

Civil Right to Counsel *Gideon's Stand-Alone Companion*

By Rick Goralewicz

Back in March, we noted the passing of the 50-year mark for SCOTUS' landmark decision in *Gideon v. Wainwright*, vouchsafing the right to counsel in criminal cases. Less widely heralded, the initiation of organized efforts to establish "civil Gideon" laws kicked off across the United States roughly a decade ago. Like its elder ancestor, the aims of that movement remain largely aspirational.

Quite often, I hear speculation as to whether the phrase "Civil Gideon" is an oxymoron. *Gideon*-derived rights stem from the Constitution which enshrines the right to counsel in criminal matters but places no such requirement in the civil arena. Such civil right to counsel as may exist in non-criminal matters spring largely from State statutes, occasionally prodded along by SCOTUS' recognition of a fundamental right requiring more exacting legal safeguards. We see this, for example, in cases such as *In re Gault* (1967) in the wake of which many states re-vamped their juvenile codes, and *Heyford v. Parker* (10th Cir., 1968), expanding the *Gault* reasoning to involuntary commitment proceedings. Of course, the High Court also seems will-

ing to contract the right to counsel as well. Following *Lassiter v. Department of Social Services* (1981), the burden upon civil proponents became heavier, and the hill they had climb more steep.

First, let's dispense with troublesome nomenclature. The movement for a civil right to counsel in certain cases does not arise from *Gideon* itself, so to the extent "Civil Gideon" by name poses problems, we may easily dispense with it. *Gideon* itself referred to the need of counsel for the indigent as an "obvious truth." Therefore, we can lay it aside to the extent that it obscures our ability to see the obvious.

As a group, the poor encounter The Law and the justice system more than any other group because their lives are regulation dependent. These encounters, in turn, tend to impact the availability of continued receipt of such basics as food and shelter. The regulations involved tend to be complex and in derogation of other interests such as privacy or parental autonomy. To the extent that they intrude on areas which many take for granted, the legal system cannot seem to be anything other than alien, hostile, and, often, counter-intuitive in content and applica-

tion to the uninitiated lay person. In fact, in the experience of this writer, many indigent litigants turned down for representation by Legal Aid or pro bono attorneys, acclimated by generations of hearing Miranda warnings on television, express surprise - even shock - upon learning that the right to counsel does not extend to most civil issues. Increasingly, indigent persons find themselves appearing *pro se* and suffering the consequences. By way of example, a study published in 2010 finds that, in an era of tough economy, the availability of counsel for the poor in civil cases decreases sharply. Terry Carter, *Judges Say Litigants are Increasingly Going Pro Se at Their Own Peril*, A.B.A.J. (July 12, 2010), http://www.abajournal.com/news/article/judges_say_litigants_increasingly_going_pro_se--at_their_own_/ (last accessed 2/13).

Since *Lassiter*, the organized bar and state level activists have led the movement towards a civil right to counsel, focusing primarily upon State Constitutions containing access to courts provisions. No one seriously contends that a right to counsel at public expense in every civil matter. The focus has been,

in the words of a 2006 ABA Resolution, "basic human needs," like "shelter, sustenance, safety, health or child custody." Since the ABA resolution, most state and local bar associations have passed resolutions of their own echoing and endorsing the concept. In addition, courts and legislatures in a number of States have expanded access to counsel. As with the universal application of *Gideon* in the criminal field, steps have begun toward a still distant goal.

An in-depth analysis of the pros and cons of expanding the right to counsel lies beyond the scope of this article. Legal and popular publications offer extensive treatment of both sides. Granted, the proposal is rife with difficult financial and logistic problems. And appointed counsel cannot alone close the "justice gap". However, I wonder if one can frankly look upon the greater goals of our times - secure and stable housing; ending hunger; protection of the vulnerable, as but three examples - and not see a meaningful opportunity to prepare and present cases impacting the availability of those noble commodities as an essential element of their realization and enjoyment.

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