





A Right to Counsel In Critical Civil Cases and the Role of the Private Bar

By Ward B. Coe III and Debra Gardner

On August 7, 2006, at the urging of its then-President Michael Greco, the American Bar Association (ABA) House of Delegates unanimously resolved:

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.

American Bar Association Task Force on Access to Civil Justice, *ABA Resolution on Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 508 (2006) (ABA Resolution). The author was proud to be present at such a historic event and prouder still of the Maryland delegation that was part of that unanimous vote. However proud she was, though, she was not surprised because three years earlier the Maryland State Bar Association (MSBA) itself had spoken eloquently on the subject. But I am getting ahead of myself.

The notion of a civil right to counsel did not begin with the ABA Resolution. And, while it is sometimes casually (and misleadingly) referred to as Civil Gideon, for the landmark case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), it did not begin with *Gideon*, either. The concept can be traced to the Magna Carta (“To no one will we sell, to no one will we refuse or delay, right or justice.”) and a Tudor era codification. That English law provided that “the Justices . . . shall assigne to the same pou psones or psones Councell lerned by their discrecions which shall geve their Councelles nothing taking for the same, and in like wise the same Justices shall appoynte attorney and attorneies for the same pou psones or psones . . .” 11 HEN. 7, ch. 12 (1495), reprinted in 2 STATUTES OF THE REALM 578 (1816), microformed on Microcard No. 55E53 (Matthew Bender & Co.) Article V of the Maryland Declaration of Rights incorporates this and other English Common Law into Maryland’s common law. A right to counsel in civil cases involving basic human needs and fundamental interests may also lie in Articles XXIV and XXIV. However, the modern Court of Appeals of Maryland has thus far declined to speak on the subject. See *Frase v. Barnhart*, 379 Md. 100, 126 (2003).

The call for recognition of a civil right to counsel is motivated by the staggering and unmet need for legal advocacy for the poor, which can be observed daily in Maryland courtrooms and clerks’ offices, in the waiting areas of Legal Aid’s eleven offices throughout the state, as well as those of all of the other civil legal services providers and pro bono programs funded through the Maryland Legal Services Corporation, MSBA and local bar foundations. Every innovation

has been brought to bear to replace dwindling federal financial support for civil legal services and Maryland is a national leader in these efforts, including Interest on Lawyers’ Trust Accounts (IOLTA) programs, civil filing fee surcharges, and aggressive private fundraising. In addition, resources have been stretched as far as they will go through programs providing limited advice to those who are forced to represent themselves, Internet-accessed and other legal educational materials, and proposed rules to facilitate limited scope representation, among others.

The result of all of these efforts: the poor, overall, have barely held their ground. Steady increases in the poverty population and continued stagnation of federal funding have offset the gains made by equal access to justice advocates in Maryland and throughout the nation. Studies continue to show the same level of unmet need for legal services among those who cannot afford to hire a lawyer. See LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 13-15 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (demonstrating the persistence over decades of the fact that existing resources for civil legal aid meet less than one in five civil legal needs experienced by poor Americans); see also *Action Plan for Legal Services to Maryland’s Poor*, A Report of the Advisory Council of the Maryland Legal Services Corporation, at ix (1988).

Such statistics about how many poor people are forced to go without lawyers when they need them tell only part of the story. The day to day practice of law tells the rest. The presence of lawyers in a civil case makes a substantial difference to the

outcome of the proceedings, which is why those who can afford lawyers hire them. Parties without lawyers are far more likely to default. See Carroll 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, 427 (2001) (indicating that an experiment showed only 16 percent of represented parties default versus 28 percent of unrepresented); see also Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL’Y REV. 385, 414, Tab. 18 (1995) (indicating a default rate of 0 percent for parties with lawyers, 19 percent for those without). Simple procedural maneuvers that are commonplace for lawyers are beyond the reach of the vast majority of unrepresented litigants. See Gunn, *supra*, at 412, Tab. 16 (73 percent of represented litigants filed motions, compared with 8 percent of those without lawyers); Anthony J. Fusco, Jr. et al., *Chicago’s Eviction Court: A Tenant’s Court of No Resort*, 17 URB. L. ANN. 93, 115 (1979) (35 percent of parties with lawyers received continuances, while only 3 percent of those without did so).

The result, as any reader of this article knows all too well, is entirely predictable: Parties who are unrepresented and face a lawyer on the other side are at a significant disadvantage. Their chances of prevailing are, on average, halved. Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?*, in DIVORCE REFORM AT THE CROSSROADS 37, 64 (Stephen D. Sugarman & Herman Hill Kay eds., Yale Univ. Press, 1990); Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role*



Of Legal Professionals, 24 U. MICH. J.L. REFORM 65, 132 (1990). In certain kinds of cases the gap is worse. Applicants for domestic violence protection orders with lawyers succeed 83 percent of the time, while only 32 percent of applicants without lawyers obtain such orders. Jane C. Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL'Y & L. 499, 511–12 (2003). Lawyers, in these and other civil matters involving basic human needs, “are necessities, not luxuries.” *Gideon*, 372 U.S. at 344. The stakes for indigent civil litigants in such cases may be as great, or even greater, than those for the criminal defendant. The loss of custody of one’s child is a life-shattering event more profound than

the prospect of a few days in jail. The homelessness that may result from eviction could have consequences far more devastating for an entire family than a short jail term for one family member.

Hence, the renewed call in the 21st century for a civil right to counsel in cases involving basic human needs and fundamental interests. ABA Resolution at 521 (“The categories contained in this resolution are 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 fundamental importance of providing legal protections for such basic human needs is also grounded in international human rights law. *See*

International Covenant on Economic, Social & Cultural Rights, art. 10, Dec. 16, 1966, 963 U.N.T.S.14531. And this is why “Civil Gideon” is a misnomer: no one in the current debate advocates for a right to counsel in all civil matters; the right to counsel in the critical types of civil cases addressed in the ABA Resolution is quite narrow and would not encompass, for example, tort actions for money damages and other contingency fee cases. It is also a right, perhaps obviously, that would only inure to private individuals, not business entities of any stripe, because personal indigence is its touchstone.

What is the role of the private bar in all this? There are at least four such roles, the first of which is well underway. As noted above, the ABA has spoken unequivocally on the sub-



ject. The MSBA has, as well. In 2003, advocates in Maryland, including the author, brought an appeal on behalf of an indigent Eastern Shore mother in a contested custody case where her opponents had a lawyer, arguing that she had a right to appointed counsel under the Maryland Declaration of Rights. While the majority of the Court of Appeals declined to reach the issue, having handed the mother a complete victory on the merits of her appeal otherwise, three members of the Court concurred but would have reached the right to counsel issue and would have found the right attached to a custody case such as was before the Court. *Frase*, 379 Md. at 143. Among the several amicus briefs presented to the Court urging recognition of a civil right to counsel in basic human needs cases was the first amicus brief ever known to have been filed by the MSBA, in which it championed recognition of the right:

[T]he MSBA has a long and proud tradition of supporting access to justice for all citizens, and of carrying out the legal profession's

responsibility to promote public respect for the rule of law. The ideal of equal access to justice remains unfulfilled when a high percentage of requests for urgent legal assistance made by indigent Maryland citizens cannot be met by the best efforts of existing civil legal aid resources and pro bono services. In addition, public respect for the rule of law depends critically on the legal system's ability to mirror the public's perception that justice is administered evenhandedly. Studies have shown, however, that as much as 80 percent of the American public believes, mistakenly, that in urgent civil matters a lawyer will be provided for persons who cannot afford one. This gap between public perception and reality threatens respect for the rule of law.

When the legal system fails to protect the fundamental rights of a citizen as a direct consequence of that person's inability to pay for or be appointed counsel, a long

shadow is cast over the ability of "the courts [to] maintain the confidence of the society and to perform the task of insuring that we are a just society operating under a rule of law." Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 503 (1998). [...] Appellant presents a compelling argument that a right to counsel is guaranteed to indigent Maryland citizens in at least some civil contexts. The recognition of such a right would be consistent with widely held notions of the basic fairness in our civil justice system. According to a poll conducted in 1991, 79 percent of Americans believe that there already exists a constitutional right to free counsel for indigent citizens in civil cases. Sweet, *supra*, at 504. This mistaken impression likely grows from the broad understanding and acceptance of the rationale for providing counsel in criminal cases: the notion that our adversary system requires a rough balance of ability to present the opposing

sides of a case. See Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right*, 29 Am. Crim. L. Rev. 35, 49 (1991)(footnotes omitted). In this regard, it is noteworthy that *Gideon v. Wainwright* is considered one of the most legitimate, and popular, constitutional decisions of the Supreme Court. See Garcia, *supra*. *Gideon's* legitimacy rests substantially on the notion that the case "affirmed a right that is now fundamentally accepted in our society." Krash & Lewis, *The History of Gideon v. Wainwright*, 10 Pace L. Rev. 379, 382 (1990). Conversely, the reality that counsel is often not available to indigent persons in civil cases whose fundamental rights are at stake is at odds with society's basic understanding of equal justice.

Brief for Maryland State Bar Association, Inc., as Amicus Curiae Supporting Appellant, at 1, 5-6, *Frase v. Barnhart*, 379 Md. 100 (2003) (No. 6) (MSBA Amicus Brief). The private bar's use of its own bully pulpit in support of a civil right to counsel has thus been critical to the advancement of the conversation in the new millennium.

The private bar has also contributed mightily by providing pro bono representation to persons seeking to advance recognition of the right through the courts in various states around the country. As just one example, in Maryland, Ms. Frase was represented by the Honorable Stephen H. Sachs, former Attorney General of Maryland and Of Counsel at WilmerHale (then Wilmer, Cutler & Pickering) and by Deborah Thompson Eisenberg, then a partner at the firm of Brown, Goldstein & Levy, LLC. The pro bono service of these private

lawyers, as co-counsel with the Public Justice Center, was indispensable.

Should a civil right to counsel be recognized and implemented, there will, of course, be a significant role for pro bono services in providing representation to indigent litigants entitled to appointed counsel in critical cases. Maryland's Access to Justice Commission has recommended that implementation of the right be provided through reliance on willing grantee participants in our "rich and diverse [legal services] provider community," which includes many local and statewide pro bono placement programs. MARYLAND ACCESS TO JUSTICE COMMISSION, IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND, at 4 (2011), available at <http://mdcourts.gov/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf>. But there is consensus that such a right could never be fulfilled through pro bono services alone.

[A] right to counsel in civil cases involving fundamental rights is a critical component of the provision of equal justice. That attorneys have a unique role in bringing the ideal of equal justice into being, and in advocating for effective measures to ensure equal justice, does not mean that attorneys must bear the entire cost of providing this societal need. As Judge Robert Sweet, formerly of the United States District Court for the District of New York, so aptly described the matter, the costs of a fair and functioning judicial system is one that must properly be borne by society at large:

[S]ociety's paramount interest must be in a just determination of a person's fundamental rights and privileges. While there will

undoubtedly be a cost to providing counsel to impoverished litigants, erosion of faith in the judicial system would exact an even higher price. To put it simply, denial of representation constitutes denial of access to real justice.

As for the money to finance such a constitutional right, it must come from the public fisc as it does for the representation of criminals, security for the aged, and protection for the poor and the infirm.

Sweet, *supra*, at 506. Equal administration of justice is a core value of the MSBA; it is the right, as well as the responsibility of all Marylanders.

MSBA Amicus Brief at 18.

Which leads directly to the final critical role of the private bar. Whether a civil right to counsel might eventually be recognized as a constitutional right by a court, or enacted through legislation or court rule, achieving the promise of such a right will depend on adequate public funding. The poor of Maryland will need the private bar, and its champion, the MSBA, to stand shoulder to shoulder with them, and with the rest of Maryland's access to justice community, to ensure that such resources are provided. Only then will our shared goal of equal access to justice be fully realized.

Mr. Coe is a partner at Gallagher Evelius & Jones LLP and a former chair of the Maryland Court of Appeals Standing Committee on Pro Bono. Ms. Gardner is the Legal Director of the Public Justice Center. She may be reached at gardnerd@publicjustice.org.