Gideon Redux: A Defender's View

National Legal Aid & Defender Association

By James Neuhard

In August of 2006, the American Bar Association House of Delegates unanimously passed the following resolution:

> RESOLVED, That 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 short title of the proposal was a call for a "civil *Gideon*." While the resolution stops short of articulating a constitutionally compelled argument for a civil right to counsel, the report makes a strong case from a common sense, common law and due process analysis of why there should be a right to counsel in civil cases. The report traces the common law right to counsel in civil cases back to the 14th century and points out that the European Union and many commonwealth countries have responded to the arguments of need, fundamental fairness and equity with either court cases or statutes that provide for the right to an attorney in civil cases. The United States now stands significantly apart from the industrialized nations in regards to the right to an attorney in civil cases.

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During this process, I, and I am sure many defenders, were asked what we thought of the proposal – not only to form a legal analysis, but more often how we thought it would affect us and how would a "civil *Gideon*" work in practice? Would we oppose it as competing for already too scarce resources? Would legislators oppose it because they already faced and too often avoided the daunting task of funding defender services?

Let me first get a little of the legal history out of the way. The U.S. Supreme Court in *Gideon* observed:

> Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. ... That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries ...

Any citizen could read this and apply it equally to civil and criminal proceedings. In fact it almost happened. In 1964, one year after *Gideon*, the Supreme Court opened the door to a true civil *Gideon* when they observed this about civil litigants. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries..." *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). But, by 1981, the door closed when the Court held there is no absolute right to court appointed counsel even when the State moves to terminate parental rights. *Lassiter v. Department of Social Services*, 425 U.S. 18 (1981). While the Court recognized a termination of parental rights proceeding might "overwhelm an uncounselled parent," they held 5-4, that the appointment of counsel was not required in every case – an opportunity lost.

So, with *Lassiter* barring the way to a true civil *Gideon*, with tribunals pressing for faster dockets, with access to true justice depending on the guiding hand of counsel and with more Americans unable to afford the cost of counsel and going it alone or foregoing access to be heard, the ABA has called on legislatures to provide for a right to counsel at least when fundamental human needs are at stake. While legislatures do provide some funding for civil legal services, litigants in these proceedings are not entitled to an attorney. Litigants get one until the money runs out. With the right to an attorney, the case cannot move without the offer of counsel.

Assuming a state moves forward on a civil *Gideon*, even if limited to the areas in the resolution, what can be learned from the defender experience and how will it affect the defender community?

The Defender Experience

Following *Gideon*, the right to an attorney quickly expanded into juvenile, misdemeanor and appellate proceedings. At each step, the question of costs arose until a series of cases limited the right to counsel to those where it was a critical stage of the proceeding, the defendant faced incarceration, to one appeal or to where an appellate court agreed to hear the case. This left entire critical defendant areas without counsel. Appeals to state supreme courts, *habeas corpus* proceedings and most misdemeanors lacked the right to an attorney. The next erosion came from the standard of what constituted an effective attorney. The Supreme Court lowered the standard such that attorneys sleeping through death penalty cases were not ineffective unless defendants could show harm such that the outcome would have been different but for the error. This weak standard of ineffectiveness in legislators allowing constitutionally required indigent defense services to grossly lag behind that of every other component of the system. Judges, particularly in the "out-of-sight" juvenile, mental health and misdemeanor areas, misapplied caselaw, extorted waivers of counsel or required large co-payments to reduce the cost of counsel. At the felony level,

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lawsuits and crisis management have repeatedly called attention to critical underfunding of defense services in almost every jurisdiction in America.

Finally, as the collateral civil consequences of criminal convictions have dramatically increased, judges, prosecutors and defenders often lack any knowledge of the impact even misdemeanor convictions can have on their clients. Loss of parental rights, deportation, eviction, loss of employment and even forfeiture of their cars are common and occur without access to counsel. Without mass transit, the loss of a car often makes access to diversion programs impossible. Even if the defender knows about the impact, they often lack the right to represent their clients in these proceedings. While defender programs around the country have often heroically increased their efforts to meet these challenges, they too often face the reality that the client gets an attorney – "until the money runs out."

This leaves the right to effective assistance of counsel in criminal cases a patchwork of services not only across America, but across county lines and often courtroom to courtroom. To combat this, defenders have fought to limit caseloads, increase reasonable fees to appointed counsel, write standards to define effective assistance of counsel and expand services to meet the challenges of reducing recidivism and handling the civil consequences of criminal convictions.

Defender Thoughts on a Civil *Gideon*

The obvious question arises - how would a statutorily-based civil *Gideon* fare if the constitutionally compelled criminal *Gideon* has been so honored in the breech? Without being exhaustive, several thoughts come to mind. First, there is a compelling difference in the perception by funders of civil and criminal clients. As one legislator rhetorically asked me in a public hearing about funding criminal appeals – "You mean I have to pay you to get them out after I have paid so much to catch 'em and convict 'em?"

That having been said, the history of the struggles concerning Legal Services Corporation's funding in Congress makes it clear that funding lawyers to fight the government or to undue their statutes comes with enormous pressures and often makes the issue of independence as central to the quality of service in the civil arena as it has been and is in the criminal arena. While each would face challenges, over the long haul, one would expect that funding for civil clients would be more appealing and often fare better than funding representation of criminal clients. This would make coordinating the request and the strategy by both criminal defense and civil programs a necessity.

But aside from the obvious competition for scarce resources, this movement presents a rare opportunity to not look backward about how to fund and deliver services in the manner we always have, but to look forward about how to meet the needs of those who cannot afford counsel and must face the loss of liberty or essential human services.

The United States is one of the only countries that separate civil and criminal legal services so completely. Most likely it stems from *Gideon* itself. *Gideon* made the right to counsel exist only in criminal prosecutions. But as time has shown, an exceedingly small percentage of criminal defendants actually receive jail or prison sentences – particularly for first and even second offenses. As noted above, the civil consequences of any criminal conviction far exceeds the criminal sanctions for most Americans. Moreover the movement to deal with prevention as well as punishment has forced the criminal justice system to increasingly look at the cause of criminal behavior with heightened interest.

Certainly juvenile reform, drug and alcohol courts and reentry services for the incarcerated have focused on removing barriers and increasing the likelihood of success for criminal defendants. The lack of basic human services creates communities of crime, criminal behavior and risky lifestyles. Often the government is the primary agency that offers lifelines, determines eligibility and enforces rules – both civil and criminal. Each decision often affects not just a person, but also entire families and their future. The need to effectively assert the rights of each individual who faces the task of asserting their right to essential needs, avoid their loss or face a criminal conviction and its total consequences, implementing a civil *Gideon* as proposed in the ABA resolution, offers the opportunity to look at common problems and combined solutions for the clients of both civil and defender programs. The competition for resources will either reward innovative and effective proposals to reduce the costs and increase the impact of both civil and criminal legal services or result in one side or the other periodically winning what will become a zero sum game – with each side divided and conquered. ☆

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Notice to Members

Pursuant to Section 3.2.1 of the NLADA bylaws, notice is hereby given to members of the association that the Annual Meeting of Members will occur on Wednesday, November 8. The meeting will commence at 5:30 p.m., in conjunction with the Opening Ceremony, in the Grand Ballroom of the Westin Charlotte, 601 South College St., Charlotte, NC 28202.