

**ABA PRESIDENTIAL TASK FORCE ON
ACCESS TO CIVIL JUSTICE**

**Executive Summary
Report with Recommendation
On Civil Right to Counsel**

Summary of the Recommendation

The resolution urges state, territorial and federal jurisdictions to provide counsel as a matter of right at public expense to low income persons in those categories of adversarial proceeding where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.

Summary of the Issue Which the Recommendation Addresses

Reliable studies consistently show that 70-80% of the legal needs of the poor go unaddressed each year. These include problems that poor individuals face in obtaining the basic necessities of life: food, shelter, health care, protection from violence, and maintaining family stability. It is unacceptable that in the world's wealthiest nation legal processes are sometimes used to deny these basic necessities to its citizens without providing any legal help. This resolution would urge creation of a fair and level playing field for all those using the legal system to address fundamental problems relating to basic human needs.

Explanation of How the Proposed Policy Position Will Address the Issue

The policy position articulates a minimum framework for a civil right to counsel. The accompanying report provides each jurisdiction with guidance on how such a right might be implemented, what it might cost, etc.

Summary of Any Minority Views or Opposition Which Has Been Identified

To date, no minority views or opposition has been identified.

AMERICAN BAR ASSOCIATION
TASK FORCE ON ACCESS TO CIVIL JUSTICE
SECTION OF BUSINESS LAW
COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS
COMMISSION ON LAW AND AGING
SECTION OF LITIGATION
STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 **RESOLVED:** That the American Bar Association urges state, territorial and federal
2 jurisdictions to provide counsel as a matter of right at public expense to low income persons in
3 those categories of adversarial proceedings where basic human needs are at stake, such as those
4 involving shelter, sustenance, safety, health or child custody.

REPORT

This Resolution is the Logical Next Step in the ABA's Long History of Support for Achieving Equal Justice in the United States

The ABA has long held as a core value the principle that society must provide equal access to justice, to give meaning to the words inscribed above the entrance to the United States Supreme Court – “Equal Justice Under Law.” As one of the Association’s most distinguished former Presidents, Justice Lewis Powell, once observed:

"Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status."

The ABA also has long recognized that the nation’s legal profession has a special obligation to advance the national commitment to provide equal justice. The Association’s efforts to promote civil legal aid and access to appointed counsel for indigent litigants are quintessential expressions of these principles.

In 1920, the Association created its first standing committee, “The Standing Committee on Legal Aid and Indigents Defendants,” with Charles Evans Hughes as its first chair. With this action, the ABA pledged itself to foster the expansion of legal aid throughout the country. Then, in 1965, under the leadership of Lewis Powell, the ABA House of Delegates endorsed federal funding of legal services for the poor because it was clear that charitable funding would never begin to meet the need. In the early 1970s, the ABA played a prominent role in the creation of the federal Legal Services Corporation to assume responsibility for the legal services program created by the federal Office of Economic Opportunity. Beginning in the 1980s and continuing to the present, the ABA has been a powerful and persuasive voice in the fight to maintain federal funding for civil legal services.

These actions are consistent with and further several of the ABA’s key goals including:

GOAL II To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.

This Goal is to be achieved by pursuing the following objectives:

1. Increase funding for legal services to the poor in civil and criminal cases.
2. Communicate the availability of affordable legal services and information to moderate-income persons.
3. Provide effective representation for the full range of legal needs of low and middle income persons.
4. Encourage the development of systems and procedures that make the justice system easier for all persons to understand and use.

The ABA Has Adopted Policy Positions Favoring a Right to Counsel

The ABA has on several occasions articulated its support for appointing counsel when necessary to ensure meaningful access to the justice system. In its amicus brief in *Lassiter v. Dept of Social Services of Durham County*, 425 U.S. 18 (1981), the ABA urged the U.S. Supreme Court to rule that counsel must be appointed for indigent parents in civil proceedings that could terminate their parental rights, “[I]n order to minimize [the risk of error] and ensure a fair hearing, procedural due process demands that counsel be made available to parents, and that if the parents are indigent, it be at public expense. *Id.* at 3-4. In reaching this conclusion, the ABA noted that “skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal . . . Pro se litigants cannot adequately perform any of these tasks.”

In 1979 the House of Delegates adopted Standards Relating to Counsel for Private Parties, as part of the Juvenile Justice Standards. The Standards state “the participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.” These standards were quoted in the *Lassiter* amicus brief. Also, in 1987, the House of Delegates adopted policy calling for appointment of counsel in guardianship/conservatorship cases.¹

The ABA stated these positions some years ago, but its continuing commitment to the principles behind the positions was recently restated when it championed the right to meaningful access to the courts by the disabled in its amicus brief in *Tennessee v. Lane*, 541 U.S. 509 (2004). The case concerned a litigant who could not physically access the courthouse in order to defend himself. In terms that could also apply to appointment of counsel, the brief states, “[t]he right of equal and effective access to the courts is a core aspect of constitutional guarantees and is essential to ensuring the proper administration of justice.” ABA Amicus Brief in *Tennessee v. Lane* at 16.

Echoing the Association’s stance in *Lassiter*, the brief continued “the right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights . . . [W]hen important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires *meaningful* access. . . To ensure meaningful access, particularly when an individual faces the prospect of coercive State deprivation through the judicial process of life, liberty, or property, due process often requires the State to give a litigant affirmative assistance so that he may participate in the proceedings if he effectively would be unable to participate otherwise.” *Id.* at 17-18 (internal citations omitted).

¹ See House of Delegates Resolution adopted in August, 1987 offered by the Special Committee on Legal Problems of the Elderly: “BE IT RESOLVED, That the American Bar Association supports efforts to improve judicial practices concerning guardianship, and adopts the following Recommended Judicial Practices and urges their implementation for the elderly at the state level: . . . I. Procedure: Ensuring Due Process Protections . . . C. Representation of the Alleged Incompetent . . . 1. Counsel as advocate for the respondent should be appointed in every case...”

Despite 130 Years of Legal Aid in the United States, Existing Resources Have Proven Inadequate to Fulfill the Promise of Equal Justice for All.

The right to representation for indigents in civil proceedings goes back to the earliest days of the common law when indigent litigants had a right to appointment of counsel so they could have access to the civil courts. Most European and Commonwealth countries have had a right to counsel in civil cases for decades or even centuries, entitling all poor people to legal assistance when needed. The United States, in contrast, has relied principally on supplying a fixed number of lawyers and providing representation only to however many poor people this limited resource is able to serve. As of today, the level of resource does not approach the level of need² and only a fortunate few of those unable to afford counsel enjoy effective access to justice when facing serious legal problems

For the first 90 years of legal aid in this country, the only financial support for civil legal aid came from private charity. It started in 1876 with a single legal aid society serving German-American immigrants in New York City. Bar associations and social service organizations later established legal aid programs in a few cities elsewhere in the country. Starting in 1920, prompted by the publication of Reginald Heber Smith's landmark expose of injustice in America, *JUSTICE AND THE POOR*, and under the leadership of Charles Evans Hughes, the ABA, as noted above, sought to nurture development of such programs and managed to foster legal aid societies in most major cities and many smaller communities around the nation. But those societies were grossly underfunded and understaffed.

It was not until 1965 that government funding first became available for civil legal aid as part of the War on Poverty. In 1974, the federal Legal Services Corporation was established as the central funding entity for legal aid programs nationwide. During the early years the federal government expanded legal aid funding considerably. But the expansion of federal appropriations soon stalled, when LSC proved vulnerable to political attack. Thus, local legal aid agencies began to more aggressively seek diversified funding from other sources including Interest on Lawyers Trust Accounts (IOLTA), state and local governments and private sources.³ Despite these innovative and often heroic efforts, however, taking account of inflation and the growth in numbers of poor people civil legal aid funding is no higher today in real terms than it was a quarter century ago.⁴

² See *Documenting the Justice Gap in America, A Report of the Legal Services Corporation* (2005) documenting the percentage of eligible persons that LSC funded-programs are unable to serve due to lack of sufficient resources.

³ Some of these funding sources also have come under attack. See, e.g., *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Wieland v. Lawyers Trust Fund of Illinois*, Docket # 5-03-0419, App. Ct. of Ill, 5th Jud Dist. (2003).

⁴ Expenditures of public resources to address the legal needs of the poor in the United States compare poorly with funding in many other industrialized nations. At the lower end, Germany and Finland invest over three times as much of their gross domestic product as the United States in serving the civil legal needs of lower income populations. At the upper end, England spends 12 times as much of its GDP as the U.S. does to provide civil legal aid to its citizens. In between, New Zealand spends five times more than the U.S and the Netherlands over seven times as much. Even Hong Kong, now a part of the People's Republic of China, invests more than six times as much as the U.S.

Given this persistent shortage of legal aid resources, it is not surprising to find a vast and continuing unmet need for the services of lawyers among those unable to afford counsel. While the nationwide Legal Services Corporation-funded system for providing legal services assists as many as one million poor people with critical legal problems each year, a recent survey shows that the legal aid programs within that system have to turn away another million people who come to their offices⁵. Millions more are discouraged and don't bother seeking legal aid because they know help is not available. Despite all the efforts of legal aid programs and pro bono lawyers, an ABA nationwide legal needs study in 1993 showed that legal help was not obtained for over 70% of the serious legal problems encountered by poor people.

More than ten years have passed since that ABA research, and matters have only gotten worse. Poverty has not significantly abated and indeed has increased since the 2000 census. Similarly, the civil legal needs of the poor remain substantially unfulfilled. For example, a September 2003 report by the District of Columbia Bar Foundation estimates that less than 10% of the need for civil legal assistance is being met in that jurisdiction. A similar study in Washington State, also released in September 2003, found that 87% of the state's low-income households encounter a civil legal problem each year, and that only 12% of these households are able to obtain assistance from a lawyer. In Massachusetts - a state with significant legal services resources - the occurrence of civil legal problems among the poor increased significantly in the period 1993-2002. By 2002 at least 53% of the poor households in the state had at least one unmet civil legal need and only 13% of those households were able to resolve all the problems they experienced.⁶

Both Constitutional Principles and Public Policy Support A Legally Enforceable Right to Counsel to Achieve Effective Access to Justice in Many Civil Cases

In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) the U.S. Supreme Court held:

[R]eason 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....From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

⁵ See n. 1, *Documenting the Justice Gap* at p. 5. It also should be noted that many of the cases in which local programs reported they provided services were ones where limited resources meant they only were able to supply self-help assistance, but believed full representation would have led to a better outcome for the clients. (*Id.* at p. 6, fn 8.)

⁶ Seven additional states have recently examined the kinds of legal problems experienced by low-income residents of the state and what they do about them: Oregon (2000), Vermont (2001), New Jersey (2002), Connecticut (2003), Tennessee (2004), Illinois (2005) and Montana (2005). These studies, too, demonstrate that only a very small percentage of the legal problems experienced by low-income people (typically one in five or less) is addressed with the assistance of a private or legal aid lawyer.

It appears just as difficult to argue a civil litigant can stand “equal before the law . . . without a lawyer to assist him.” Indeed just a year after *Gideon*, the Supreme Court made a similar observation 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). Yet, in 1981, the Supreme Court, in a civil matter, said that there is no absolute right to court appointed counsel for an indigent litigant in a case brought by the state to terminate parental rights. *Lassiter v. Department of Social Services*, 425 U.S. 18 (1981). While the Court recognized that the complexity of a termination of parental rights proceeding might “overwhelm an uncounseled parent,” the Court found--by a 5-4 vote--that the appointment of counsel was not required in every case. *Id.* at 30. Instead, trial courts were instructed to balance three factors to determine whether due process requires that a parent be given a lawyer: “the private interest at stake, the government’s interest and the risk that the procedures used will lead to erroneous decisions.” *Id.* at 27. The court went on to apply the standard in such a way that it virtually excluded the appointment of counsel except in the most extraordinary circumstances, in particular by overlaying on the three-part due process test an additional presumption against appointed counsel where there is no risk of loss of physical liberty.

It is to be hoped that the U.S. Supreme Court will eventually reconsider the cumbersome *Lassiter* balancing test and the unreasonable presumption that renders that test irrelevant for almost all civil litigants. There would be precedent for such a reversal, as seen in the evolution of the criminal right to counsel from *Betts v Brady*, 316 U.S. 455 (1942) to *Gideon* in 1963. In *Betts*, the Court said the appointment of counsel was required in criminal cases only where, after a case-by-case analysis, the trial court determined that counsel is necessary to ensure that trial is not “offensive to the common and fundamental ideas of fairness and right.” *Id.* at 473. But by 1963, the Court realized that the *Betts* approach was unworkable, and overturned it in *Gideon*.

Powerful common law, constitutional, and policy arguments support a governmental obligation to ensure low income people are provided the means, including lawyers, to have effective access to the civil courts. These arguments have equal and sometimes greater application at the state level than they do at the federal level.

Common Law Antecedents Support a Right to Counsel in Civil Matters

The common law has a long history of granting indigent litigants a right to counsel in civil cases. As early as the 13th and 14th centuries English courts were appointing attorneys for such litigants, a right that Parliament codified in 1495.⁷ Several American colonies imported this statute and its right to counsel as part of the common law they adopted from the mother country and, it has been argued, this nascent right continues to the current day.⁸ But at a minimum the venerable age

⁷ The critical language from the Statute of Henry VII, which also relieved indigent civil litigants from the obligation to pay fees and costs, reads as follows: “[T]he Justices...shall assign to the same poor person or persons counsel,...which shall give their counsel, nothing taking for the same;...and likewise the Justices shall appoint attorney and attorneys for the same poor person or persons....” II Hen VII, c. 12 (1495), An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, reprinted in 2 Statutes of the Realm 578 (1993). .

⁸ See, e.g., Brief for Appellant, *Frase v. Barnhart*, 379 Md. 1000 (2003) at pp. 33-42, arguing the Statute of Henry VII is part of the English common law the colony and later the state of Maryland adopted as its own and this right to

and persistence of this right⁹ in the common law tradition suggests the fundamental importance that tradition, which is the basis of American law, accords guaranteeing poor people equality before the law and furnishing them the lawyers required to make that guarantee a reality.

Other European and commonwealth countries also have come to recognize a statutory right to counsel in civil cases. France created such a statutory right in 1852, Italy did so when Garibaldi unified the country in 1865, and Germany followed suit when it became a nation in 1877. Most of the remaining European countries enacted right to counsel provisions in the late 19th and early 20th century. Several Canadian provinces, New Zealand and some Australian states have provided attorneys to the poor as a matter of statutory right for decades, although the scope of the right has changed in response to legislative funding and priorities.¹⁰

As of this time, no American jurisdiction has enacted a statutory right to counsel at public expense nearly as broad as these other countries. But many states have passed laws conferring a right to counsel in certain narrow areas of the law. The most common are those guaranteeing counsel to parents – and sometimes children -- in dependency (often called neglect) proceedings, and to prospective wards in guardianship and similar proceedings in which interference with personal liberties are at stake. A handful of states also have extended a statutory right to counsel in other situations. It is encouraging that state legislatures have recognized the truth that poor people cannot have a fair hearing in these particular adversarial proceedings. Yet many other proceedings that threaten loss of basic human needs are equally adversarial and often more complex. In those cases, just like dependency proceedings, no civil litigant can be “equal before the law...without a lawyer.”

Courts perhaps more than legislatures are familiar with the truth of this principle embodied in the common law right to counsel and implemented, to a limited degree in many state statutes in the U.S., and to a broader extent, in the laws of many other countries. On a regular basis, the judiciary witnesses the helplessness of unrepresented parties appearing in their courtrooms and the unequal contest when those litigants confront well-counseled opponents. Judges deeply committed to reaching just decisions too often must worry whether they delivered injustice instead of justice in such cases because what they heard in court was a one-sided version of the law and facts. Nearly a decade ago, one trial judge, U.S. District Court Judge Robert Sweet, gave voice to this concern in a speech to the Association of the Bar of New York, and also tendered a

counsel remains part of Maryland law in the current day. Nor is this common law argument limited to the original 13 states. Many if not most other states expressly incorporated the English common law as it existed at the moment of their statehood as the common law of those states. See Johnson, *Beyond Payne: The Case for A Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOYOLA OF LOS ANGELES L. REV. 249, 251-259 (1978) for an explanation why the Statute of Henry VII the California Supreme Court used as the basis for finding a common law right to waiver of fees and costs also appears to justify the provision of free counsel to those same indigent litigants.

⁹ The Statute of Henry VII was not replaced until 1883, when it was succeeded by a law designed to make the right more effective. In 1914 the English Parliament passed another reform of legal aid. Then in 1950 it enacted a sophisticated civil legal aid program that remains the most comprehensive and generously funded legal aid system in the world.

¹⁰ These developments in other countries are surveyed in Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 Loyola of Los Angeles Law Review 341 (1985). Several of the foreign statutes are translated in Cappelletti, Gordley and Johnson, *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (Milan/Dobbs Ferry: Giuffre/Oceana, 1975, 1981).

solution. “What then needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society under a rule of law? . . . To shorthand it, we need a civil *Gideon*, that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system.”¹¹

State and Federal Constitutional Principles Support a Civil Right to Counsel

In the years between *Gideon* and *Lassiter*, a few state supreme courts took some promising steps toward a constitutional right to counsel in civil cases. The Maine and Oregon Supreme Courts declared the constitutional right to due process required that their state governments provide free counsel to parents in dependency/neglect cases.¹² The Alaska Supreme Court ruled that counsel must be appointed at public expense to an indigent party in a child custody proceeding if the other party was provided free representation.¹³ The California Supreme Court found a due process right to counsel for defendants in paternity cases¹⁴ and an equal protection right for prisoners involved in civil litigation.¹⁵ The New York Court of Appeal fell only one vote short of declaring a constitutional right to free counsel for poor people in divorce cases.¹⁶

During that era, between *Gideon* and *Lassiter*, academic articles also frequently appeared discussing the many legal theories which would support a constitutional right to counsel in civil cases.¹⁷ In common with the state supreme court decisions mentioned above, these articles usually articulated arguments based on the due process clauses found in the federal and state constitutions and their implicit guarantees of a fair hearing in civil proceedings. But they carried the argument beyond the narrow categories of cases covered by the then existing state court decisions to embrace a far broader range of civil litigation. They emphasized the serious consequences losing litigants face in many other civil cases poor people commonly experience – and the empirical and other evidence suggesting the lack of counsel virtually guarantees these people in fact would lose those cases.

Some of these articles likewise found strong support for a right to counsel in the equal protection clauses common to the federal and most state constitutions. Some pointed to the fundamental interest all citizens have in enjoying “like access to the courts” for the protection of their rights – as the essential handmaiden of the right to vote without which laws enacted to give them substantive rights cannot be enforced. As a fundamental interest, it warrants the “close

¹¹ Sweet, *Civil “Gideon” and Justice in the Trial Court (The Rabbi’s Beard)*, 42 THE RECORD 915, 924 (Dec. 1997).

¹² *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794 (Me. 1973); *State v. Jamison*, 444 P.2d 15 (Ore. 1968).

¹³ *Flores v. Flores*, 598 P. 2d 893 (Ak, 1979).

¹⁴ *Salas v. Cortez*, 24 Cal.3d 22, 593 P.2d 226 cert. den. 444 U.S. 900 (1979).

¹⁵ *Payne v. Superior Court*, 17 Cal.3d 908 (1976).

¹⁶ *In re Smiley*, 369 N.Y.S.2d 87, 90 (N.Y. 1975).

¹⁷ See, e.g., Note, *The Right to Counsel in Civil Litigation*, 66 Colum.L.Rev. 1322 (1966); O’Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 5 (1967); Note, *The Indigent’s Right to Counsel in Civil Cases*, 76 Yale L.J. 545 (1967); Note, *The Indigent’s Right to Counsel in Civil Cases*, 43 Fordham L. Rev. 989 (1975), Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U.Mich.J.L. Ref. 554 (1976), Comment, *Current Prospects for an Indigent’s Right to Appointed Counsel and Free Transcript in Civil Litigation*, 7 Pac. L.J. 149 (1976), Johnson, *Beyond Payne: The Case for a Legally Enforceable Right to Representation for Indigent California Litigants*, 11 Loyola of Los Angeles L.Rev. 249 (1978).

scrutiny” to which the courts are to subject any policies denying that access. It also was observed that some states have made “poverty” a “suspect class.” This again would mandate close scrutiny of a state’s denial of counsel to poor people in judicial proceedings structured in a way that requires a lawyer if one is to have effective access to those courts.

Over the years after *Gideon*, lawyers continued to pursue litigation seeking to establish the right to counsel in civil cases, with considerable success, initially on traditional notions of due process. In Michigan and other states, a detailed blueprint was developed to take a series of cases through the appellate courts to establish the right to counsel in various circumstances. After several victories, the initiative was set aside in part because of the *Lassiter* decision.

After *Lassiter* and its narrow construction of due process, most of the possible constitutional theories remain untested in either the federal or state courts. But they have been reinforced by constitutional decisions abroad. As early as 1937, a quarter century before *Gideon* and over four decades before *Lassiter*, the Swiss Supreme Court found the analog of our constitution’s equal protection clause, the “equality before the law” provision of that nation’s Constitution, mandated appointment of free counsel for indigent civil litigants.¹⁸ Then in 1979 the European Court of Human Rights issued a historic decision, *Airey v. Ireland*¹⁹, based on an analog of due process--a provision in the European Convention on Human Rights and Fundamental Freedoms which guarantees civil litigants a “fair hearing.”²⁰ In a decision that now applies to 41 nations and over 400 million people, the court held indigents cannot have a “fair hearing” unless represented by lawyers²¹ and required member states to provide counsel at public expense to indigents in cases heard in the regular civil courts.²² As a direct result of this decision, the Irish legislature created that nation’s first legal aid program which is now funded at three times the level of America’s. The *Airey* decision and its progeny also have influenced the scope of legal aid legislation in several other European countries.²³

Policy Considerations Support Recognition of a Civil Right to Counsel

Underlying all the constitutional theories are several undeniable truths. The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the

¹⁸ *Judgment of Oct. 8, 1937*, Arrêts du Tribunal Federal (ATF) 63, I, 209 (1937), discussed in O’Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 5 (1967).

¹⁹ *Airey v Ireland*, 2 Eur. Ct. H.R. (ser.A) 305 (1979).

²⁰ “In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time.” Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, para.1, 213 U.N.T.S. 222.

²¹ As the court explained: “The Convention was intended to guarantee rights that were *practical and effective*, particularly in respect of the right of access to the courts, in view of its prominent place in a democratic society....The possibility of appearing in person before the [trial court] did not provide an *effective* right of access. . . [I]t is not realistic,...to suppose that,...the applicant could effectively conduct her own case, despite the assistance which,...the judge affords to parties acting in person....” (*Id.* at p. 315, emphasis supplied.)

²² A constitutional “fair hearing” guarantee likewise formed the basis for the Canadian Supreme Court’s recent declaration of a right to counsel at public expense for indigent litigants, in this instance parents involved in dependency/neglect cases. *New Brunswick v J.G.* 177 D.L.R. (4th) 124 (1999).

²³ See, e.g., *Steel and Morris v. The United Kingdom*, Eur.Ct.H.R. (Judgment of Feb. 15, 2005) which found England’s legal aid statute denying counsel to indigent defendants in defamation cases violated the right to counsel required to satisfy the European Convention’s guarantee of a “fair hearing.”

primary and costly responsibilities of finding the controlling legal principles and uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in a cogent fashion to the judge or jury. Discharging these responsibilities ordinarily requires the expertise lawyers spend three years of graduate education and more years of training and practice acquiring. With rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position may be, especially if opposed by a lawyer. Not surprisingly, studies consistently show that legal representation makes a major difference in whether a party wins in cases decided in the courts.²⁴

There are other problems, too, when parties lack counsel in civil proceedings. In seeking to insure that justice is done in cases involving pro se litigants, courts must struggle with issues of preserving judicial neutrality (where one side is represented and the other is not), balancing competing demands for court time, and achieving an outcome that is understood by pro se participants and does not lead to further proceedings before finality is reached. Meantime large numbers of pro se litigants lose their families, their housing, their livelihood, and like fundamental interests, losses many of them would not have sustained if represented by counsel. Furthermore, the perception the courts do not treat poor people fairly has consequences for the system itself. As California Chief Justice Ronald George recently observed, “[E]very day the administration of justice is threatened...by the erosion of public confidence caused by lack of access.”²⁵

Whether cast as a constitutional imperative or a policy finding compelling a legislative remedy, when litigants cannot effectively navigate the legal system, they are denied access to fair and impartial dispute resolution, the adversarial process itself breaks down and the courts cannot properly perform their role of delivering a just result. Absent a systemic response, access to the courts will continue to be denied to many solely because they are unable to afford counsel. Considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a right of meaningful access to the courts.

Current Efforts to Establish a Civil Right to Counsel

For over two decades, the *Lassiter* decision appeared to paralyze serious consideration of a right to counsel in civil cases. But in the last few years advocates around the country have taken up the challenge with renewed vigor and strategic thinking.²⁶ Some are exploring state law common

²⁴ See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 Hofstra L.Rev. 533 (1992); 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 & Soc'y Rev. 419 (2001).

²⁵ Chief Justice Ronald George, State of Judiciary Speech to California Legislature, 2001.

²⁶ This renewed interest also is reflected in the academic literature. Marvy, Paul and Gardner, Debra, *A Civil Right To Counsel For the Poor*, 32 Human Rights 8 (Summer 2005); Boyer, Bruce, Justice, *Access to the Courts, and the Right to Free Counsel For Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 Loy. U. Chi. L.J. 363 (2005); Nethercut, John, *'This Issue Will Not Go Away...': Continuing to Seek the Right to Counsel in Civil Cases*, 38 Clearinghouse Review 481 (2004); Smith, Jonathan, *Civil Gideon*, 18 MIE Journal 4:3 (2004); Perluss, Deborah, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 Seattle J. for Soc. Just. 571 (2004); Klienman, Rachel, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 Fordham Urb. L.J. 1507 (2004); Johnson, Earl, *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 Seattle J. for Soc. Just. 201 (2003); Johnson, Earl, *Equal Access to Justice: Comparing Access to Justice in*

law rights and constitutional guarantees of open courts and access to the courts as well as due process and equal protection, through appellate advocacy and litigation. Others are pursuing a range of legislative approaches. In each of what is already a significant number of states, a local broad-based team of advocates has determined the route they believe is most likely to achieve success.

Many of those advocates have come together as the National Coalition for a Civil Right to Counsel (NCCRC). The coalition provides information-sharing, training, networking, coordination, research assistance, and other support to advocates pursuing, or considering pursuing, a civil right to counsel. It includes well over a hundred advocates from legal services programs, private law firms, state bar associations, law schools, national strategic centers and state access to justice commissions, representing over 30 states. At present, there are active civil right to counsel projects underway in at least eight jurisdictions and discussions are taking place in a number of others.

Courts are also now being asked to revisit the issue. For example, a nonprofit poverty and civil rights program and two major private firms in Maryland are actively pursuing recognition of the civil right to counsel through an appellate strategy raising claims under the state's constitution as well as the common law this state imported from the mother country. In 2003, in the case of *Frase v. Barnhart*, 379 Md. 1000 (2003), they brought the question whether a poor person has the right to appointed counsel in a civil case before Maryland's highest appellate court. As part of a coordinated effort, the state bar association and legal services programs filed amicus briefs in support of the appellant's right to counsel. The court avoided ruling on the issue by a 4-to-3 vote, finding in favor of the unrepresented litigant without reaching the issue. But an impassioned 3-judge concurrence would have declared a civil right to counsel for the indigent mother who faced a contested custody dispute without the assistance of counsel.

In Washington, advocates from the private bar, legal services, the state's three law schools, and others have joined together to pursue judicial recognition of the civil right to counsel under the state's constitution. To date, the group has litigated two cases. One involved a local city seeking to remove a 77-year old disabled man from the home he built nearly 50 years earlier for alleged building code violations. The other case involved an abusive husband asserting false allegations through his attorney in order to obtain sole custody of his children. Both cases were ultimately resolved in the appellate courts in ways that did not result in rulings on the right to counsel issue.

In Wisconsin advocates have filed appeals on behalf of indigent mothers seeking to retain custody of their children from their abusive estranged husbands, contending the Wisconsin state

the United States and Other Industrial Democracies, 24 Fordham Int'l L.J. 83 (2000); Sweet, Robert, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503 (1998); Sweet, Robert, *Civil Gideon and Justice in the Trial Court (the Rabbi's Beard)*, 52 The Record of the Ass'n of the Bar of the City of N.Y. 915 (1997); Young, Rosalie, *The Right to Appointed Counsel In Termination Of Parental Rights: The States' Response to Lassiter*, 14 Touro L. Rev. 247 (1997); Scherer, Andrew, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv. C.R.-C.L. L. Rev. 557 (1988); Werner, F. *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, 17 Housing L. Bull. 65 (1987). Estrelle, Mark, *Gideon's Trumpet Revisited: Providing Rights of Indigent Defendants in Paternity Actions*, 29 J. Fam. L. 1, 9 (1985); Besharov, Douglas, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After Lassiter v. North Carolina*, 15 Fam. L. W. 205, 219, 221 (1981).

constitution guarantees them the right to counsel to defend their custodial rights. In Georgia, the federal District Court, relying in part on the Georgia state constitution's due process clause, recently held that foster children have a right to counsel in all deprivation cases (elsewhere known as dependency cases, abuse and neglect proceedings, etc.).²⁷ And, in a recently filed test case the Canadian Bar Association is seeking to establish a national right under their Constitution to obtain civil legal aid in certain types of cases and challenging British Columbia's current legal aid plan as inconsistent with required standards for legal aid delivery for low-income Canadians.

In other states, new focus on legislative recognition of a right to counsel has emerged. In California an effort is underway to draft a "model" statute, with alternative provisions regarding certain key issues, which creates and defines the scope of a statutory entitlement to equal justice including a right to counsel in appropriate circumstances. Recently, the State Bar of Texas sought legislation providing a civil right to counsel for low income tenants in certain eviction appeals cases. In New York this past June, the City Council appropriated \$86,000 for a study of the need for counsel in eviction proceedings and the costs and benefits of providing counsel to tenants facing eviction. In addition, the New York State Equal Justice Commission has made advocacy for a civil right to counsel a prominent part of its agenda.

The effort to establish a right to court appointed counsel is a part of the struggle to make justice a matter of substance over form. More than 50 million people have incomes so low that they are eligible for legal services from Legal Services Corporation-funded programs²⁸ and millions more survive on incomes so low they cannot afford lawyers when in serious legal jeopardy. Many also have physical or mental disabilities or experience other barriers to navigating the legal system without a lawyer. Yet over the past quarter century the federal government has reduced its commitment to legal services by over 50%.

There is a crisis in equal justice, as documented above, and advocates are pursuing litigation and legislative strategies that might force a change in prevailing practices. The resolution voices the ABA's support for these primarily state-law-based approaches. While it remains important to look for the right in federal due process and equal protection law as the ultimate objective, the resolution seeks to foster the evolution of a civil right to counsel on a state-by-state basis, rooted in the unique provisions of each state's constitution and laws. This approach is likely to achieve significant results and provide doctrinal support for a future reconsideration of the right to civil counsel under the federal constitution.

The Proposed Resolution Offers a Careful, Incremental Approach to Making Effective Access to Justice a Matter of Right, Starting with Representation by Counsel in those Categories of Matters in which Basic Human Needs Are at Stake.

The right proposed in this resolution is long overdue and deeply embedded in the nation's promise of justice for all. But it also represents an incremental approach, limited to those cases where the most basic of human needs are at stake. The categories contained in this resolution are

²⁷ *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (D. Ga. 2005).

²⁸ "CPS Annual Demographic Survey, March Supplement," http://pubdb3.census.gov/macro/032005/pov/new01_125_01.htm

considered to involve interests so fundamental and critical as to require governments to supply lawyers to low income persons who otherwise cannot obtain counsel.

The resolution does not suggest that jurisdictions should limit their provision of counsel and other law-related services to these high-priority categories. Rather it indicates that in these categories they should *guarantee* no low income person is ever denied a fair hearing because of their economic status. In other categories of legal matters, it is expected that each jurisdiction will continue to supply legal services on the same basis as they have in the past. This includes jurisdictions where courts have the constitutional, statutory, or inherent power to appoint counsel in other categories of cases or for individuals who suffer impairments or unique barriers which make it impossible for them to obtain a fair hearing in any cases unless they are represented by lawyers.

The right defined in this resolution focuses on representation in adversarial proceedings; it does not propose a generalized right to legal advice or to legal assistance unrelated to litigation in such forums. “Adversarial proceedings” as defined in the resolution are intended to include both judicial and some quasi-judicial tribunals, because many of the disputes involving the basic human needs described below are, in one jurisdiction or another, allocated to administrative agencies or tribunals. Indeed the label is often arbitrary. Cases a forum labeled a court would hear in one jurisdiction will be heard by a tribunal labeled an administrative agency or hearing officer or something else in other jurisdictions. The emphasis of the right articulated here is on the adversarial nature of the process, not what the tribunal is called. Some courts as well as some tribunals bearing another name function in an inquisitorial manner and without legal counsel. (In many states, for instance, parties in the small claims court are not allowed to be represented by lawyers and judges are expected to take an active role in developing the relevant facts. Similarly, some states have created pro se processes through which litigants can quickly and effectively access legal rights and protections without the need for representation by an attorney, for example in simple uncontested divorces.)

The basic human needs identified in this resolution as most critical for low income persons and families include at least the following: shelter, sustenance, safety, health and child custody.

- “Shelter” includes a person or family’s access to or ability to remain in an apartment or house, and the habitability of that shelter.
- “Sustenance” includes a person or family’s sources of income whether derived from employment, government monetary payments or “in kind” benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers’ wage or employment disputes where counsel is not realistically available through market forces.
- “Safety” includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise.

- “Health” includes access to appropriate health care for treatment of significant health problems whether that health care is financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an employee benefit, through private insurance, or otherwise.
- “Child custody” embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.²⁹

The above categories are considered to involve interests so fundamental and important as to require governments to supply low income persons with effective access to justice as a matter of right. There is a strong presumption this mandates provision of lawyers in all such cases. Trivial threats, however, even to a basic human need would not warrant such an investment of legal resources. Nor need counsel be supplied at public expense in cases where a lawyer is available to the litigant on a contingent fee basis. Furthermore, in some instances, there are informal proceedings, such as welfare fair hearings, in which government expressly permits trained and supervised non-lawyer advocates to represent both sides and where providing such representation is often sufficient. In still other instances, jurisdictions have redesigned a few select proceedings so they are not adversarial and also furnish self-help assistance sufficient to permit a litigant to have a fair hearing without any form of representation before the court. In such proceedings, the test is whether it can be honestly said the litigant can obtain a fair hearing without being represented by a lawyer. With rare exceptions, this will be true only when certain conditions are met: the substantive law and procedures are simple; both parties are unrepresented; both parties are individuals and neither is an institutional party; both parties have the intellectual, English language, and other skills required to participate effectively; and, the proceedings are not adversarial, but rather the judge assumes responsibility for and takes an active role in identifying the applicable legal standards and developing the facts.

This resolution focuses the right on “low income persons,” but leaves to each individual jurisdiction the flexibility to determine who should be considered to fit within that category. Rather than being bound by the current national LSC eligibility guidelines (which are widely considered to be under-inclusive), it is anticipated jurisdictions will create their own criteria taking account of the applicant’s income, net assets (if any), the cost of living and cost of legal services in the state or locality, and other relevant factors in defining the population to which this right attaches.

Because a civil right to counsel is likely to evolve in different ways in different jurisdictions, and also because states presently invest at very different levels, it is difficult to estimate how much a given jurisdiction will have to spend in additional public resources in order to implement such a right. It is possible to estimate the maximum possible exposure at the national level, however, from two sources – legal needs studies in the U.S. and the experience in other countries which have implemented a right to counsel in civil cases. Although there are major disparities among states, the United States is estimated to provide on average less than \$20 of civil legal aid per eligible poor person. Most needs studies conclude the U.S. is already meeting roughly 20 percent of the need. This suggests the full need could be met if the U.S. raised the average to \$100 per

²⁹ See generally, ABA Standards of Practice for Lawyers Representing Children in Custody Cases (2003) which includes suggested criteria to decide when counsel should be appointed for children in custody cases.

eligible person. But the right advocated in this resolution is substantially narrower and thus could be funded for substantially less than that. This conclusion is reinforced by the experience in England which has a much broader right to counsel than proposed in this resolution and the most generously funded legal aid program in the world, and furthermore uses a more costly delivery system than the U.S.³⁰ Yet it only spends in the neighborhood of \$100 per eligible poor person. Thus, it is reasonable to anticipate the narrower right advocated in this resolution at the worst would result in a tripling of a jurisdiction's current investment in civil legal aid – although it might require somewhat more for states well below the national average and somewhat less for those presently above that average.

In any event, put in perspective the increase would be a comparatively minor budgetary item in most states. Compared to Medicaid, for example, which nationally costs over \$200 billion a year and spends nearly \$4,200 per eligible person,³¹ devoting even as much as \$60 to \$100 per eligible poor person in order to give them meaningful access to justice in their most urgent cases appears to be a minimal and justifiable investment. Funding this right also would only bring the total civil legal aid investment to about 1.5 percent of what American society currently spends on lawyers in this country, about the same share as they had in 1980.³²

It is often difficult to obtain clear public understanding of the needs of the justice system. The third branch has historically struggled to obtain sufficient resources to fulfill its constitutional mandates.³³ Yet a peaceful and orderly society depends upon the effective functioning of the justice system. Within the sphere of justice system funding, there is a hierarchy of poor and poorer agencies. The courts are frequently under-funded. Even more resource starved are systems for providing constitutionally-mandated services to indigent persons accused of crimes. Last on the list are programs supplying civil legal aid. Implementation of a civil right to counsel as proposed herein is not intended to set up a struggle for the crumbs of finite resources between deserving, but oft-ignored constituencies. The result should not be a diminution of current or future funds allocated for public defense, which is an area that has all too often been inadequately supported by states and counties. Rather, it will be necessary for bar and judicial

³⁰ England provides partially-subsidized counsel to those above its poverty line. But completely free civil legal aid is available for the approximately 26 percent of the population below its poverty line, which amounts to approximately 13.5 million people. The English legal aid program currently spends about 1.36 billion dollars providing civil legal services to those in this lowest income stratum who are entitled to free legal services. That amounts to slightly more than \$100 per eligible person in this income category.

³¹ 2006 Statistical Abstract of the United States, Table 136, reflecting Medicaid alone provided \$213 billion in health care to low income people. (This does not include the Medicare funds devoted to elderly poor in addition to their Medicaid benefits. Nor does it include other public funds used for health clinics and other special health care programs for low income patients. In 2003, a total of \$279 billion was spent on the combination of Medicaid and other health care for the nation's low income residents. Table 122. This figure still did not include Medicare payments for the elderly poor, however.)

³² According to the Statistical Abstract of the United States, Table 1263, individuals and institutions spent \$194 billion on the services of lawyers in 2002. \$3 billion would represent only 1.5 percent of that total societal expenditure on lawyers. This 1.5 percent would be about the same share of total legal resources as low income Americans had in FY 1980. That year the LSC budget was \$321 million with other public and private resources supplying several million more in civil legal aid, while the total societal investment in lawyer services was \$23 billion. This gave civil legal aid roughly 1.5 percent of the nation's legal resources in that year.

³³ See *Funding the Justice System*, A Report by the American Bar Association Special Committee on Funding the Justice System (August, 1992).

leaders to assist in educating the public and policy-makers about the critical functions of these parts of the justice system, and the need for our society to guarantee true access to justice for all.

Conclusion

In a speech at the 1941 meeting of the American Bar Association, U.S. Supreme Court Justice Wiley Rutledge observed:

"Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion."

If Justice Rutledge's self-evident statement required proof, the past 130 years of legal aid history have demonstrated its truth. Not only has equality before the law remained merely a matter of charity in the United States, but that charity has proved woefully inadequate. The lesson from the past 130 years is that justice for the poor as a matter of charity or discretion has not delivered on the promises of "justice for all" and "equal justice under law" that form the foundation of America's social contract with all its citizens, whether rich, poor, or something in between. The Task Force and other proponents of this resolution are convinced it is time for this nation to guarantee its low income people equality before the law as a matter of right, including the legal resources required for such equality, beginning with those cases where basic human needs are at stake. We are likewise convinced this will not happen unless the bench and bar take a leadership role in educating the general public and policymakers about the critical importance of this step and the impossibility of delivering justice rather than injustice in many cases unless both sides, not just those who can afford it, are represented by lawyers.

Respectfully submitted,

Howard H. Dana, Jr., Chair
Task Force on Access to Civil Justice

August 2006

GENERAL INFORMATION FORM
To Be Appended to Reports with Recommendations

Resolution on Civil Right to Counsel

Submitting Entity: Task Force on Access to Civil Justice

Submitted By: Howard H. Dana, Jr., Chair

1. Summary of Recommendation(s).

The resolution urges state, territorial and federal jurisdictions to provide counsel as a matter of right at public expense to low income persons in those categories of adversarial proceeding where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.

2. Approval by Submitting Entity.

The Task Force voted to submit this resolution at its meeting on March 29, 2006.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No, though the House did adopt a resolution at the 2006 Midyear meeting calling for a right to counsel in immigration removal proceedings for specified types of individuals subject to such proceedings.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

This resolution would be consistent with existing policies calling for support for legal services for the poor, immigrants and other vulnerable individuals.

5. What urgency exists which requires action at this meeting of the House?

This resolution would clarify ABA support for a civil right to counsel, and such support will be crucial to advocates who are actively seeking recognition of such a right in several states at the current time.

6. Status of Legislation. (If applicable.)

There is no pending legislation, state or federal, though efforts are underway to develop such legislation in at least one state.

7. Cost to the Association. (Both direct and indirect costs.)

It is not anticipated that this resolution will result in any direct or indirect costs to the Association.

8. Disclosure of Interest. (If applicable.)

No members of the Task Force would benefit from adoption of this resolution, nor do any members have any financial or other personal interests that would be affected by the resolution.

9. Referrals.

This resolution has been referred to the following entities with a request for support or cosponsorship:

StC on Legal Aid and Indigent Defendants	Commission on Immigration
StC on the Delivery of Legal Services	Commission on Law and Aging
StC on Pro Bono and Public Service	Steering Committee on the Unmet Legal Needs of Children
Coalition for Justice	Business Law Section (has agreed to cosponsor)
SpC on Death Penalty Representation	Litigation Section
Commission on Domestic Violence	Individual Rights and Responsibilities Section
Commission on Homelessness and Poverty	Young Lawyers Division
Commission on Interest on Lawyers' Trust Accounts	

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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