter* was imprisoned. 542 U.S. 18, 21 n.1 (1981). Strikingly different is the Delaware Supreme Court's discussion in *Watson v. Division of Family Services*, 813 A.2d 1101 (Del. 2002), which fully describes the substance abuse, threats of violence, criminal history, and failure to comply with the case plan of the mother facing termination of her parental rights, only to hold that mother did not require counsel, albeit not due to a categorical rule.

<sup>10</sup>See, e.g., *In re V.R.P.*, 2005 WL 1552641, at \*2 (Tex. App. 2005), in which the court declined to consider a constitutional claim for counsel in a privately initiated termination action because respondent raised it for the first time on appeal. During the proceedings, the indigent *pro se* respondent wrote to the trial court a letter requesting counsel and was allowed to "speak extensively about the reasons he believed counsel should be appointed, but at no time did he raise any constitutional argument. Accordingly, [respondent] failed to preserve the argument for appeal." *Id.* (The court also noted that even if the issue had been preserved, counsel would have been denied.) See also *In Re Termination of Parental Rights of Michaela L.P.L.*, 220 Wis. 2d 359 (Wis. Ct. App. 1998) (where record below is inadequate to determine whether court considered *Mathews* factors in declining to appoint counsel in termination proceeding, appellate court will assume it did so); *Baird v. Harris*, 778 S.W.2d 147, 149 (Tex. App. 1989) (constitutional claim for counsel rejected because record inadequate to evaluate *Mathews* factors).

grant counsel often invoke the complexity of the proceedings and the integrity of the adversary system, while those that reject requests for counsel often refer to the simplicity of the proceedings.<sup>11</sup>

One state supreme court flatly rejected the *Lassiter* analysis as a matter of state law, even where the state constitutional provision at issue had been held to be coextensive to the federal due process clause. The Alaska Supreme Court in 1991 noted that state due process claims were evaluated under the *Mathews v. Eldridge* balancing test but then reached the opposite conclusion from the *Lassiter* majority as to the necessity of counsel in private parental rights termination actions to facilitate adoptions.<sup>12</sup> The state high court bluntly stated, “[W]e reject the case-by-case approach set out by the Supreme Court in *Lassiter*. Rather, our view comports more with the dissent.”<sup>13</sup>

A few other state courts have also found ways to skirt the essence of *Lassiter*, albeit less directly than the Alaska court. For

example, the Court of Appeal of Louisiana held in 1985 that “constitutional due process” mandated the categorical appointment of counsel for indigent parents in state-initiated termination of parental rights proceedings, even while citing *Lassiter*, which held that it did not.<sup>14</sup> A Pennsylvania superior court held in 1982 that counsel was categorically required for indigent putative fathers in paternity actions and noted that “we do not believe that fundamental fairness may be maintained by determining whether an indigent is entitled to appointed counsel on a case-by-case basis, subject to appellate review, as the *Lassiter* Court held with respect to parental termination proceedings.”<sup>15</sup> Yet the reasons the Pennsylvania court gave are virtually identical to those set forth by Justice Blackmun in his dissent in *Lassiter*: that judging the fairness of a proceeding by after-the-fact evaluation of a record created without the guidance of counsel is patently inadequate.<sup>16</sup> The Connecticut Supreme Court did the same in 1985 when it cited Pennsylvania’s *Corra* case but not

<sup>11</sup>Compare *Pasqua v. Council*, 892 A.2d 663, 673 (N.J. 2006) (finding counsel categorically required for indigent parents facing child support contempt proceedings and noting that, “[h]owever seemingly simple support enforcement proceedings may be for a judge or lawyer, gathering documentary evidence, presenting testimony, marshalling legal arguments, and articulating a defense are probably awesome and perhaps insuperable undertakings to the uninitiated layperson”), with *Rodriguez v. Eighth Judicial District Court ex rel. County of Clark*, 102 P.3d 41, 51 (Nev. 2004) (“[I]t would be the exception, not the rule, for a [child support contempt] case to present such legal and factual complexities so as to require the aid of counsel. In only the rarest of cases would a party be unable to comprehend the nature of court ordered child support, or not understand the proceedings and why he or she is before the court on a charge of contempt.”). See also *Corra v. Coll*, 451 A.2d 480, 487 (Pa. Super. Ct. 1982) (counsel required for indigent putative fathers in paternity actions, noting “a paternity proceeding often becomes an adversary contest between a complainant, backed by the resources of a skilled attorney, and the uncounselled accused father. Under these circumstances, the contest is undeniably tilted in favor of the complainant. Since many indigent defendants may be illiterate and unfamiliar with courtroom procedure, that imbalance is exacerbated yet further.”); *Perotti v. Ohio Department of Rehabilitation and Corrections*, 572 N.E.2d 172, 176 (Ohio Ct. App. 1989) (prisoner plaintiff capable of prosecuting action because “[he] filed the complaint, made requests for production of documents, and made numerous pretrial motions, all of which indicate that plaintiff was in control of the situation”).

<sup>12</sup>*In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1991).

<sup>13</sup>*Id.* at 282 n.6. The opinion goes into some detail about the difficulties in negotiating the court process for *pro se* litigants, the strain on court resources when they do, and the role of counsel in safeguarding other protections, such as the “clear and convincing evidence” standard. See *id.* at 283–85. Cf. *In re Render*, 377 N.W.2d 421, 423 (Mich. Ct. App. 1985) (*Mathews* factors as set forth in *Lassiter* are “one framework for consideration” and a “helpful tool” for determining due process question, but not the “sole basis” for determination that due process requires mother’s presence at termination of parental rights dispositional hearing). The California Court of Appeal also departed from *Lassiter* as a matter of state constitutional law in 1983; the court held that the state’s due process clause analysis did not include the *Lassiter* presumption that counsel was required only when physical liberty was at stake. *In re Jay*, 197 Cal. Rptr. 672, 679–81 (1983) (due process under California constitution requires counsel for indigent parents in stepparent adoption proceedings). Later decisions limit this holding to cases involving the parent-child relationship and adopt the presumption against counsel in other contexts. See *Iraheta v. Superior Court*, 83 Cal. Rptr. 2d 471, 477 & n.3 (Cal. Ct. App. 1999) (collecting cases).

<sup>14</sup>*State ex rel. Johnson*, 465 So. 2d 134, 138 (La. Ct. App. 1985).

<sup>15</sup>*Corra*, 451 A.2d at 488.

<sup>16</sup>Compare *id.* with 542 U.S. 18, 51 (2004) (Blackmun, J., dissenting) (“Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard pressed to discern the significance of failures to challenge the State’s evidence or to develop a satisfactory defense.”).

*Lassiter* for this point.<sup>17</sup> A North Carolina court questioned whether *Lassiter* was the appropriate framework for all right-to-counsel determinations, and the Iowa Supreme Court cited it for the proposition that “automatic denial of counsel in all termination proceedings would deny due process.”<sup>18</sup>

The most robust interpretation of *Lassiter*’s application of the *Mathews* test appears to be in Tennessee, where the Court of Appeals held in 1990 that because the interests of the parents and the state were “evenly balanced,” the third part of the *Mathews* test (the chance that failure to appoint counsel might result in an erroneous decision) “becomes the main consideration in this case.”<sup>19</sup> Citing *Lassiter* and *Davis v. Page*, the Tennessee court in *Min* set forth seven factors “that bear on the question” of whether counsel is required: “(1) whether expert medical and/or psychiatric testimony is presented at the hearing; (2) whether the parents have had

uncommon difficulty in dealing with life and life situations, (3) whether the parents are thrust into a distressing and disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures; (5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child in question.”<sup>20</sup> Rigorous application of these factors would certainly seem to suggest that courts should grant counsel in many termination cases. Indeed, many Tennessee decisions have reversed or remanded termination decisions absent any record that the trial court considered these factors, or where the court did not advise indigent parents of their right to request counsel, even while the court described facts that would make termination seem a foregone conclusion.<sup>21</sup> Significantly, however, Tennessee courts have been unreceptive to the few reported claims for counsel outside of the termination-of-parental-rights context.<sup>22</sup>

<sup>17</sup>*Lavertue v. Niman*, 196 Conn. 403, 413 (Conn. 1995).

<sup>18</sup>See *McBride v. McBride*, 431 S.E.2d 14, 18 (N.C. 1993) (describing *Lassiter*’s presumption against counsel where physical liberty is not at stake as “dictum”); *In re S.A.J.B.*, 679 N.W.2d 645, 650 (Iowa 2004); see also *id.* at 651 (citing *Lassiter* for the proposition that “trial courts must not automatically deny counsel, but instead engage in a two-prong balancing test”).

<sup>19</sup>*State ex rel. T.H. v. Min*, 802 S.W.2d 625, 626–27 (Tenn. Ct. App. 1990).

<sup>20</sup>*Id.* at 627. *Davis v. Page*, 714 F.2d 512, 516–17 (Former 5th Cir. 1983) (cited by the Tennessee court in *Min*) was a habeas action by an indigent mother seeking reversal of a dependency order and a classwide order that counsel be required in all dependency proceedings involving indigent parents. The Fifth Circuit upheld summary judgment for the plaintiff-petitioner. 640 F.2d 599 (5th Cir. March 1981). The U.S. Supreme Court vacated and remanded in light of its ruling in *Lehman v. Locoming County Children’s Services Agency*, 458 U.S. 502 (1982), not to invoke federal habeas corpus jurisdiction in challenging state termination-of-parental-rights actions. *Chastain v. Davis*, 458 U.S. 1118 (1982). (Interestingly the remand order did not mention *Lassiter*.) On remand, a badly split Fifth Circuit held that *Lassiter* should reverse its prior determination categorically requiring counsel for indigent parents in all termination actions but also cited *Lassiter*’s language that in some circumstances “an uncounselled parent might be overwhelmed by the proceeding” resulting in a high risk of erroneous deprivation. *Davis*, 714 F.2d at 516. The lengthy dissent by ten judges offers a view of a road not taken to distinguish initial dependency proceedings from the termination proceedings at stake in *Lassiter*, supported by extensive discussion of the probation and other cases on which *Lassiter* relied. *Id.* at 524.

<sup>21</sup>See *State Department of Human Services v. Taylor*, 1997 WL 122242, at \*2 (Tenn. Ct. App. 1997) (Tennessee’s Rule 39 of Juvenile Procedure, adopted in 1984, is intended to implement *Lassiter*’s due process requirements; it was thus reversible error for the trial court to fail to inform the respondent of his right to an attorney and to fail to consider the factors enumerated in *Lassiter* as set forth in *Min* before denying counsel); *In re M.E.*, 2004 WL 1838179, at \*11 (Tenn. Ct. App. 2004) (same; also holds that right to counsel presumptively continues until court finds parent no longer indigent); *In re Valle*, 31 S.W.3d 566, 571 (Tenn. Ct. App. 2000) (failure to inform parent of right to request counsel renders judgment reversible); *In re Adoption of J.D.W.*, 2000 WL 1156628, at \*7 (Tenn. Ct. App. 2000) (“a parent’s failure to request a court appointed attorney prior to trial does not relieve the court of the obligations to inform the parent of his right to be represented and to determine whether due process requires the appointment of counsel where the parent is indigent”); *Adoption of Howson*, 1993 WL 258783 (Tenn. Ct. App. 1993) (*Min* standards applied to privately initiated termination of parental rights; appellate court applied seven-factor test and found mother entitled to counsel); *Tennessee Department of Human Services v. Pepper*, 1986 WL 11275, at \*2 (Tenn. Ct. App. 1986) (pre-*Min* case holding counsel required under *Lassiter* for particular indigent parents in termination of parental rights based on “intellectual capacity” of parents, prior reliance on counsel, and need for expert testimony and cross-examination). But see *Matter of Fillingier*, 1996 WL 271748, at \*4 (Tenn. Ct. App. 1996) (appointment not required under *Lassiter* factors as applied to this litigant who apparently did not request counsel).

<sup>22</sup>See, e.g., *Lyon v. Lyon*, 765 S.W.2d 759, 763 (Tenn. Ct. App. 1988) (no absolute right to counsel in civil cases; dismisses request for counsel in dissolution action without analysis); *Tuttle v. Tuttle*, 1997 WL 629956, at \*2 (Tenn. Ct. App. 1997) (same).

### Contexts of Requests for Counsel

As the Tennessee reports suggest, termination of parental rights cases make up by far the largest category of reported right-to-counsel cases in the state courts. Many states have acted upon the Supreme Court's closing observation that the statutory provision of counsel in termination actions is "enlightened and wise."<sup>23</sup> However, litigation over the precise contours of such statutory entitlements, including at what point in the proceedings the court must appoint counsel, whether a statutory right to counsel encompasses a right to effective assistance, and what the availability and duties are of appellate counsel, is frequent.<sup>24</sup> In states where courts before *Lassiter* found a constitutional right to counsel in termination of parental rights or other actions, courts have had to decide whether the right survived *Lassiter*.<sup>25</sup>

Civil contempt, civil commitment of the mentally ill, and paternity are frequently the context for appellate decisions on the right to counsel. Many courts analogize civil contempt (because of its threat of incarceration) and civil commitment (because of the restrictions on physical liberty) to the criminal context and provide counsel as of right to all indigents (or to all who request or do not waive counsel). These courts often cite *Lassiter* to support the presumption that litigants facing the imposition or threat of such deprivation require counsel.<sup>26</sup> Still, a significant number of courts find no categorical right to counsel in civil contempt.<sup>27</sup> Interestingly the civil contempt cases frequently arise in the context of child support enforcement proceedings.<sup>28</sup>

Several state court decisions address whether indigent potential fathers in paternity actions always require counsel.

<sup>23</sup>See 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, 367 (2005) (noting that forty states now provide free counsel for parents in state-initiated termination-of-parental rights actions, up from thirty-three at the time of the *Lassiter* decision).

<sup>24</sup>See, e.g., *In re O.S.*, 126 Cal. Rptr. 2d 571 (Cal. Ct. App. 2002) (ineffective assistance of counsel rules apply to parental rights termination); *In re E.H.*, 609 So. 2d 1289 (Fla. 1992) (same); *V.F. v. State*, 666 P.2d 42 (Alaska 1983) (same); *In re Heather R.*, 694 N.W.2d 659, 664 (Neb. 2005) (ineffective assistance rules inapplicable to parental rights terminations because right to counsel is statutory, not constitutional). There is also considerable litigation over whether to require appellate counsel and whether appellate counsel must follow the procedures established for criminal defense attorneys in *Anders v. California*, 386 U.S. 738 (1967), in the event counsel feels an appeal is meritless. See, e.g., *Appellate Defenders Inc. v. Cheri S.*, 42 Cal. Rptr. 2d 195, 199 (Cal. App. 1995) (statutory right to counsel in stepparent adoption proceeding that includes parental rights termination encompasses right to appellate counsel; noting there is apparently no situation in which indigents have right to trial counsel but not appellate counsel). Compare *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131 (2004) (*Anders* procedures required; collecting other states' cases so holding), with *N.S.H. v. Florida Department of Children and Family Services*, 843 So. 2d 898 (Fla. 2003) (*Anders* procedures not required in termination proceedings).

<sup>25</sup>The question drew an affirmative answer in Massachusetts (*Petitions of Catholic Charitable Bureau of Archdiocese of Boston Inc. to Dispense with Consent to Adoption*, 490 N.E.2d 1207, 1213 (Mass. App. Ct. 1986)); in Ohio (*In re Johnson*, 1982 WL 8498 (Ohio Ct. App. 1982); *State ex rel. Howard v. Ferreri*, 639 N.E.2d 1189 (Ohio 1994)); in Montana (*In re A.S.A.*, 852 P.2d 127 (Mont. 1993) (right to counsel based on state due process clause)); in Wisconsin (*State v. Pultz*, 556 N.W. 2d 708 (Wis. 1996) (civil contempt)); and in Oklahoma (*In re D.D.F.*, 801 P.2d 703 (Okla. 1990) (reestablishing categorical right to counsel for indigents in parental-rights terminations, now grounded in state rather than federal constitution)). But see *Davis*, 714 F.2d at 518 (former categorical right established in case challenging Florida rules now case by case after *Lassiter*).

<sup>26</sup>See, e.g., *Krieger v. Virginia*, 567 S.E.2d 557, 592 (Va. Ct. App. 2002) (dissenting opinion) (collecting state and federal cases finding right to counsel in civil contempt); *Rapoport v. G.M.*, 657 N.Y.S.2d 748 (N.Y. App. Div. 1997) (*Lassiter* requires counsel in all involuntary hospitalizations); *Honor v. Yamuchi*, 820 S.W.2d 267 (Ark. 1991) (federal due process requires counsel in civil commitment); *In re Civil Commitment of D.L.*, 797 A.2d 166 (N.J. Super. Ct. App. Div. 2002) (counsel required for appeal of sex offender commitment).

<sup>27</sup>See, e.g., *Andrews v. Walton*, 428 So. 2d 663, 666 (Fla. 1983) (finding no circumstances under which a parent is entitled to court-appointed counsel in a civil contempt hearing for failure to pay child support); *In re Marriage of Betts*, 558 N.E.2d 404, 422 (Ill. App. Ct. 1990) (indigent respondent in indirect civil contempt proceeding is not entitled to appointed counsel despite possible imprisonment); *Sheedy v. Merrimack County Superior Court*, 509 A.2d 144, 147 (N.H. 1986) (trial court determines whether to appoint counsel for an indigent defendant in a civil contempt proceeding); *State v. Case*, 667 P.2d 978, 983 (N.M. Ct. App. 1983) (defendant had no right to counsel if actual punishment for civil contempt did not exceed six months' imprisonment).

<sup>28</sup>A recent New Jersey decision finding a categorical right to counsel in child support civil contempt cases, *Pasqua v. Council*, 892 A.2d 663, 673, n. 3 (N.J. 2006), collects child support contempt cases from other jurisdictions.

A majority of post-*Lassiter* cases find no categorical right.<sup>29</sup>

Five published decisions (one pre-*Lassiter*) evaluate the constitutionality of statutes' regulation of minors' access to abortion on grounds related to the right to counsel. Illinois, Indiana, and Florida statutes were held unconstitutional for failure to provide counsel to a minor who sought a judicial bypass of parental notification, while Nebraska and Pennsylvania rules were upheld against such challenges.<sup>30</sup>

### State Due Process and Beyond: Hints of Other Possible Sources for a Right to Counsel

In several states, categorical claims for appointed counsel in the context of privately initiated terminations of parental rights have succeeded on due process grounds

under state constitutions. The cases typically arise when parents separate, one later remarries, and the new spouse wishes to adopt the child of the former marriage, prompting a privately initiated action to terminate the birth parent's parental rights. In Alaska, California, and Florida, courts have held, the states' constitutional due process clauses categorically require counsel for indigent parents facing termination of their rights in these privately initiated proceedings, even though *Lassiter* mandates only an individual inquiry under the federal constitution.<sup>31</sup>

Other states have reached the same result under an equal protection theory. For example, providing counsel to parents in state-initiated but not privately initiated termination proceedings, the high courts of Iowa, North Dakota, Oregon, and Illinois have held, violates equal protection.<sup>32</sup> The

<sup>29</sup>Rulings that paternity actions require no counsel or that adopt only the case-by-case right enunciated under *Lassiter* include *Burrell v. Arkansas Department of Human Services*, 850 S.W.2d 8 (Ark. Ct. App. 1993); *Nordgren v. Mitchell*, 716 F.2d 1335 (10th Cir. 1983) (Utah); *State ex rel. Hamilton v. Snodgrass*, 325 N.W.2d 740 (Iowa 1982); *Franks v. Mercer*, 401 So. 2d 470 (La. Ct. App. 1981); *State Department of Human Services v. Tarvers*, 561 A.2d 1029 (Me. 1989); *Wake County ex rel. Carrington v. Townes*, 293 S.E.2d 95 (N.C. 1982); and *Blake v. Blake*, 878 S.W.2d 209 (Tex. App. 1994). Post-*Lassiter* decisions finding a categorical right to counsel in paternity cases include *Lavertue v. Niman*, 493 A.2d 213 (Conn. 1985) (state-initiated paternity actions); *Kennedy v. Wood*, 439 N.E.2d 1367 (Ind. Ct. App. 1982); *Carroll v. Moore*, 423 N.W.2d 757 (Neb. 1988); *State ex rel. Cody v. Toner*, 456 N.E.2d 815 (Ohio 1983); and *Clinton L.C. v. Lisa B.*, 741 N.Y.S.2d 834 (N.Y. Fam. Ct. 2002). Note that these decisions reflect only the post-*Lassiter* landscape; we did not examine pre-*Lassiter* state decisions, some of which required counsel for indigent putative fathers in paternity actions. See, e.g., *Salas v. Cortez*, 24 Cal. 3d 22 (1979) (complexity of proceedings requires counsel in state-initiated paternity action); *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977); *Artibee v. Cheboygan Circuit Judge*, 243 N.W.2d 248 (1976).

<sup>30</sup>See *Wynn v. Carey*, 582 F.2d 1375, 1389 (3d Cir. 1978) (Illinois) (statute mandating parental notice or judicial bypass for teens seeking abortion is unconstitutional without counsel for teen); *Indiana Planned Parenthood Affiliates Association v. Pearson*, 716 F.2d 1127 (7th Cir. 1983) (same); *In re T.W.*, 551 So. 2d 1186, 1204 (Fla. 1989) (same); *Orr v. Knowles*, 337 N.W.2d 699, 706 (Neb. 1983) (Nebraska statute not unconstitutional despite lack of counsel for teens because proceedings to obtain a judicial bypass of parental notification are not adversarial); *American College of Obstetricians and Gynecologists v. Thornburgh*, 656 F. Supp. 879 (E.D. Pa. 1987) (rule not unconstitutional despite failure to require appointment of counsel for minor seeking abortion).

<sup>31</sup>See *In re K.L.J.*, 813 P.2d at 276 (rejecting *Lassiter's* case-by-case analysis; holding state due process clause requires categorical right to counsel in privately initiated termination proceeding); *In re Jay*, 197 Cal. Rptr. at 679–81 (no presumption under California constitution that due process requires counsel only when physical liberty is at stake; due process requires counsel in privately initiated termination proceeding); *O.A.H. v. R.L.A.*, 712 So. 2d 4 (Fla. Dist. Ct. App. 1998) (due process requires counsel in stepparent adoption just as in state-initiated termination proceeding). Later California decisions undermine *Jay's* holding that there is no state constitutional presumption against counsel where physical liberty is not at stake. See, e.g., *Iraheta v. Superior Court*, 83 Cal. Rptr. 2d 471, 476–77 (1999) (rejecting request for counsel by indigent facing injunction as purported gang member; holding that presumption against counsel applies unless case involves physical liberty or parent-child interest, citing cases).

<sup>32</sup>See *In re S.A.J.B.*, 679 N.W.2d 645 (Iowa 2004) (because statute grants counsel to indigent parents in state-initiated termination proceeding, state equal protection clause requires counsel in privately initiated proceeding); *Adoption of K.A.S.*, 499 N.W.2d 558, 567 (N.Dak. 1993) (same); *Zockert v. Fanning*, 800 P.2d 773, 776 (Or. 1990) (state constitutional "equal privileges and immunities" clause requires counsel for indigent parents in privately initiated termination proceedings since state provides counsel in state-initiated proceedings); *In re Adoption of K.L.P.*, 763 N.E.2d 741, 753 (Ill. 2002) (equal protection analysis identical under state and federal constitutions; providing counsel to parents in state-initiated termination actions but not in those by private individuals after guardianship awarded violates equal protection). Note that the Illinois court in *K.L.P.* expressly reserved the question of whether equal protection also required counsel in termination cases that private individuals initiated entirely; the court vacated the court of appeals' holding on this issue. *Id.* The state-action reasons for the distinction are beyond the scope of this overview. See also *In re Application to Adopt H.B.S.C.*, 12 P.3d 916 (Kan. Ct. App. 2000) (discussing due process and equal protection concerns in failure to appoint counsel for natural father in stepparent adoption-termination case when counsel is provided in state-initiated termination; remanding for new trial and appointment of counsel without precise articulation of basis). *In re Adoption of J.A.P.* 749 A.2d 715, 717–18 (D.C. 2000) (interlocutory appeal dismissed after *pro bono* counsel secured) raised but did not reach an equal protection claim based on the provision of counsel in state-initiated but not privately initiated termination actions.

Illinois case, *In re Adoption of K.L.P.*, also considered the manner of compensating the appointed counsel and found no separation-of-powers bar to the appellate court's order that the county treasurer pay the fees of the mother's appointed counsel.<sup>33</sup> Other courts have split on the availability of payment for appointed counsel in various circumstances.<sup>34</sup>

Another interesting theme in many of the post-*Lassiter* right-to-counsel cases—the relatively frequent discussion of courts' inherent power to appoint counsel for indigents—suggests a fruitful area for further research, advocacy, or perhaps litigation. Many courts have held that they possess such power, or have so assumed in passing, only to decline to exercise it in the case at bar.<sup>35</sup>

A few courts have flirted with constitutional provisions or statutes granting all necessary powers to courts in aid of jurisdiction or the court's inherent "duty to ensure judicial proceedings remain truly adversary" as possible bases for the appointment or payment of counsel. Again, however, these rarely form the basis of an actual appointment.<sup>36</sup>

One of the strongest and most detailed discussions of a court's inherent power to appoint counsel came from the Wisconsin Supreme Court in 1996, in a case overturning a state law which prohibited the appointment of counsel for parents in child neglect proceedings.<sup>37</sup> The state high court held that the statute violated the separation-of-powers principle inherent in the state constitution

<sup>33</sup>*In re Adoption of K.L.P.*, 763 N.E.2d at 747–48 (citing Supreme Court decisions requiring free paternity tests and waiver of court fees for indigents, court notes that "constitutionally based judicial decisions often impose a financial burden on other branches or agencies of government").

<sup>34</sup>See, e.g., *Holt v. Jones*, 1991 WL 214715, at \*3 (Tenn. Ct. App. 1991) (no right to compensation for attorney appointed to represent incarcerated respondent in adoption-termination action); *Ex parte Dibble*, 310 S.E.2d 440 (S.C. Ct. App. 1983) (court has inherent power to require appointed counsel to serve without compensation; remanding for review to ensure appointments fairly distributed among the bar); *Baker v. Arkansas Department of Human Services*, 16 S.W.3d 530 (Ark. 2000) (attorney appointed to represent indigent parent in termination proceeding has claim against state for services rendered to state); *Bedford v. Salt Lake County*, 447 P.2d 193 (Utah 1968) (statute providing for appointment of counsel in civil commitment cases invalid in absence of provisions for compensation of counsel); *State ex rel. A.P.*, 815 So. 2d 115, 118–19 (La. Ct. App. 2002) ("court has inherent authority to order the state, its appropriate subdivision, department or agency to provide for counsel fees and expenses when necessary for effective representation of indigents"). Cf. *Holmes v. Jones*, 719 N.E.2d 843, 847 (Ind. Ct. App. 1999) (although state "pauper statute" mandates appointment of counsel, it "provide[s] no mechanism for funding the expense").

<sup>35</sup>See, e.g., *Cox v. Slama*, 355 N.W.2d 401 (Minn. 1984) (court's supervisory powers to ensure fair administration of justice allow for appointment of counsel for indigent facing child support contempt action, but only when incarceration is a real possibility); *In re Smiley*, 330 N.E.2d 53 (N.Y. 1975) (courts have authority to appoint but not to compensate counsel); *Piper v. Popp*, 482 N.W.2d 353 (Wis. 1992) (although prisoner in tort case has no right to counsel under *Lassiter*, court has inherent authority to appoint counsel in civil cases to ensure meaningful opportunity to be heard); *Caron v. Betit*, 300 A.2d 618, 619 (Vt. 1972) (court has inherent "power to require attorneys to serve and protect the vital interests of uncounseled litigants where circumstances demand it"); *Vick v. Department of Corrections*, 1986 WL 8003, at \*2 (Del. Super. Ct. 1986) (court has inherent power, but denies appointment of counsel to prisoner because no showing that meaningful access to court denied without counsel). Only a few courts have found abuse of discretion in failure to appoint counsel. See *In re Xena X. D.-C.*, 617 N.W.2d 894 (Wis. Ct. App. 2000) (despite lack of statutory right to counsel in neglect proceedings, trial court abused its discretion by not appointing counsel for mother "when the circumstances raise a reasonable concern that the parent will not be able to provide meaningful self-representation"). The Texas Court of Appeal did so in a prisoner medical malpractice case in 2001, only to be reversed by the state supreme court. *Tolbert v. Gibson*, 67 S.W.3d 368 (Tex. App. 2001), rev'd, 102 S.W.3d 710 (Tex. 2003) (without deciding whether statute in fact requires exceptional circumstances for counsel to be granted, supreme court holds that prisoner with medical malpractice claim against prison doctor presents no such circumstances).

<sup>36</sup>See *State ex rel. Johnson*, 465 So. 2d 134, 138 (La. Ct. App. 1985), citing La. Const. art. V, § 2 ("A judge may issue writs of habeas corpus and all other needful writs, orders, and process in aid of the jurisdiction of the court") as authority for payment of appointed counsel; *Travelers Indemnity Company of Connecticut v. Mayfield*, 923 S.W.2d 590, 594 (Tex. 1996). In *Travelers Indemnity* the Texas Supreme Court noted that, despite the duty to ensure judicial proceedings remain truly adversary, "we have never held that a civil litigant must be represented by counsel in order for a court to carry on its essential, constitutional function. Indeed, thousands of cases each year are prosecuted by *pro se* litigants. Nevertheless, we recognize that in some exceptional cases, the public and private interests at stake are such that the administration of justice may best be served by appointing a lawyer to represent an indigent civil litigant." *Id.* While several Texas cases cite this standard, only one reported case used it to appoint counsel, only to be reversed on appeal. See *Tolbert v. Gibson*, 67 S.W.3d 368, 372–73 (Tex. App. 2001), rev'd, 102 S.W.3d 710 (Tex. 2003). See also *Graves v. Adult and Family Services Division*, 76 Or. App. 215, 221 (1985), for a discussion of the duty of administrative law judges to assist unrepresented claimants in welfare hearings to develop an adequate record, including usefully citing the duties of federal administrative law judges, especially toward claimants whose disabilities preclude effective self-advocacy.

<sup>37</sup>*Joni B. v. State*, 549 N.W.2d 411 (Wis. 1996).

because it intruded on the judiciary's inherent power to "appoint counsel in furtherance of the court's need for the orderly and fair presentation of a case."<sup>38</sup> The court noted that such a case might arise with a parent who is "poorly educated, frightened, and unable to fully understand and participate in the judicial process" and who "obviously needs assistance of counsel to ensure the integrity of the [neglect] proceeding...."<sup>39</sup>

State "pauper" statutes are another source sometimes considered when appointed counsel is requested. These statutes often date back to the earliest days of statehood and derive from British common law or statute.<sup>40</sup> They give courts the authority to allow indigents to proceed *in forma pauperis* without paying court fees and frequently confer the power, and in some cases the duty, to appoint attorneys for indigent litigants.<sup>41</sup> (The interesting question of how an indigent layperson could learn of

the existence of such statutes is unanswered in the cases, although at least one court raised the pauper statute *sua sponte* on appeal as a source of the right.)<sup>42</sup> Often such statutes are couched in broad terms offering no guidance as to when a court should actually grant counsel. Case law, however, often narrows both the statutes and the courts' exercise of their inherent powers to "extraordinary circumstances."<sup>43</sup>

In one of the very few cases where a court read a "pauper" statute's broad, unqualified language actually to require the granting of counsel to any indigent litigant who seeks it, the Indiana Court of Appeals fretted for five paragraphs about the effect of its ruling and the lack of funding for appointed counsel, virtually inviting the legislature to intervene.<sup>44</sup> The legislature did so three years later when it amended the original statute, which required that upon finding the litigant indigent the court "shall assign

<sup>38</sup>*Id.* at 414.

<sup>39</sup>*Id.* at 415. The court went on to hold the statute unconstitutional under the federal constitution as well because it precluded the appointment of counsel even when due process as set forth in *Lassiter* required it. *Id.* at 415–16. The court's hypothetical portrait of the litigant who might be entitled to counsel under *Lassiter* is perhaps instructive to advocates. *Id.* at 417.

<sup>40</sup>*Campbell v. Criterion Group*, 605 N.E.2d 150, 160–61 (Ind. 1992), traces the history of Indiana's pauper statute back to the Statute of Henry VII, enacted in Britain in 1495. The plaintiff in *Fraser v. Barnhart*, 840 A.2d 114, 129 (Md. 2003) (Clearinghouse No. 55,347), argued that the Maryland Constitution incorporated a right to counsel derived from the Henry VII statute, a claim the majority refused to reach. The concurring opinion in *Quail v. Los Angeles Municipal Court*, 217 Cal. Rptr. 361, 365 (Cal. Ct. App. 1985), discusses the incorporation of the British common law and statutory right to counsel into California's constitution. A Pennsylvania court held in 1985 that the Henry VII statute might provide, albeit as a matter of court discretion, not right, for the appointment of counsel. *Zerr v. Scott*, 39 Pa. D. & C.3d 459 (Pa. Ct. Com. Pl. 1985). The *Zerr* court, discussing the limits of such discretion, called for its exercise only when "the case has a reasonable possibility of success" and "a person of moderate means would embark upon the litigation." *Id.* at 462.

<sup>41</sup>See, e.g., N.Y. C.P.L.R. 1102(a) (McKinney 2006) ("the court in its order permitting a person to proceed as a poor person may assign an attorney"); TEX. GOV'T CODE ANN. § 24.016 (Vernon 2004) ("A district judge may appoint counsel to attend to the cause of a party who makes an affidavit that he is too poor to employ counsel to attend to the cause."); VA. CODE ANN. § 17.1-606 (2006) ("any person, who is a resident of this Commonwealth, and on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees, except what may be included in the costs recovered from the opposite party"); MO. ANN. STAT. § 514.040 (West 2002) (providing for determination that a litigant is a "poor person" entitled to proceed without payment of fees and that "the court may assign to such person counsel..."); KY. REV. STAT. ANN. § 453.190 (West 2006) ("A court shall allow a poor person residing in this state to file or defend any action or appeal therein without paying costs, whereupon he shall have any counsel that the court assigns him.").

<sup>42</sup>See *Streidel v. Streidel*, 15 S.W.3d 163, 167 (Tex. App. 2000) (citing *Lassiter* for the presumption that due process requires counsel where an indigent may lose personal freedom; finding that the loss of personal freedom from the grant of a restraining order suffices to invoke presumption, court remanded and "recommend[ed] that the trial court give additional consideration to appellant's right to appointed counsel.").

<sup>43</sup>See, e.g., *Coleman v. Lynaugh*, 934 S.W.2d 837 (Tex. App. 1996) (no abuse of discretion in denying appointment of counsel where no showing that case was exceptional); *Hurst v. Department of Rehabilitation and Corrections*, 1992 WL 30785, at \*1 (Ohio Ct. App. 1991) (no right to counsel in prisoner tort suit because no exceptional circumstances); *Wills v. City of Troy*, 686 N.Y.S.2d 154 (N.Y. App. Div. 1999) (no abuse of discretion in failing to appoint counsel for plaintiff in tort suit against city since plaintiff not faced with grievous forfeiture or loss of fundamental right).

<sup>44</sup>*Holmes v. Jones*, 719 N.E.2d 843, 847–48 (Ind. Ct. App. 1999).

him an attorney to defend or prosecute the cause,” to read that counsel “may” be assigned “under exceptional circumstances.”<sup>45</sup> No reported decisions cite the amended statute.

No discussion of state right-to-counsel cases is complete without mention of two notable cases in which concurring or dissenting judges wrote extensively and passionately to protest their courts’ refusal to reach the issue. In *Quail v. Los Angeles Municipal Court* Justice Earl Johnson Jr., a longtime proponent of the right to counsel for indigent civil litigants, dissented from the California Court of Appeal’s refusal to reach the issue of whether an indigent tenant with a mental disability was entitled to counsel in an eviction action.<sup>46</sup> He wrote in encyclopedic scope and detail of the federal and state due process clauses, the California common-law rights of indigents, the inherent power of the judiciary to administer justice, and the injustice of forcing indigent unrepresented litigants to resolve their disputes “through a highly technical process which can only be negotiated by educated and skilled lawyers.”<sup>47</sup>

The other, and more recent, such case is *Frase v. Barnhart*, in which three judges of the Maryland Court of Appeals dissented from the majority’s refusal to reach the issue of whether an indigent mother in a

private custody dispute was entitled to counsel. The dissent described the counsel issue as one “that goes to the very center of the American constitutional, and extra-constitutional promises—equality under the law.”<sup>48</sup> Explicating a right to counsel founded on due process and equal access to justice, Judge Dale R. Cathell wrote: “[I]t is my belief that there is no judge on this Court that believes in his or her heart or mind, that justice is equal between the poor and the rich—even in the tradition hallowed halls of our appellate courts.”<sup>49</sup> One day, perhaps, we will look back from the vantage point of an adversary system with true adversaries on each side and recognize the foresight of these jurists.

## Conclusion

Advocates can perhaps draw several lessons from this brief survey of the post-*Lassiter* landscape. If, as many fear, the 2006 Supreme Court is in no rush to expand the federal rights of indigent litigants, advocates should examine state due process, equal protection, and access-to-court guarantees as an alternate source of incremental expansion of a right to counsel at the state level. This is of course particularly true in states where due process or equal protection guarantees have been held to be broader than the analogous federal provisions or not limited by federal courts’ interpretation of the federal constitution.<sup>50</sup>

<sup>45</sup>Compare former IND. CODE § 34-1-1-3 (repealed 1998), cited in *Holmes v. Jones*, 719 N.E.2d at 845, with IND. CODE § 34-10-1-2 (1998) (amended 2002). Under the amended statute, factors the court may consider in making the exceptional circumstances determination include the applicant’s likelihood of prevailing on the merits and her “ability to investigate and present [her] claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.” The statute requires denial of the application if the applicant “failed to make a diligent effort to obtain an attorney” or is unlikely to prevail. *Id.*

<sup>46</sup>*Quail v. Los Angeles Municipal Court*, 217 Cal. Rptr. 361 (Cal. Ct. App. 1985). For Justice Earl Johnson Jr.’s views on a right to counsel, see, e.g., 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); *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INTERNATIONAL LAW JOURNAL 583 (2000); and *Toward Equal Justice: Where the United States Stands Two Decades Later* 5 MARYLAND JOURNAL OF CONTEMPORARY LEGAL ISSUES 199 (1994).

<sup>47</sup>*Quail*, 217 Cal. Rptr. at 372 (Cal. Ct. App. 1985).

<sup>48</sup>*Frase*, 840 A.2d at 131.

<sup>49</sup>*Id.* at 134.

<sup>50</sup>See, e.g., *Dua v. Comcast Cable*, 805 A.2d 1061, 1071 (Md. 2002) (state constitutional provisions not always interpreted identically to federal counterpart); *Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979) (collecting cases regarding state power to interpret state constitutions more broadly than federal counterparts); *Adoption of K.A.S.*, 499 N.W.2d at 563 (state constitution may be broader than analogous federal provisions).

The adoption cases in which equal protection has mandated the extension of rights are a source of encouragement. Another path to consider is the pauper statutes and their common law and state constitutional equivalents, as *Frase* raised and the concurrence in *Quail* “briefed.” Still another is pushing the frontiers of “extraordinary circumstances” under which state pauper or other statutes provide authority for appointed counsel, perhaps at first on behalf of litigants with documentable disabilities precluding effective self-representation.<sup>51</sup> If adopted elsewhere, the factors and process that Tennessee courts use to assess an individual’s ability to proceed without counsel might make a significant difference. Development of the law under courts’ inherent power to ensure the fair administration of justice might also be promising.

Clearly the push for counsel for indigent litigants also requires an evolution in the thinking of judges and the public so that they no longer regard limited access to justice for those too poor to pay for counsel as an inevitable, if unfortunate, aspect of the system but instead recognize it as a form of state-created inequality. As Justice Johnson’s *Quail* concurrence notes, “this state has chosen to use an adversary system to resolve... disputes.... [The state] also has chosen to implement this adversary system through a highly technical process which can only be negotiated by educated and skilled lawyers. Thus, the... courts cannot effectively and fairly administer justice to civil litigants unless both adversaries are represented by competent legal counsel.”<sup>52</sup>

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<sup>51</sup>For a discussion of the Americans with Disabilities Act as a source of the right to counsel for indigent litigants with disabilities, see Lisa Brodoff et al., *Access to Justice—A Call for Civil Gideon: The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 609 (2004).

<sup>52</sup> *Quail*, 217 Cal. Rptr. at 372.