

A Civil Right to Counsel for the Poor

By Paul Marvy and Debra Gardner

Is it extravagant to think that legal assistance should be provided as a matter of right for some civil litigants? Current federal law answers yes. This response is so out of keeping with the guarantee of equal justice and the needs of the poor that advocates across the country are creating a different question: Is the right to counsel in civil cases a basic right whose recognition is long overdue?

The gap between civil legal needs and available services has been well documented. A 1993 American Bar Association study showed that 70 percent of poor people could not obtain legal help for their serious legal problems. Many follow-up studies suggest the number is closer to 90 percent. As a consequence, poor people largely cannot enforce what rights they have. Without available legal assistance, laws that protect such basic needs as family integrity, shelter, medical care, food, and employment have become effectively meaningless for many people. Some states even can and do sever the parent-child relationship without providing legal help to either parents or children. The individual and social costs of losing housing, healthcare, and family are enormous and often far in excess of those associated with the threat of incarceration, which is sufficient to trigger the criminal right to counsel.

Although lay litigants are no better able to navigate the legal system in civil cases than in criminal ones, the simple logic of *Gideon v. Wainwright*, 372 U.S. 335 (1963), has yet to be applied in the civil arena. In *Gideon*, the U.S. Supreme Court required that counsel be appointed for criminal defendants because “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.” *Id.* at

344–45. Eighteen years later, the Supreme Court in *Lassiter v. Dep’t of Social Services*, 452 U.S. 18 (1981), acknowledged that federal due process does at times require appointment of counsel in civil cases. However, in a 5–4 decision, the court held that there is a blanket presumption against appointing counsel in cases where no threat of incarceration exists, a presumption that can only be overcome in exceptional circumstances. In practice, *Lassiter* sounded a death knell for efforts to recognize a meaningful civil right to counsel as a matter of federal due process.

Moving Beyond Federal Law

Like the pre-*Gideon* jurisprudence in criminal cases it closely resembles, *Lassiter* is remarkably out of step with the demands of equal justice, demands that are well articulated in international norms, our common-law heritage, and the dictates of many state constitutions.

Among peer nations, the United States stands virtually alone in its tight-fisted approach to civil legal assistance. Over fifty countries provide legal representation in civil cases as a matter of right. Many do so because the European Court of Human Rights has recognized the right as fundamental to the very notion of a fair hearing. Countries as diverse as Germany, South Africa, Poland, Greece, Ireland, Slovenia, and Hong Kong have well-functioning civil assignment systems, some centuries old.

These civil right-to-counsel provisions are no recent invention, and they derive from concepts of open and fair justice as old as the justice systems themselves. Because of our shared common-law heritage, Americans would do well to remember that there was free legal assistance for the poor

in English courts as early as the 1200s. Mandatory appointment-of-counsel provisions existed at common law by the fourteenth century. Recognizing that these provisions were necessary for equitable access to the justice system, the British Parliament in 1494 codified the then-existing right to appointed counsel in a statute that has remained effective and been practiced ever since.

The principles that inform international and common-law appointment of counsel practices find full expression in many state constitutions here at home. Article 19 of Maryland’s Declaration of Rights reads, for instance,

[t]hat every man, for any injury done to him in his person or property, ought to have remedy by course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.

Maryland’s provision derives from three sources well read by drafters of state constitutions: William Blackstone, Edmund Coke, and the Magna Carta. At least forty states have similar open courts provisions. Together with related guarantees of equal justice and the rule of law, these provisions provide a solid foundation for a broad civil right to counsel.

Organizing for Change

Does this seem like pie in the sky? Think again. In 2003, Maryland’s highest court heard a case presenting these claims and, by just one vote, declined to reach the civil right-to-counsel issue. In an impassioned concurrence, three members of the court declared that the issue will not go away until it is answered in the affirmative. *See Frase v. Barnhart*, 379 Md. 100 (2003). Advocates in

Maryland are working to ensure that the issue does not, in fact, disappear. Indeed, creative litigation and legislative efforts are underway in California, Georgia, Maryland, New York, Texas, Washington, and Wisconsin to recognize the right to civil counsel.

Recognizing the considerable value to be gained from coordinating these efforts, the Public Justice Center in Baltimore, Maryland, recently organized comprehensive discussions about advancing the civil right to counsel. Those discussions have now evolved into the National Coalition for a Civil Right to Counsel, a group with members from public interest organizations, the private bar, universities, the judiciary, bar associations, national strategic centers,

and others. The coalition now performs important support functions for what are, because of *Lassiter*, now largely state-based efforts. Coalition activities include strategic planning, information sharing, education, recruitment, and the development of social science research. These efforts reflect a widespread conviction that the civil right to counsel is not an extravagant wish for reform but instead a fundamental aspect of any justice system that lays claim to doing justice.

In *Democracy in America*, Alexis de Tocqueville wrote in 1835 that “lawyers belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society.”

Poverty should not mean having to surrender vital legal rights. If our justice system conditions the rights to family, housing, and food upon having enough wealth to afford a lawyer, there is no justice in it.

Paul Marvy works as project coordinator for the Committee for Indigent Representation and Civil Legal Equity, a group of equal justice advocates seeking recognition of a civil right to counsel in civil cases in Washington State. Debra Gardner serves as legal director of the Public Justice Center and coordinates the National Coalition for a Civil Right to Counsel. To find out more about the national coalition, contact Debra at gardnerd@publicjustice.org.