



Advocacy for a Civil Right to Counsel: An Update

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Advocacy for a civil right to counsel has grown over the last several years. The entire July–August 2006 issue of *CLEARINGHOUSE REVIEW: JOURNAL OF POVERTY LAW AND POLICY* explored these efforts. And the special issue’s title—*A Right to a Lawyer? Momentum Grows*—neatly matched many readers’ reactions to the meaty issue. Featured articles covered scholarship, legal strategies, public defense experiences, human rights law, statutory rights, and strategies being pursued in many states.

The described activities have by now borne some fruit, and new initiatives have begun as well. Diverse groups of advocates continue to pursue creative strategies to expand recognition and implementation of rights to legal assistance. These efforts highlight real challenges to the ways in which we understand and organize civil legal aid. Below I describe the most critical developments since publication of the *REVIEW* special issue—developments that deserve close attention from all who care deeply about civil legal aid and the problems it confronts.

American Bar Association Resolution

In August 2006 the American Bar Association adopted a formal policy calling on governments to recognize and implement a right to counsel in civil cases. The resolution had been developed by a task force established by the association’s then-president, Michael Greco. It reads:

The American Bar Association urges 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.

The accompanying policy report outlines justifications for recognizing the right and ways that advocates have pursued that goal.¹

The resolution garnered significant support from many constituencies of the American Bar Association and passed the association’s policy-making body, the House of Delegates, unanimously.² Since then, the association’s Standing Committee on Civil

¹See www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

²The resolution was cosponsored by the bar associations of New York, Maine, Colorado, Washington, Minnesota, Connecticut, New York City, New York County, King County (Seattle), Los Angeles, Boston, Philadelphia, and the District of Columbia; American Bar Association (ABA) commissions on Interest on Lawyers’ Trust Accounts, Immigration, and Law and Aging and the ABA sections of Litigation, Business Law, Labor and Employment Law, Administrative Law and Regulatory Practice, and Individual Rights and Responsibilities; and ABA committees on Unmet Legal Needs of Children, Death Penalty Representation, and Legal Aid and Indigent Defendants. The National Legal Aid and Defender Association was also a formal cosponsor.

Legal Aid and Indigent Defendants appointed a permanent subcommittee charged with furthering the resolution's goals.

The American Bar Association leads in two related initiatives: advocacy for a right to counsel for those detained in immigration proceedings and for meaningful representation for youth involved in child abuse and neglect proceedings.³

State-Based Advocacy

Advocacy is proceeding in several states through both litigation and support from bar associations and other parts of the legal community.

Alaska. In October 2006 defendant Siv Jonsson asked an Anchorage court to appoint counsel for her in a custody dispute in which the plaintiff was represented. In her motion, Jonsson argued that she had a right to counsel under the due process clause of the state's constitution.

The trial court requested amicus briefing from the Alaska Legal Services Corporation and the Attorney General's office, among other entities. The Alaska Legal Services Corporation, the Alaska Pro Bono Program Inc. and the Alaska Network on Domestic Violence and Sexual Assault jointly filed a brief supporting Jonsson's position. After finding that the opposing party—the father of the child who is the subject of the custody dispute—could not pay for an attorney for Jonsson, the judge entered a sixteen-page order and memorandum appointing counsel and citing as authority both the due process and equal protection clauses of Alaska's constitution. Under case law and statute, Alaskans already had a right to counsel in custody cases when one party is indigent and a public agency represents the other. The court's order recognized that the right extended to cases where one party is indigent and a private attorney represents the other.

The Alaska Court System moved to intervene and for reconsideration of the order appointing counsel; the trial court granted these motions. The court system argued either that some statutory language should be severed—a change that would result in cases like Jonsson's being handled by the state's Office of Public Advocacy—or that the due process argument should fail. The Office of Public Advocacy in turn intervened and argued instead that the court system bore responsibility for implementing any right recognized by the trial court.

In January 2008 the judge ruled that the Office of Public Advocacy was responsible for providing Jonsson with an attorney because a private attorney and publicly funded guardian ad litem were already involved in the case.⁴ The Office of Public Advocacy has appealed to the state's supreme court.

California. In October 2006 the Conference of Delegates of California Bar Associations (a separate entity from the State Bar of California) passed a resolution recommending legislation to add a new provision to the state constitution as Article 1, Section 32:

All people shall have a right to the assistance of counsel in cases before forums in which lawyers are permitted. Those who cannot afford such representation shall be provided counsel when needed to protect their rights to basic human needs, including sustenance, shelter, safety, health, child custody, and other categories the Legislature may identify in subsequent legislation.

A task force of the California Commission on Access to Justice developed a model statute that would implement a comprehensive right of access to equal justice, including, when appropriate, a right to appointed counsel.⁵ That group

³See www.abanet.org/publicserv/immigration/107a_right_to_counsel.pdf.

⁴*Randall Guy Gordanier Jr. v. Siv Betti Jonsson*, No. 3AN-06-8887C1 (Alaska Super. Ct. 3d Dist. Jan. 23, 2008).

⁵The model statute is available at www.povertylaw.org/poverty-law-library/research-guides/civil-gideon/state-model-statute.pdf.

is now at work on a related model statute that could be the basis for a right similar in scope to that urged in the resolution.

Maine. In October 2007 Maine's Justice Action Group issued the state's first comprehensive plan for delivery of civil legal services. The plan and its accompanying resolution call for a commission to study adoption "of a civil right to counsel in adversarial proceedings in which basic human needs are at stake" and to take into consideration

costs and evaluation of funding mechanisms; the scope of the right and when it attaches; eligibility criteria; types of representation and/or the scope of services; the types of providers; screening/process; right to counsel on appeal; phasing in of implementation; monitoring and evaluation of a pilot project.⁶

The work of the Justice Action Group is especially notable because of its broad membership—state supreme court justices, members of the federal judiciary, state legislators, staff from the governor's office, presidents of the state bar association and bar foundation, the dean of the University of Maine Law School, and board members of legal aid providers.

Massachusetts. Underscoring the Boston Bar Association's long commitment to access to justice, Anthony M. Doniger, the association's president recently created a task force on civil right to counsel and explained that "[w]e are now beyond discussing the civil right to counsel as a positive concept, which we accept, and must address the harder issue, which is how to go about implementing such a right."⁷

Mary K. Ryan, a past president of the association, chairs the task force, with representatives who sit on bar committees that cover housing, probate and family, immigration, juvenile, civil collateral consequences of criminal cases, funding, research, and litigation. The housing and

probate and family committees are surveying judges, court personnel, legal aid advocates, private bar members, and other interested parties to determine the types of cases in which counsel is most needed for a just outcome.

Both the Massachusetts Bar Association and the Access to Justice Commission have endorsed the concept of providing civil counsel to low-income people by right in areas vital to basic human needs. In October 2007 the two organizations and the Boston Bar Association jointly sponsored a civil Gideon symposium. Speakers called for revisiting the roles of judges, clerks, and court procedures; using every form of legal assistance short of counsel, such as hotlines, unbundling, *pro se* clerks, lawyer for the day, and technology; and establishing a right to counsel in cases where basic human needs are at issue and only counsel can secure a just outcome.

Minnesota. In September 2007 the 124-member assembly of the Minnesota State Bar Association voted to establish a task force to study the feasibility of recognizing broader rights to counsel in civil cases. The bar president will appoint task force members, with representatives from the legal aid, public defender, county attorney, law school, and judicial communities. The task force may examine the basis for a civil right to counsel in Minnesota, the costs of recognition, and how a right might affect funding for legal services, public defenders, county attorneys, and the judiciary; the task force may convene public hearings.

New Hampshire. In April 2005 the chief justice of New Hampshire appointed a Citizens Commission on the State Courts to assess the justice delivered by the judicial branch and recommend improvements. The commission saw its role particularly in light of the state constitutional provision that

[e]very subject of this state is entitled to a certain remedy, by having recourse to the laws, for

⁶See www.mbf.org/JAGReport12-17-07.pdf. The report noted that the state's commissions on Legal Needs and the Future of Maine's Courts had raised the issue almost two decades earlier.

⁷Anthony Doniger, *President's Page: A Civil Right to Counsel*, BOSTON BAR JOURNAL, Sept.–Oct. 2007, at 2.

all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.⁸

In its final report the commission recommended examining the “expansion of legal representation to civil litigants unable to afford counsel and study[ing] the implementation of a ‘civil Gideon.’”⁹ New Hampshire’s newly formed access to justice commission will examine the recommendations of the citizens’ commission.

New York. Through legislation passed in August 2007, New York expanded access to appointed counsel. A right to counsel was already in place for child custody cases heard in family courts. The new law extends that right to similar proceedings in the state’s general jurisdiction trial courts.

Kathryn Madigan, the New York Bar Association president, created a committee on civil right to counsel, some of whose immediate goals are developing a messaging strategy, preparing a white paper on ways to advance the civil right to counsel, and coorganizing a statewide conference to be held in March at Touro Law School.

The New York City counsel is considering a bill that would provide a right to counsel for low-income seniors in eviction and foreclosure cases. Nearly half the council members signed on as cosponsors, and many spoke at the press conference announcing it, some of them describing seniors in their districts forced to represent themselves in housing court and others describing the bill as fiscally responsible. Participants chanted “no lawyer, no justice” and held signs saying, “Would you send your grandmother to court without a lawyer?”

Ohio. Advocates have focused on expanding the right to counsel of defendants caught in involuntary adoption proceedings. In Ohio a nonparent may file a probate action to adopt a child and simultaneously terminate the rights of one or both parents. Defendants faced with termination of their parental rights have no right to counsel, nor do they receive many of the other procedural protections available when the state seeks termination.

Ohio courts are inconsistent on whether defendant parents in probate court have a right to counsel. In an effort to clarify the question, Southeastern Ohio Legal Services and a pro bono attorney, relying on due process and equal protection claims, raised the issue. That case, with an amicus brief filed by the National Center for Adoption Law and Policy, went to an intermediate appellate court, which expressed a great deal of interest in the right-to-counsel issue. However, the court decided the case favorably on a substantive issue and so did not reach the right-to-counsel claim.¹⁰

Ohio advocates, among them being representatives from all the state’s legal aid programs, private attorneys, and the Ohio Legal Assistance Foundation, continue monthly telephone meetings and held their first statewide meeting last October. They plan to examine the cost of providing counsel in involuntary adoption proceedings and are preparing model pleadings.

Pennsylvania. In November 2007 the Pennsylvania Bar Association’s House of Delegates passed two combined resolutions. One called for full restoration of state and federal funding for the Pennsylvania Legal Aid Network; the other urged the state to provide counsel as a matter of right in cases involving basic human needs. The resolution had the unanimous support of the board of governors, and advocacy is under way to pursue implementation.

⁸Me. CONST. pt. 1, art. 14.

⁹New Hampshire Citizens Commission on the State Courts, Report and Recommendations 10 (2006), www.nhcticourts.org/committees/pdf/printer's_final_report_web.pdf.

¹⁰*In re Adoption of Hughes*, No. 07CA2947, 2007 WL 2070363 (Ohio Ct. App. July 17, 2007).

Washington State. Litigation had just begun on *In re Marriage of King*, a custody case, when the civil-right-to-counsel issue of the REVIEW went to press. The sole question in the case was whether the defendant mother, Brenda King, had a right to appointed counsel.

In December 2007 the Washington Supreme Court ruled that she had none. In doing so, the court squarely addressed the merits of three state constitutional arguments that King had raised through her pro bono appellate counsel.¹¹

While a dissent can be cold comfort, Justice Barbara A. Madsen in this case spoke clearly to the issues at hand:

Ms. King's struggle to represent herself in this case demonstrates the legal hurdles that arise every day in courtrooms across Washington, showing the importance of counsel to a parent in a dissolution proceeding seeking to secure her fundamental right to parent her children. The majority's decision does not begin to address the obstacles an indigent parent encounters when she is unrepresented by counsel, nor does it realistically assess the loss she faces....¹²

Ms. King's case is complex, though not remarkably so. It is in a great many respects a microcosm of the legal hurdles that arise in quite ordinary circumstances, and therefore is a representative case for showing the importance of counsel to a parent seeking residential placement of her children. Because the facts illuminate the need

for counsel and show how the absence of representation can frustrate proceedings in a court of law, I present them in some detail....¹³

The case did bring together a remarkable coalition. Amicus briefs were filed on behalf of the Washington State Bar Association, the Northwest Women's Law Center, international law scholars, retired superior court judges, and the National Coalition for a Civil Right to Counsel. Members of Washington's Equal Justice Alliance are working to use the attention that the case received as a vehicle to publicize the scope of unmet civil legal needs. Advocates are considering the opinions and strategic environment as they plan their next steps.

In a more positive development, Washington's supreme court adopted in September 2007 a court rule that clarifies the court system's responsibilities to users of the system who have disabilities. The rule specifically notes that appointed counsel is a possible reasonable accommodation.¹⁴

Wisconsin. In the REVIEW special issue, John F. Ebbott describes litigation seeking recognition of a right to counsel for civil litigants in Wisconsin; the case had grown out of a motion to modify a parenting plan that was dismissed for failure to prosecute.¹⁵ Ebbott describes the case's legal arguments and procedural history up to the point at which a motion to bypass the Wisconsin Court of Appeals had been denied. In December 2006 the appellate court ruled in an unpublished decision that the litigant, Diana Romfeldt-Mendoza, did not have a right to representation by a lawyer.¹⁶ The state supreme court declined review.¹⁷

¹¹*In re Marriage of King*, 174 P.3d 659 (2007) (Clearinghouse No. 56,032). Oral arguments can be heard at www.tvw.org/media/mediaplayer.cfm?evid=2007050057B&TYPE=V&CFID=1219485&CFTOKEN=10d48dc7c3242868-EE1D8074-3048-349E-4ED2D913294A82C6&bhcp=1.

¹²*In re Marriage of King*, 162 Wash. 2d 403-404 (2007).

¹³*Id.* at 405.

¹⁴Washington General Rule 33(a)(1)(C) (2007).

¹⁵John F. Ebbott, *To Gideon via Griffin: The Experience in Wisconsin*, 40 CLEARINGHOUSE REVIEW 223 (July-Aug. 2006).

¹⁶*Parrish v. Romfeldt-Mendoza*, 727 N.W.2d 374 (2006).

¹⁷*Parrish v. Romfeldt-Mendoza*, 732 N.W.2d 860 (2007).

Other Strategic Developments

Advocacy for a civil right to counsel is proceeding on other fronts as well.

National Discussions. Efforts to expand recognition and implementation of rights to counsel in civil proceedings have been featured at meetings sponsored by the National Legal Aid and Defender Association, where workshops have addressed the steps that can be taken by the American Bar Association and Access-to-Justice Commissions; current advocacy strategies; and the experiences of veteran public defenders in managing a rights-based appointment system. This last topic offers many lessons for civil-right-to-counsel advocates: successful appointment systems require adequate training and supervision, workload limits, appropriate advocacy support systems, performance and support standards, and reliable funding.¹⁸

Similar presentation and discussions have taken place at meetings of the National Association of IOLTA [Interest on Lawyers' Trust Account] Programs and the American Bar Association's Equal Justice Conference.

Press Coverage. Coverage of advocacy for a civil right to counsel has begun to appear in the local and national press; stories and editorials have generally been fair and positive. In addition to discussing the need for appointed counsel in civil cases, coverage has highlighted the scope of unmet civil legal needs.¹⁹

Research. Advocates developed a survey instrument to collect information on how other countries provide a civil right to counsel; the instrument examined the scope of the right, mechanisms for de-

livery, and funding schemes.²⁰ Advocates are also exploring ways to generate social science research on the benefits of providing counsel as a matter of right and on how provision of counsel protects individuals involved in the legal process.

Shadow Report to United Nations Committee to End Racial Discrimination.

The committee monitors government compliance with the Convention to End All Forms of Racial Discrimination—a convention the United States ratified. While the U.S. government completed its own compliance report in April 2007, a consortium of nongovernmental organizations subsequently prepared a shadow report, a section of which highlights the failure of state and federal governments to provide counsel as a matter of right. The drafters hope that the shadow report will open another avenue of advocacy on right-to-counsel matters and contribute to the application of international legal norms to policy in the United States. Compliance hearings are scheduled for February 2008; shortly thereafter the committee will issue observations and recommendations.

National Coalition for a Civil Right to Counsel.

Participants in the National Coalition for a Civil Right to Counsel have played a critical role in all of the activities listed so far. The coalition meets monthly by phone to discuss advocacy developments and strategy. Over the last year it has submitted amicus briefs in the Washington and Wisconsin cases discussed above. In recent months a steering committee has been formed, and participants are seeking support for the work generated by the activities listed above.

¹⁸James Neugard, *Gideon Redux: A Defender's View*, 28 CORNERSTONE 5 (Fall 2006), www.nlada.org/DMS/Documents/1164033041.51/Fall%2006%20Cornerstone%20Small.pdf.

¹⁹See Editorial, *Closing the Justice Gap*, BOSTON GLOBE, Nov. 6, 2007, www.boston.com/news/globe/editorial_opinion/editorials/articles/2007/11/06/closing_the_justice_gap/; Manny Fernandez, *Free Legal Aid Sought for Elderly Tenants*, NEW YORK TIMES, Nov. 16, 2007, www.nytimes.com/2007/11/16/nyregion/16housing.html?_r=1&scp=1&sq=Free+Legal+Aid+Sought+for+Elderly+Tenants&st=nyt&oref=slogin; Jonathan Martin, *Court Rules that Spouses Aren't Entitled to Public Divorce Lawyers*, SEATTLE TIMES, Dec. 7, 2007, <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=divorce07m0&date=20071207&query=brenda+king>; Bob Egelko, *Chief Justice Seeks Lawyers for Poor in Civil Cases*, SAN FRANCISCO CHRONICLE, Dec. 20, 2006, www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/12/20/BAGA8N2UKF1.DTL&hw=Chief+Justice+Seeks&sn=001&sc=1000.

²⁰For a summary of some of the results, see Raven Lidman, *Civil Gideon: A Human Right Elsewhere in the World*, 40 CLEARINGHOUSE REVIEW 288 (July–Aug, 2006), and *Civil Gideon as a Human Right: The U.S. Is Out of Step with Much of the World*, 15 TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW 769 (2006).

On behalf of the coalition, the Sargent Shriver National Center on Poverty Law is creating a new website, www.civilrighttocounsel.org, that will focus exclusively on the movement for a civil right to counsel. Serving as a central repository of information, the site will contain advocacy resources, background information, and the latest developments. It will be available in the spring of 2008.

Reflections

The range of activities reported above reflects broad community interest in advancing civil-right-to-counsel initiatives. It also demonstrates the different ways partially overlapping groups of advocates have sought to pursue right-to-counsel initiatives in light of the opportunities and constraints peculiar to the forums in which they are operating. The variety of local approaches is in part the product of deliberate decisions to avoid federal litigation or legislative work. In the interests of promoting greater cross-fertilization, a few common threads are worth emphasizing.

Right-to-counsel work has been done largely through broad coalitions. Most state and national activity has deep involvement from the legal aid community, the private bar, the organized bar, and academics. Some stirrings of advocacy can even be detected outside the legal community. Bringing all these stakeholders together has greatly benefited efforts to date.

Broad coalitions enhance advocates' ability to deploy many, often parallel, strategies. Groups combine litigation, public education, and policy building. These tactics inform and build on one another, offering new avenues should one, say litigation, be temporarily foreclosed.

But to be effective, this range of activities requires close coordination, both local and national. The skills and experience of REVIEW readers are needed in the many efforts described here. To join the National Coalition for a Civil Right to Counsel's activities or be connected to any of the state-based advocacy efforts, send an e-mail to info@civilrighttocounsel.org.