civil right to counsel

inevitable or unrealistic?

by gary toohey
Which document is more vital – the Declaration of Independence or the U.S. Constitution? Is it the Declaration of Independence, the definitive statement of a people committed to freedom, happiness, and self-determination? Or is it the Constitution, which formalizes the structure of our government – including the separation of powers – and enumerates the rights of all Americans?

Whatever other paths that argument may wander, it is clear that this debate is at the heart of one controversial legal, public policy and social issue – whether Americans have the right to publicly-funded legal counsel in civil cases.

This debate has continued – sometimes simmering, sometimes boiling – since the founding of the nation. But the controversy came to the forefront in 1963 when the U.S. Supreme Court issued its decision in *Gideon v. Wainwright*. In that case, the Supreme Court unanimously ruled that state courts are required under the Sixth Amendment of the Constitution to provide counsel in criminal cases for defendants who are unable to afford their own attorneys.

Since that landmark decision, politicians, lawyers, judges, social scientists and scores of others have debated whether a similar guarantee of legal representation should be created for civil litigants – particularly those facing loss of basic human needs.

**A LONG TRADITION, BUT NO PRESUMPTION**

As with much of American law, the concept of a civil right to counsel can be traced back to English law. Given this, supporters of the civil Gideon concept contend that it was the Founding Fathers’ intent, if not their words, to support the idea. “The United States was founded upon the notion of equal justice,” noted a 2008 report of the
Boston Bar Association Task Force on Expanding the Civil Right to Counsel:

The founders of this nation established the Constitution in order to form a more perfect union and to establish a system of laws to guarantee justice to all. The Fifth and Fourteenth Amendments ensure equal protection of the law and due process from both the federal government and the state governments. Even the edifice of the Supreme Court re-enforces that aspiration as “Equal Justice Under Law” is proudly inscribed above the entrance. 

Likewise, when the U.S. Supreme Court handed down its decision in the Gideon case nearly 50 years ago, the Court wrote:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law…. He is unfamiliar with the rules of evidence…. He lacks both the skill and the knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

However, the nation’s highest court has yet to specifically rule that a right to civil counsel exists. In fact, in the 1981 case of Lassiter v. Department of Social Services, “the Court held in a 5-to-4 decision that there was no Fourteenth Amendment due process right to counsel for an indigent in a proceeding brought by a state to terminate her parental rights.” For backers of civil Gideon, such a situation is unacceptable:

A rigid delineation that presumes that counsel is important in criminal cases but not civil cases is untenable in the United States in the twenty-first century. Most parents would choose to serve thirty days in prison before giving up custody of their children, yet no right to counsel currently exists in private custody matters. Most parents would similarly choose a temporary loss of liberty to avoid eviction and homelessness, yet no right to counsel exists in eviction matters. Many people believe they have such rights, but they are sadly mistaken.

THE ABA WEIGHS IN

During its 2006 annual meeting, the American Bar Association’s House of Delegates unanimously passed Resolution 112A, which read:

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.

Then-ABA president Howard H. Dana, Jr. said that, in regard to civil matters, “poor litigants have basic human needs which deserve as much attention as the interest in liberty found to be the basis of criminal right to counsel in Gideon.” In fact, the ABA argued that implementing a civil right to counsel would give Americans the same right to counsel as in foreign countries.

“The right to counsel in civil cases is already provided in many western countries, including England, Canada and Australia,” Burke said. Indeed, in Great Britain, the right to counsel “has expanded to include civil defendants, nonlitigation transactions, and advice. England has modified its statutory system over the years, but the English legal aid system has continuously provided indigent parties with a right to counsel in civil cases.”

However, George Liebmann of the Calvert Institute notes that foreign countries do not have American legal institutions:

[They have] limitations on contingent fee litigation; restrictions on legal advertising, barratry, and maintenance; mandatory fee-shifting against unsuccessful plaintiffs; heavier reliance on lay magistrates; discretionary powers in courts to deny rights of suit or legal aid certificates; severe limits on punitive and other damages; highly limited use of juries in civil cases; the reservation to public authorities of the right to sue for employment discrimination, environmental impairment or antitrust violation; and much smaller court systems and more elaborate systems of administrative law.
Instead, critics of the civil Gideon concept contend, the justice system should look to another foreign notion – the so-called “English rule” – to help those in need of civil legal assistance.

“If we were to move to a ‘loser pays’ rule, private attorneys would happily take meritorious cases no matter what the income level of the plaintiff or defendant; moreover, we would increase access to civil justice for defendants who are currently forced to settle extortionate meritless cases because they cannot afford the overwhelming costs of defense – costs that would only be exacerbated by the ABA resolution,” argued Ted Frank, a Washington lawyer who writes for the American Enterprise Institute.  

“If the goal is to get taxpayers to spend more money on lawyers, then ABA Resolution 112A will certainly accomplish that,” he added. “But if the goal is really to increase access to justice or to help the poor, then one needs to turn a skeptical eye on the way the legal system [will respond to it].”

Despite the ABA’s passage of this resolution, progress toward achievement of its goal has been virtually non-existent. Indeed, in 2003 the Maryland Supreme Court avoided the issue, although a concurring opinion stated that “this issue will not go away…. So long as the Court declines to resolve it, the advocates for the poor will continue to seek judicial relief…. The poor need a yes or a no.”

Likewise, the Washington State Supreme Court rejected the notion of a right to civil counsel in 2007. But it was perhaps the nation’s most cash-strapped state that would break new ground.

CALIFORNIA LEADS THE WAY

“Most states mandate lawyers for the poor in civil cases that could result in them being committed to a mental institution. A few states provide lawyers in some types of child-custody cases. … [and a] city council resolution pending in New York City would provide free legal representation to the elderly in eviction cases.

“But California is the first state to enact … a sweeping mandate.”

In mid-October of 2009, California Governor Arnold Schwarzenegger signed into law the Sargent Shriver Civil Counsel Act. This law “recognizes a civil right to counsel and establishes funding for a two-year pilot project that will provide poor individuals a lawyer in certain high stakes cases, anticipated to include domestic violence claims, child custody cases, and housing matters.”

“The California law will be funded by a pre-approved $10 increase in some court fees. For now, those fees – expected to generate about $11 million annually – will go into the cash-strapped court system’s general operating budget. California’s budget crisis has forced its courts to close every third Wednesday of the month.

“Starting in 2011, the fee will be funneled toward the new law, which calls for legal aid groups to propose methods of delivering services to the indigent. Those living at 200% above the federal poverty guidelines or less will be eligible for free legal services. For a family of four, that means an annual income of $44,100.”

The Los Angeles Times, in an editorial endorsing the law, stated that without the measure “more than 4 million Californians who can’t afford lawyers stand in jeopardy of losing their homes, the custody of their children, even the power to make their own decisions. … It offers a smart, creative way to protect the rights of litigants and preserve the resources of the courts – while making the best use of state tax dollars.”

However, Frank feels the new law will result in additional waste within the court system. For example, he claims that parents fighting over child custody may be less inclined to work out an agreement on their own and more apt to take their dispute to court because of easier access to free legal services. Similarly, he said, landlords will have a more difficult and more costly time carrying out legitimate evictions, which may in turn cause rents to rise.

“What is clear is that you will never have a simple eviction because every single one of them will be litigated,” Frank said. “The rest of the poor will be worse off because of that.”

PROBLEMS ABOUND

Beyond the fact that there is no specifically enumerated constitutional right to counsel in civil cases, opponents of the civil Gideon concept say implementing such a system would be impractical and swamp the legal system with cases. But proponents say these arguments are overstated:

For too long, recognizing a civil Gideon has been resisted due to fears that do not comport with the reality of the concept. Civil Gideon … stands for the basic proposition that when a civil proceeding involves a basic need or right, and nothing short of representation by counsel will preserve that right, counsel must be provided. No one is calling for a lawyer for all litigants in all civil matters. No one is calling for representation by counsel when more limited forms of assis-
Still, no one on either side of the debate can argue that the proposal has the potential to create multiple problems. These include the further growth of government power, a huge price tag, crushing demand for services and a resulting caseload crisis, and a potential growth in meritless cases.

Expansion of Government

“[T]he unanimous Gideon decision was based on a plainly expressed right in the Sixth Amendment and acts as a limitation on the government’s power to prosecute someone criminally,” Frank said. … “In civil cases, however, there is no corresponding constitutional provision. Moreover, the vast majority of applications of civil Gideon will use taxpayer-funded attorneys to litigate cases against private citizens, aggrandizing rather than limiting government power.”

Costs

While a civil right to counsel would please Missouri’s legal aid directors in that their programs could help more needy people, they are also aware of the pitfalls inherent in such a proposal. Foremost among these is the lack of funding to meet such an obligation.

“Our charge is equal access to justice for all. Anything that will facilitate more representation for those in need is critical,” said Daniel Glazier, executive director of Legal Services of Eastern Missouri. “But we have to be sure that extending the responsibility to serve all those in need is coupled with funding that would allow it to happen.”

“What concerns me about a civil Gideon is the problem of funding,” added Doug Kays, executive director of Legal Services of Southern Missouri. “As the funding is right now, we couldn’t handle a civil right to counsel.”

And Richard F. Halliburton, former executive director of Legal Aid of Western Missouri and current chair of The Missouri Bar’s Delivery of Legal Services Committee, said a civil right to counsel “could prompt better state funding to handle those cases. If it doesn’t, there would be a disaster.

“As a concept, I think our society is overdue in adopting something like this, but everyone has to understand the realities of funding it.”

Halliburton’s hopes for increased state funding for civil legal representation seem increasingly unlikely, as the State of Missouri is already cutting personnel, reducing services and chopping funding of state agencies in an attempt to make ends meet.

“In many ways, it seems ludicrous or hopeless to have a discussion about expanding the right to counsel to include civil cases when we are struggling mightily to effectively fund legal services offices and our public defender system,” Burke said. “Yet, despite the gloomy picture and the great economic challenges we face as a nation, there seems to be a growing sense of community and cooperation, and a desire to turn away from a focus on self, toward the commonweal. It is in this spirit that I believe we must begin to address whether low-income persons should be provided legal counsel as a matter of right in those categories of adversarial civil proceedings where basic human needs are at stake, such as those involving housing, sustenance, benefits, health care of child custody.

“ Obviously, the idea of a civil Gideon – the right to counsel in civil cases – faces enormous challenges and hurdles, not the least of which include who should get counsel and in what types of cases, how much such a program would cost, and a source of funding,” Burke conceded. “Though the costs and commitment would be significant, the greater cost, both individually and collectively, is in failing to provide counsel in cases involving housing, health care and child custody.”

Demand for Services/Quality of Services

In making an argument that a right to civil legal representation would clog the civil justice system, opponents of a civil Gideon need look no further than Missouri’s beleaguered public defender system to see the crisis that would result from an obligation to provide legal help without a commensurate increase in funding.

“[A]s any economist would tell you, if you lower the price of something, you get more demand for it,” Frank argues:

Because it is costless for convicted defendants to file meritless criminal appeals, the court system is inundated with them …. We accept these costs in the criminal context because of Western notions that it is better that no guilty defendants go free than one innocent be convicted and because of the Sixth Amendment right to criminal counsel enshrined in the Constitution. Both of these factors are absent when it comes to civil Gideon. Absent these benefits, all that criminal Gideon has
accomplished is a vast increase in expense – not just in defense costs, but in the cost of prosecution – and a clogged justice system; worse, there is no evidence of increased accuracy and every reason to think that the cases of real innocents may be getting lost in the haystack of bogus appeals.

We can expect that the flood of meritless criminal defense appeals will be duplicated in the civil context if legal access is costless to both the client and the attorney.25

Indeed, Frank foresees that an overwhelming – and unfulfilled – demand for free civil legal services will be driven not by meritorious cases, but rather by frivolous cases filed by those who seek to take advantage of the justice system. That situation will, in turn, cost legitimate users of the justice system.

“If a dispute over shelter entitles one to a free attorney on the government’s dime, it will be much easier for people to intentionally refuse to pay rent or fight evictions when they violate a lease in ways that threaten other tenants,” Frank explains. “This will have costs far beyond simply paying for the plaintiffs’ attorneys. Landlords and mortgage-holders will have to hire their own attorneys and raise rents and costs for their honest customers.

Meanwhile, the honest poor will be worse off as a group: they will trade higher rents and higher taxes for the right to legal services that often will not help them. And, as in the criminal context, parties with meritorious cases will find it harder to signal to overwhelmed judges that their cases are distinguishable from the vast majority of meritless cases with appointed counsel that the courts will see every day. And if the right to civil counsel is of constitutional import, the problem of a litigation explosion is only exacerbated. Now, every loss in a civil court can be collateralized as a constitutional violation because of lack of adequate counsel, and the habeas disaster we face in the criminal context will be repeated here.

The goal may be to increase access to justice or to help the poor, but … proposals to guarantee legal counsel in civil cases at public expense will decrease access to justice and hurt the poor, as well as the middle class.26

CONCLUSION

Of course, calls for a civil right to legal counsel would be unnecessary if adequate resources were available to the various legal aid offices around the nation that strive to meet the civil legal needs of the poor. Government funding for these agencies has been on the decline for many years, and the current economic climate offers virtually no hope of improvement. As a result, legal services agencies have implemented restrictions on the types of cases they accept – a “legal triage” system – and developed a variety of outside funding sources in an effort to serve as many people as possible. But the demand for services continues to far outstrip the resources.

A 2005 report “documents that nationwide, for every person helped by [federally] funded programs, another is turned away. Fifty percent of those actually seeking help are turned away for one primary reason: lack of resources. If anything, this funding is an understatement.”27

Similarly, although Missouri’s legal aid providers have worked hard to replace shrinking federal funds with other sources of income, the huge unmet legal demand among poor Missourians continues to grow at a rate that far outstrips the minimal growth in the number of legal aid employees and resources.

“Studies of courts and administrative agencies consistently show that indigent litigants without counsel routinely forfeit basic rights, not due to the facts of their case or the governing law, but due to the absence of counsel,” the Boston Bar Association report concludes. “On the other hand, the few who are fortunate enough to obtain representation stand a dramatically increased chance of obtaining a favorable outcome and preserving basic human needs. Such an unequal system of justice, that is available to some but not all, is untenable.”28

“Clearly our current approach to providing access to justice is not working,” Burke said. “There are large gaps between services provided and services needed. A new approach seems necessary. New ideas and a broader vision are required, and although the goal seems both unattainable and unfeasible, we must begin the process of looking at the problem in new ways that will provide new solutions.

“[T]he concept of a civil right to counsel may seem far-fetched to many. Only time and thoughtful discourse will tell,” he added. “But one thing is clear: As members of this noble profession and officers of the court, we
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have the ongoing obligation to consider any and all avenues that lead to access to justice for all citizens.”

ENDNOTES

3 John Nethercut, “This Issue Will Not Go Away”: Continuing to Seek the Right to Counsel in Civil Cases, CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY (November-December 2004).
4 “Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts,” Boston Bar Association Task Force on Expanding the Civil Right to Counsel (September 2008).
5 Id.
6 John Nethercut, “This Issue Will Not Go Away”: Continuing to Seek the Right to Counsel in Civil Cases, CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY (November-December 2004).
7 “Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts,” Boston Bar Association Task Force on Expanding the Civil Right to Counsel (September 2008).
11 Id.
14 Id.
15 John Nethercut, “This Issue Will Not Go Away”: Continuing to Seek the Right to Counsel in Civil Cases, CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY (November-December 2004).
21 “Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts,” Boston Bar Association Task Force on Expanding the Civil Right to Counsel (September 2008).
26 Id.
28 “Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts,” Boston Bar Association Task Force on Expanding the Civil Right to Counsel (September 2008).
29 Id.

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