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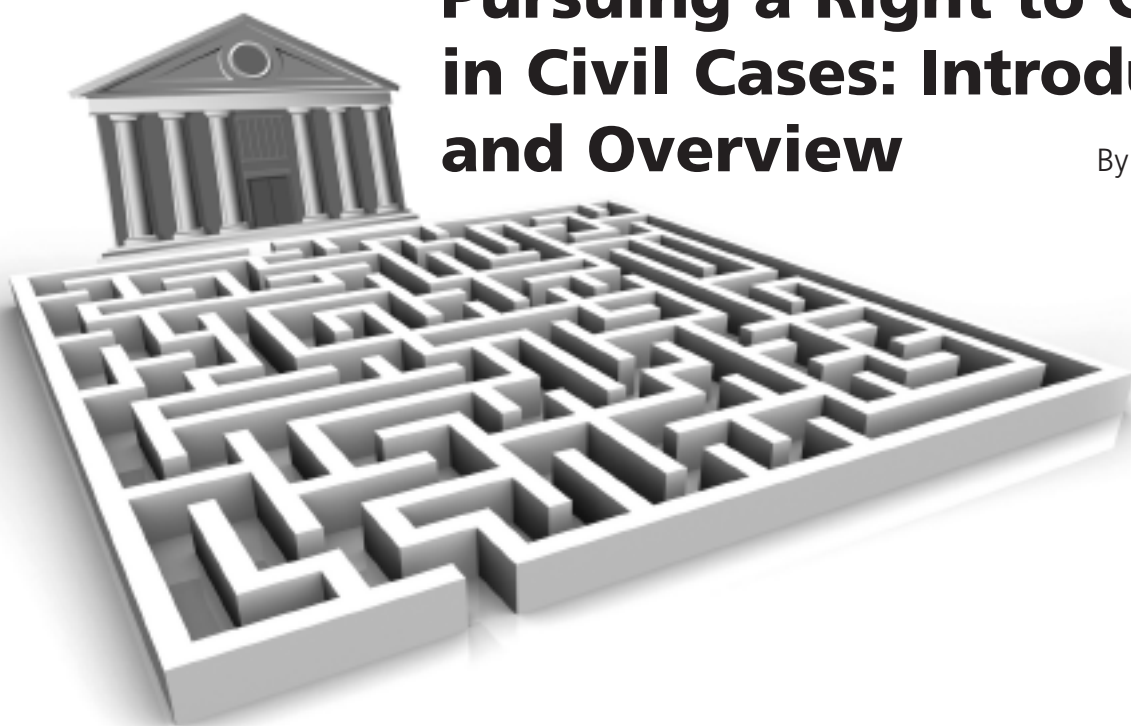


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Pursuing a Right to Counsel in Civil Cases: Introduction and Overview

By Debra Gardner



Debra Gardner
Legal Director, Public Justice Center,
and Coordinator, National Coalition
for a Civil Right to Counsel

500 E. Lexington St.
Baltimore, MD 21202
410.625.9409
gardnerd@publicjustice.org

This issue of CLEARINGHOUSE REVIEW deals entirely with a range of perspectives on current efforts to achieve a right to counsel at public expense for poor people involved in civil cases. Although a single issue of this journal cannot possibly cover the entire subject—on which much has been written for many years, as readers can see in Paul Marvy’s article, *Thinking About a Civil Right to Counsel Since 1923*—the articles published here offer a wealth of information on legal theories, strategies, public policy arguments, and other matters crucial to the eventual success of this effort.

On at least a couple of points, there is little room for debate. First, the unmet need for civil legal assistance in this country is immense, and the need continues to grow.¹ No one knows—or feels—or lives that crushing need more every day than readers of the REVIEW and, of course, low-income clients themselves. Despite every creative and innovative effort brought to bear on spreading our thin, and thinner, resources as far as they will possibly go, the need does not diminish. Second, having a lawyer makes a difference.² Justice Black’s description in *Gideon v. Wainwright* of the importance of counsel in criminal cases is equally true in civil matters:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law He is unfamiliar with the rules of evidence He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.³

¹See LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA, (2005), available at www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf.

²See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in the Legal Process*, 20 HOFSTRA LAW REVIEW 533 (1992); 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).

³*Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

A Word About Wording

Advocates often use the term “civil Gideon” as shorthand for the right to counsel in civil cases. Users of the term are referring, of course, to the landmark 1963 U.S. Supreme Court decision in *Gideon v. Wainwright* that a defendant in a criminal case has a constitutional right to court-appointed counsel. Articles in this issue use the terms “civil Gideon,” “right to counsel in civil cases,” and “civil right to counsel” interchangeably.

California Justice Earl Johnson Jr., a founder and leading proponent of the modern civil Gideon movement, observed that “poor people have access to the American courts in the same sense that the Christians had access to the lions when they were dragged into a Roman arena.”⁴

Once we move beyond these basic points of agreement, advocates bring varied views to the quest for a civil right to counsel. This issue of the REVIEW includes detailed accounts of campaigns in a few states where advocates have had their noses to the grindstone for several years, each with its own set of legal claims and strategies. A step-by-step tale of getting a civil Gideon effort off the ground will, we hope, inspire readers in other states to start the journey as well. Authors present litigation and legislative approaches, federal and state law claims, and other questions challenging advocates today, including important lessons we can learn from the experience of our comrades on the defender side since *Gideon*. One article analyzes the status of a civil right to counsel under the federal Constitution twenty-six years after the U.S. Supreme Court allowed the right’s invocation only on a case-by-case basis. Another article details international law and human rights support, and the Canadian Bar Association weighs in on its strategy. A

legal services leader and civil rights leader team up to explicate what every reader knows instinctively: because of the disparate impact of poverty on women and people of color, civil Gideon is among our most relevant tools to achieve race and gender justice.

To be sure, not all advocates of a civil right to counsel agree on a single approach. The beauty of this new movement is that such agreement is unnecessary. We are free to grow our civil Gideon efforts locally, organically, and see where they take us. One thing we do know, however, is that the time has not yet come to seek a reversal of *Lassiter v. Department of Social Services*. The U.S. Supreme Court in *Lassiter* refused to find that indigent parents facing termination of their parental rights had a categorical constitutional right to counsel.⁵ While overruling *Lassiter* may well be our eventual goal, getting ahead of ourselves would be extremely unwise.

For that reason, advocates mindful of the need to coordinate and strategize together, to share information and tools, formed the National Coalition for a Civil Right to Counsel. Begun in January 2004 as a result of discussion at a civil Gideon workshop at the 2003 National Legal Aid and Defender Association (NLADA) annual conference in Seattle, Washington, the coalition continues to grow as a loose association of legal aid advocates, supporters from public interest law firms, the private bar, academy, state and local bar associations, and others. Significantly it also includes staff from and has the support of national organizations such as NLADA, the Center on Law and Social Policy, the Brennan Center for Justice at New York University School of Law, and the Sargent Shriver National Center on Poverty Law. Well over one hundred members from more than thirty-five states are now part of the group, which keeps members in touch with developments and strategic discussions through a national listserv and monthly conference calls.

⁴Earl Johnson Jr., *Thrown to the Lions: A Plea for a Constitutional Right to Counsel for Low-Income Civil Litigants*, BAR LEADER, Sept.–Oct. 1976, at 17.

⁵*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

Efforts by the National Coalition for a Civil Right to Counsel to raise the level of awareness of the call for a civil Gideon have been paying off. The coalition has presented workshops at the NLADA annual conferences since 2003 and at the American Bar Association and NLADA's Equal Justice Conference for the last two years. Coalition members have given presentations and hosted discussions at state bar, statewide legal aid, and state access to justice events in many states. Because of these efforts, the University of Pennsylvania School of Law's Annual Edward V. Sparer Symposium chose civil Gideon as its subject for 2006. The symposium took place on March 28, and the papers will be published in the *Temple Political and Civil Rights Law Review* next winter. The civil right to counsel was the featured topic on National Public Radio's *Justice Talking* with Margot Adler during the week of April 10, 2006. And, most significant, as reflected in Michael Greco's introduction, we are hopeful that the American Bar Association will, at its

annual meeting in August, adopt a policy resolution endorsing a defined right to counsel in civil matters.

As civil Gideon gains more traction, the national coalition and the broader poverty law community must be ready for the accompanying challenges. How will the justice system implement and administer a right to counsel in civil cases? How will proponents secure funding adequate to ensure that the right is not a hollow one? How will we ensure that legal aid programs remain free to set local priorities and remain client-centered? Our National Coalition for a Civil Right to Counsel consists of almost all of us who have devoted our lives and careers to civil legal aid and who have been thinking about these issues from the beginning of our work together. These and other strategic questions will continue to occupy us as we move ahead, and we need help from the breadth of the poverty law community—from all of you—to answer them. To become part of the national coalition, send an e-mail to gardnerd@publicjustice.org.

Stop Rolling Your Eyes!

With an introduction and call to action from the American Bar Association president, Michael Greco, and this entire issue of *CLEARINGHOUSE REVIEW* chock-full of impressive scholarship and practical advice, we might think we had gotten past the tendency of some of our colleagues to roll their eyes and tell us, "Civil Gideon is just not realistic. It's pie in the sky." Indeed, many participants at our National Legal Aid and Defender Association and Equal Justice Conference workshops have said, "I used to think you were wasting your time, that this would never happen." But, they went on, "after looking at the briefs, hearing the legal arguments, listening to conversations about strategizing and organizing, I'm a believer." So, dear reader, that's your challenge. Before you decide that this issue of your favorite poverty law journal is not relevant to your work and toss it on the pile on your desk that you never quite get around to reading, take a closer look. Read these articles and the briefs some of them will point you to. Give yourself, and us, a chance to overcome your skepticism—and then start or join a civil Gideon effort in your own state and become part of the national coalition.

DEBRA GARDNER