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CURRENT DEVELOPMENTS IN ADVOCACY TO EXPAND THE CIVIL RIGHT TO COUNSEL

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Around the country, state and local bar associations, access to justice commissions, and local advocacy groups are working to expand the right to counsel in their jurisdictions. The passage of three statutes in the past three years is tangible evidence of their efforts. Many civil right to counsel advocates take as their mandate a resolution passed unanimously by the American Bar Association's House of Delegates two years ago, calling on the government to provide counsel in cases in which "basic human needs are at stake." This Article describes efforts underway in eleven states to expand the right to counsel, as well as national efforts, and concludes that these efforts promise to result in increased access to the courts for low-income people.

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CURRENT DEVELOPMENTS IN ADVOCACY TO EXPAND THE CIVIL RIGHT TO COUNSEL

INTRODUCTION

Around the country, state and local bar associations, access to justice commissions, and local advocacy groups are working to expand the right to counsel in their jurisdictions. The passage of three statutes in the past three years is tangible evidence of their efforts. In July 2008, Louisiana enacted legislation requiring the appointment of counsel for a parent facing termination of his or her parental rights through an adoption proceeding brought by a family member.¹ In August 2006, New York expanded the right to counsel already in place for child custody cases heard in family courts to similar proceedings in the state's supreme courts (which are the trial courts of general jurisdiction).² And in June 2005, Florida enacted legislation requiring the provision of legal representation to children who a state court says may be eligible for special immigrant juvenile status, for

¹ 2008 La. Sess. Law Serv. 778 (West) (enacted July 7, 2008), available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=502952>. The statute passed both houses of the legislature with no opposition. Prior to passage of this legislation, there was a right to counsel for people facing the termination of their rights in a state initiated proceeding, but not for people facing the termination of their rights in a proceeding initiated by a private individual.

² 2006 N.Y. Sess. Laws (McKinney) (codified at N.Y. JUD. LAW § 35.8 (McKinney 2008)). The state has also taken several steps to improve mandated representation of children in abuse and neglect cases. In October 2007, a new court rule was issued, making clear that law guardians should act as an attorney for the child. N.Y. Rules of the Chief Judge, § 7.2 (Oct. 4, 2007). In early April 2008, the Chief Administrator of the Courts limited to 150 the number of cases each law guardian can handle. Joel Stashenko, *Law Guardian Cases are Capped at 150*, 239 N.Y.L.J. 1 (2008). The case cap followed in the heels of a report commissioned by Office of Court Administration citing a need for better case management in legal proceedings involving children. See generally PRELIMINARY REPORT OF THE CHIEF ADMINISTRATIVE JUDGE PURSUANT TO CHAPTER 626 OF THE LAWS OF 2007 (Dec. 2007), available at <http://www.courts.state.ny.us/ip/gfs/LawGuardianDoc2007.pdf>.

the purpose of applying for that status.³

These and other efforts to expand the right to counsel in civil cases emanate from the failure of the legal system to provide access to civil legal aid for the overwhelming majority of low-income people.⁴ Many civil right to counsel advocates take as their mandate a resolution passed unanimously by the American Bar Association's House of Delegates two years ago, calling on:

[F]ederal, 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.⁵

In accordance with the ABA's acknowledgement that it is up to "each jurisdiction" to determine the "categories of adversarial proceedings where basic human needs are at stake,"⁶ in a number of states, broad-based coalitions have emerged to consider the types of cases in which a civil right to counsel is most essential, and to develop strategies for obtaining and implementing the right. In other states, individuals are asserting the right to counsel in their own cases. The strategies are as varied as the types of cases in which a right to counsel is being sought, including the following: mortgage

³ 2005 Fla. Sess. Law. Serv. 245 (codified at FLA. STAT. ANN. § 39.5075(5) (West 2008)).

⁴ See, e.g., Symposium, *Creating a Constitutional Right to Counsel in the Civil Context—Report to the House of Delegates*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 511-12 (2006).

⁵ See Am. Bar Ass'n House of Delegates, *Task Force on Access to Civil Justice*, Res. 112A (Aug. 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

⁶ *Id.*

foreclosures, school exclusions, child custody, private party adoptions, and the list goes on. Below are some notable examples of advocacy in eleven states.

I. STATE-BASED ADVOCACY

A. Alaska

In September 2008, the Alaska Bar Association passed a resolution urging Alaska to “provide legal counsel as a matter of right 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.”⁷

In August 2007, a state trial court held that under the Alaska Constitution, a person unable to afford counsel has a right to counsel in a child custody case where a private attorney represents the other party.⁸ The ruling came in response to a motion by Siv Jonsson, who had unsuccessfully sought help from Alaska Legal Services. Among the organizations filing an amicus brief on her behalf were the Alaska Legal Services Corporation, the Alaska Pro Bono Program Inc., and the Alaska Network on Domestic Violence and Sexual Assault.⁹

Taking on an unusual role, the Alaska Court System moved to intervene and sought reconsideration of the order appointing counsel;

⁷ Alaska Bar Ass’n Pro Bono Comm., Resolution in Support of Recognizing a Right to Counsel for Indigent Individuals in Certain Civil Cases (Sept. 2008), available at http://civilrighttocounsel.org/pdfs/alaska_bar_resolution_9_2_2008.pdf. See also Alaska Bar Latest to Endorse Civil Right to Counsel, Civil Right to Counsel Update (Oct. 2008), available at <http://www.civilrighttocounsel.org/pdfs/2008-10-13-newsletter.pdf>.

⁸ *Gordanier v. Jonsson*, No. 3AN-06-8887 C1, Order (Alaska Super. Ct. Aug. 14, 2007).

⁹ *Gordanier v. Jonsson*, No. 3AN-06-8887 C1, Order, slip op. at 2 (Alaska Super. Ct. Jan. 23, 2008).

the trial court granted these motions.¹⁰ The court system argued either that some statutory language should be severed—a change that would result in cases like Jonsson’s being handled by the state’s Office of Public Advocacy—or that the court should revisit its earlier ruling and hold that appointment of counsel was not constitutionally required.¹¹ The Alaska Office of Public Advocacy (which provides representation in criminal and other court-appointed cases) in turn intervened and argued instead that the court system bore responsibility for implementing any right recognized by the trial court.¹² In January 2008, the judge ruled that the Office of Public Advocacy was responsible for providing Jonsson with an attorney because a private attorney and publicly funded guardian ad litem were already involved in the case.¹³

The case is now on appeal to the state’s supreme court, which has not yet issued an opinion.¹⁴ In support of Ms. Jonsson’s position, the American Bar Association has authorized the filing of its first ever brief to a state supreme court.¹⁵

B. California

In October 2006, the Conference of Delegates of California

¹⁰ See *id.* at 1 (Alaska Super. Ct. Jan. 23, 2008).

¹¹ *Id.* at 2-3.

¹² *Id.* at 2, 3.

¹³ *Id.* at 14.

¹⁴ See Office of Public Advocacy v. Alaska Court Sys., Case No. S12999, Docket, available at <http://www.appellate.courts.state.ak.us/frames1.asp?Bookmark=S12999> (last visited Sept. 29, 2008).

¹⁵ ABA Seeks to File Amicus Brief in Alaska Civil Right to Counsel Case, Civil Right to Counsel Update (Oct. 2008), available at <http://www.civilrighttocounsel.org/pdfs/2008-10-13-newsletter.pdf>.

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

All people shall have a right to the assistance of counsel in cases before forums in which lawyers are permitted. Those who cannot afford such representation shall be provided counsel when needed to protect their rights to basic human needs, including sustenance, shelter, safety, health, child custody, and other categories the Legislature may identify in subsequent legislation.¹⁶

The resolution has the support of California Chief Justice Ronald George.¹⁷

Additionally, a task force of the California Commission on Access to Justice has developed two model statutes: (1) the State Equal Justice Act, which would implement a comprehensive right of access to equal justice, including, when appropriate, a right to appointed counsel;¹⁸ and (2) the State Basic Access Act, which would guarantee a right to counsel in cases concerning basic human needs except where less expensive methods are available.¹⁹

Finally, in 2007, the Governor, with the support of the Chief

¹⁶ Conference of Delegates of California Bar Associations, Resolution 01-06-2006, *available at* <http://cdcba.org/pdfs/R2006/01-06-06.pdf>.

¹⁷ Pa. Bar Ass'n, Legal Services to the Public Comm.—Resolution in Support of Recognizing a Right to Counsel For Indigent Individuals in Certain Civil Cases (2007), p. 4, *available at* <http://www.pabar.org/public/committees/lspublic/resolutions/right%20to%20counsel%20resl%20boardapprovdoc.pdf>.

¹⁸ State Equal Justice Act (2006), *available at* http://www.brennancenter.org/content/resource/state_equal_justice_act/.

¹⁹ State Basic Access Act (2008), *available at* http://www.brennancenter.org/content/resource/state_basic_access_act/.

Justice, proposed a three-county pilot project to expand the right to counsel in certain civil cases.²⁰ Given the state's multi-billion dollar deficit, the pilot has not yet been funded.²¹

C. Hawaii

In December 2007, the Hawaii Hui—a group consisting of the Hawaii Justice Foundation, Hawaii State Bar Association, and the Judiciary of the State of Hawaii, along with a number of advocacy groups—listed the recognition of a right to counsel in civil cases concerning basic human needs as one of ten action “steps [to] increase access to justice in Hawaii by 2010.”²²

D. Maine

In October 2007, Maine's Justice Action Group issued the state's first comprehensive plan for delivery of civil legal services. The plan and its accompanying resolution call for a commission to study adoption “of a civil right to counsel in adversarial proceedings in which basic human needs are at stake”²³ and to take into consideration:

²⁰ CAL. COMM'N ON ACCESS TO JUSTICE, ACTION PLAN FOR JUSTICE 40 (2007), available at http://www.nlada.org/DMS/Documents/1180967706.51/CA%202007_Action-Plan-Justice.pdf; Eric Wolff, *Justice for All: Why the Nation's Lawyers Think Everyone Should Get an Attorney in Civil Court*, SDCITYBEAT.COM, (Dec. 11, 2007), <http://www.sdcitybeat.com/cms/story/detail/?id=6464>.

²¹ Wolff, *supra* note 20.

²² HAW. JUSTICE FOUND. & HAW. STATE BAR ASS'N, ACHIEVING ACCESS TO JUSTICE FOR HAWAII'S PEOPLE ii (2007), available at <http://www.hsba.org/resources/1/Documents/Access%20to%20Justice.pdf>.

²³ JUSTICE ACTION GROUP, JUSTICE FOR ALL: A REPORT OF THE JUSTICE ACTION GROUP: STATEWIDE ACCESS TO JUSTICE PLANNING INITIATIVE 10 (2007), available at <http://www.mbf.org/JAGReport12-17-07.pdf>.

[C]osts and evaluation of funding mechanisms; the scope of the right and when it attaches; eligibility criteria; types of representation and/or the scope of services; the types of providers; screening/process; right to counsel on appeal; phasing in of implementation; monitoring and evaluation of a pilot project.²⁴

The work of the Justice Action Group is especially notable because of its broad membership—state supreme court justices, members of the federal judiciary, state legislators, staff from the governor’s office, presidents of the state bar association and bar foundation, the dean of the University of Maine Law School, and board members of legal aid providers.²⁵

E. Massachusetts

On September 9, 2008, the Boston Bar Association’s Task Force on the Civil Right to Counsel issued a report, entitled “Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts.”²⁶ The report calls for a right to counsel in civil cases relating to a criminal matter in which the deprivation of liberty is potentially at stake (such as civil contempt and immigration detention proceedings), and also in civil cases in which litigants face the potential loss of basic human needs due to a dramatic power imbalance (such as eviction cases involving members of a household with mental disabilities, school exclusion cases, custody and adult guardian-

²⁴ *Id.* at 27.

²⁵ *Id.* at iv.

²⁶ Boston Bar Ass’n, *Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts* (2008), available at http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf.

ship cases, and people seeking asylum).²⁷

The Task Force also developed proposals for pilot projects to provide representation to individuals in each area of the law and is seeking foundation funding for each proposal.²⁸ The Task Force's goal is to demonstrate the utility of providing counsel in each type of proceeding before seeking public funding.²⁹

On May 23, 2007, the Massachusetts Bar Association unanimously passed a resolution endorsing the principles behind the ABA civil right to counsel resolution. It states:

RESOLVED, That the Massachusetts Bar Association urges the Commonwealth of Massachusetts to provide legal counsel as a matter of right at public expense to low income persons in those categories of judicial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as defined in Resolution 112A of the American Bar Association.³⁰

In October 2007, the Massachusetts Bar Association and the Massachusetts Access to Justice Commission jointly sponsored a Civil Gideon symposium.³¹

²⁷ *Id.* at 1-3 (stating the executive summary of the group).

²⁸ *Id.* at 2, 11, 15-17, 19-20, 23-24.

²⁹ Press Release, Boston Bar Ass'n, Boston Bar Releases Plan to Expand Right to Counsel in Civil Cases (Sept. 2, 2008), *available at* http://www.bostonbar.org/prs/nr_0809/ExpRight2Council090208.htm.

³⁰ Boston Bar Ass'n, *supra* note 26, at 32 n.19. *See also* Massachusetts Bar Ass'n—House of Delegates Unanimously Supports Principle of Civil Gideon, Lawyers e-Journal, *available at* <http://www.massbar.org/for-attorneys/publications/e-journal/2007/may/523/hod> (last visited Sept. 29, 2008).

³¹ Kelsey Sadoff, *Civil Gideon Symposium Mobilizes Legal Community Behind Equal Justice in Law*, LAWYERS JOURNAL, Nov. 2007, <http://www.massbar.org/for-attorneys/publications/lawyers-journal/2007/november/civil-gideon-symposium-mobilizes-legal-community-behind-equal-justice-in-law> (last visited Sept. 29, 2008).

F. Minnesota

In September 2007, the Minnesota State Bar Association voted to establish a task force to study the feasibility of recognizing broader rights to counsel in civil cases. The bar president has appointed 60 task force members, with representatives from the legal aid, public defender, county attorney, law school, and judicial communities.³² The task force has produced a white paper describing the current scope of the right to counsel in Minnesota and possible areas for expansion.³³

G. New Hampshire

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

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain rights and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.³⁴

³² Minnesota State Bar Ass'n on Civil Gideon Task Force, Committee Roster (on file with author).

³³ Dorsey & Whitney LLP, *The Right to Civil Counsel Under Minnesota Law: A White Paper Presented to the Minnesota Bar Association's Civil Gideon Task Force* (Sep. 11, 2008), available at <http://www.mnbar.org/committees/CivilGideon/MaterialsReports/Civil%20Gideon%20White%20Paper%20-%20Dorsey-Whitney.pdf>.

³⁴ N.H. CONST. pt. 1, art. 14.

In its final report, the commission recommended examining the “expansion of legal representation to civil litigants unable to afford counsel and study[ing] the implementation of a ‘civil *Gideon*.’”³⁵ New Hampshire’s newly formed access to justice commission will examine the recommendations of the citizens’ commission.

H. New York

In November 2008, the New York State Bar Association passed a resolution urging the state legislature to provide a right to counsel in two situations: 1) for vulnerable, low-income people facing eviction from or foreclosure on their homes, and 2) for workers defending a grant of unemployment insurance benefits before the Unemployment Insurance Appeal Board.³⁶ On the same date, the Bar Association adopted a report describing the current scope of the civil right to counsel and outlining areas for possible expansion.³⁷

The resolution and report grew out of the work of a civil right to counsel subcommittee of the Bar Association’s President’s Committee on Access to Justice, which was formed in 2007. Since then, the bar association has convened a civil right to counsel conference, out of which this symposium issue grew, prepared a white paper on the civil right to counsel (included in this symposium issue), and run radio spots promoting the civil right to counsel concept.³⁸ Bernice

³⁵ N.H. CITIZENS COMM’N ON THE STATE COURTS, REPORT AND RECOMMENDATIONS 10 (2006), available at www.nhcitcourts.org/committees/pdf/printer's_final_report_web.pdf.

³⁶ Joel Stashenko, *A “Modest” First Step for Civil Justice Plan*, 240 N.Y.L.J. 1 (2008).

³⁷ *Id.* The report is published in this symposium issue in its entirety.

³⁸ See Press Release, N.Y. State Bar Ass’n, New York State Bar Association Launches

Leber, the current president, is deeply committed to continuing this work.³⁹

The New York City Council is considering a bill that would provide a right to counsel for low-income seniors in eviction and foreclosure cases.⁴⁰ More than half the Council Members have signed on as co-sponsors.⁴¹ At the press conference announcing the bill's introduction, participants chanted, "No lawyer, no justice," and held signs saying, "Would you send your grandmother to court without a lawyer?"⁴²

I. Ohio

Ohio advocates, among them representatives from all of the state's legal aid programs, private attorneys, and the Ohio Legal Assistance Foundation, hold monthly telephone meetings, and have held a few in-person meetings since October 2007.⁴³ They plan to examine the cost of providing counsel in involuntary adoption proceedings and are preparing model pleadings seeking a right to counsel in such cases. In Ohio, a nonparent may file a probate action to adopt a child

Radio Campaign (Apr. 15, 2008), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=17644> (containing a link to the radio spots themselves).

³⁹ See Bernice K. Leber, *The Time for Civil Gideon is Now*, 25 TOURO L. REV. 23 (2009).

⁴⁰ Provision of Legal Services in Ejectment and Foreclosure Proceedings, Int. No. 648 (proposed Nov. 15, 2007), available at <http://webdocs.nyccouncil.info/textfiles/Int%200648-2007.htm?CFID=2443041&CFTOKEN=75931060>.

⁴¹ NYC Council, Legislation Details for Int. 0648-2007, available at http://www.nyccouncil.info/html/legislation/legislation_details.cfm?ID=Int%200648-2007&TYPE=all&YEAR=2006&SPONSORS=YES&REPORTS=YES&HISTORY=YES.

⁴² *Takes More Than Rain to Stop City's Seniors*, HOUS. COURT MONITOR, Fall 2007, at 1.

⁴³ See generally, Marcia Palof, *How to Start Advocating a Right to Counsel in Civil Cases in Your State: A Look at Ohio*, 40 CLEARINGHOUSE REV. 231 (2006).

and simultaneously terminate the rights of one or both parents.⁴⁴ Defendants faced with termination of their parental rights in such cases have no right to counsel, nor do they receive many of the other procedural protections available when the state seeks termination.

J. Pennsylvania

In November 2007, the Pennsylvania Bar Association's House of Delegates passed a resolution urging the state to provide counsel as a matter of right in cases involving basic human needs.⁴⁵ The resolution had the unanimous support of the board of governors, and advocacy is under way to pursue implementation.

The Philadelphia Bar Association has a civil right to counsel committee that is considering how to expand the civil right to counsel in Pennsylvania. On April 10, 2008, that committee, and the Pennsylvania Bar Association, held a symposium on the civil right to counsel, at which a state legislator and others spoke.⁴⁶

K. Washington State

In September 2007, the Washington Supreme Court adopted an innovative court rule clarifying the court system's responsibilities to users of the system who have disabilities, and specifying that appointed counsel may be considered a "reasonable accommodation."⁴⁷

In December 2007, the Washington Supreme Court rejected a

⁴⁴ *Id.* at 237.

⁴⁵ Legal Services to the Public Committee, *supra* note 17.

⁴⁶ Amaris Elliot-Engel, *Civil Gideon Movement Looks to Expand Right to Publicly Provided Counsel*, LEGAL INTELLIGENCER (April 15, 2008), available at <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=900005508806>.

⁴⁷ WASH. REV. CODE ANN. GR 33(a)(1)(C) (West 2007).

right to counsel claim brought by a mother in a child custody case.⁴⁸ Although the case was unsuccessful, members of Washington's Equal Justice Alliance are working to capitalize on the attention the case received to publicize the scope of unmet civil legal needs. Advocates are considering the opinions and strategic environment as they plan their next steps.

II. CIVIL RIGHT TO COUNSEL RESOURCES

Participants in the National Coalition for a Civil Right to Counsel have played a critical role in all of the state-based activities described above. The coalition meets monthly by phone to discuss advocacy developments and strategy, and in person at the annual meeting of the National Legal Aid and Defender Association. There is also an active listserv on which advocates discuss civil right to counsel developments and issues. People interested in participating may e-mail info@civilrighttocounsel.org.⁴⁹

On behalf of the coalition, the Sargent Shriver National Center on Poverty Law maintains a website, www.civilrighttocounsel.org, containing advocacy resources, background information, and the latest civil right to counsel developments.

III. CONCLUSION

The efforts currently underway to expand the right to counsel

⁴⁸ King v. King, 174 P.3d 659, 666 (Wash. 2007).

⁴⁹ Include your name, employer or organization, title or position, mailing address, phone number, e-mail, and a brief description of your interest in or work on a civil right to counsel.

in civil cases hold great promise. By focusing specifically on determining the types of cases and litigants in their jurisdictions that most need a right to counsel, the coalitions in Alaska, California, Hawaii, Maine, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Pennsylvania, Washington, and elsewhere will be able to ensure that the court system's resources are directed where they are most needed. At the same time, by including essential stakeholders, such as judicial personnel, public defenders, entities funding legal aid, and others, the coalitions can ensure that the solutions they develop meet the needs of everyone. Additionally, the pilot projects some of these coalitions are developing, which will produce information about the effect of providing lawyers in various types of cases, will prove invaluable to courts, legislatures, access to justice planners, and others attempting to ensure that the legal needs of low income communities are met.

The Alaska lawsuit seeking a right to counsel in contested custody cases where the other side has an attorney has had remarkable success so far. It is impossible to determine whether a lawsuit will succeed until it is done. Regardless of its outcome in the courts, by prompting the filing of many amicus briefs, the lawsuit has already deepened support for the civil right to counsel concept locally and nationally—much as the child custody case in Washington State did.

Finally, the statements by the Hawaii Hui and Maine Justice Action Group about the importance of moving forward to examine and expand the civil right to counsel indicate that those interested in

the civil right to counsel should pay close attention to developments in those states.