

# **No House, No Child Custody, No Money, No Lawyer**

**by Bob Rothman (as published in *Litigation Magazine*)**

Would you rather go to jail or be homeless for 30 days?

Prison or poverty—which is worse? What if you and your family were being evicted from your house, your belongings thrown out on the street and you did not have enough money in your pocket to rent another place to live? What if, in fact, you had paid the rent and this was all a mistake? Or what if the local department of children’s services wanted to take custody of your children because they believed that you were endangering them? But, in fact, you were taking good care of them and children’s services had you mixed up with another family with the same last name on the next street.

Would either of those events have more impact on your life than, say, being charged with a low-level felony carrying a maximum sentence of 12 months in prison? How about a misdemeanor with a potential sentence of 30 days? Hard to say, but none of those outcomes is something you would want to face alone.

In either case, the first person you would want by your side is a lawyer, right? It may be difficult for many lawyers to imagine such a scenario, but bear with me while we “suspend disbelief,” as they say in theatre, and put yourself in the place of any one of millions of people in this country who could no more afford a lawyer to deal with life’s very real, very painful civil injustices than a shiny new Mercedes Benz or, for that matter, even a used clunker.

If you are indigent and facing a felony, or even a misdemeanor charge that might deprive you of your liberty, you are entitled—as you should be—to receive the services of a publicly funded lawyer. But if you are threatened with deprivation of your basic

human needs—such as shelter, health, safety, sustenance or child custody—you have no right to any legal help at all.

Let's say you are a laid-off factory worker and you receive an official-looking document that says it is a "Summons." The word "dispossess" is on there, perhaps "foreclose" or "eviction," so you get the idea that you might lose your home. It says you are required to file an "Answer" to the complaint, but you don't know what that means or what you should do next. You go to the courthouse address at the bottom of the paper and ask for help, but the clerk cannot help you because to do so she may be engaging in the unauthorized practice of law. Next you go to the local legal aid office only to find that they are overwhelmed with clients in similar situations, short on lawyers because they do not have enough funding, and simply unable to represent you.

So you fill out a form the clerk gave you as best you can, and then you show up in court on the date shown on the Summons, not understanding why you are there, what evidence you might need to present, what "discovery" you might be able to take to obtain that evidence—or even that you have a right to take discovery and to present evidence (assuming you can figure out how to get it admitted because you have never heard of the rules of evidence). Once in court, you learn that the bank seeking to evict you has a lawyer. Worse yet, she is in the courtroom and is ready to go to trial immediately.

If the judge tells you to call your first witness, you might as well be taking a final exam in quantum physics at MIT or Cal Tech. You don't understand the language, the procedural rules or the substantive law, and there is nobody there to advise or represent you. Failure is all but a certainty. Even a 30-day "continuance" isn't going to do you much good, because unlike the situation where you are charged with shoplifting groceries

worth more than \$100 to help feed your family, the judge will not offer to appoint a lawyer to represent you if you cannot afford one. Prison, yes; poverty, no.

Just to be clear, this is not and should not be a matter of weighing one right against the other. A constitutional right to publicly funded legal representation has been recognized in this country since the U.S. Supreme Court decided *Gideon v. Wainwright* in 1963. Initially established in the context of criminal charges amounting to a felony, the right has since been expanded to misdemeanors carrying the possibility of jail time and other situations that threaten incarceration. But the obligation of the states to provide for indigent criminal defense is neither an excuse for not having, nor a reason to have, a right to counsel in civil cases involving basic human needs. The need for a right to civil counsel stands on its own merits.

The reason to have a right to civil counsel takes no great imagination. It is not difficult to appreciate how a civil proceeding in which a party risks the loss of housing, healthcare, welfare benefits, or child custody rights can have just as catastrophic an effect on the individual's life as would 30 days in prison. In those circumstances, just as in the case of misdemeanors carrying the risk of imprisonment, the assistance of competent counsel ought to be a matter of right to ensure due process.

But as millions of people in this country find out each year to their utter disbelief, it isn't. They watch Judge Judy. They know—or they think they know—that judges interrogate the parties and resolve the dispute without the help of lawyers. And they are deeply frustrated when they get no such help from the judge, from a lawyer, or from anyone else.

In its 1981 decision in *Lassiter v. Department of Social Services* (a case involving termination of parental rights), the U.S. Supreme Court rejected, by a 5-4 margin, a guaranteed constitutional right to publicly funded counsel in civil litigation .. Unless *Lassiter* is overruled—just as the Court eventually reconsidered and overruled its 1942 decision in *Betts v. Brady* with its 1963 decision in *Gideon*—development of a right to civil counsel will occur, if at all, at the state and local level. Indeed, state courts are being flooded with self-represented litigants who are facing foreclosure, eviction, and deprivation of child custody rights. But the problem hardly is confined to state courts. Federal courts also are seeing a surge in self-represented individuals in bankruptcy, immigration, and civil rights cases.

Judicial administrative offices and educational organizations are working to help teach judges how to better deal with self-represented litigants to minimize the potentially disastrous impact of proceeding in court without counsel and to assure, to the best of the court's ability, a fundamentally fair proceeding. A number of organizations joined together to develop extensive judicial training materials as part of the 2007 National Judicial Conference on Leadership, Education and Courtroom Best Practices in Self-Represented Litigation held at Harvard University.

This work is essential for several reasons. First, self-represented litigants are consuming vast amounts of judicial resources, slowing the administration of justice, and costing all litigants timely access to courtrooms and to judges needed to resolve their disputes. Second, public support for our judicial system depends on the public's perception that justice is fairly administered. Self-represented litigants who emerge from their courtroom experiences not understanding how and why they lost their cases are

likely to be extremely frustrated and lose confidence in the courts. Despite the best efforts of many judges to be as fair and impartial as possible when they have a lawyer on one side of a case and a self-represented litigant on the other, equal justice—or the appearance of equal justice—is elusive.

Why is that? As the August 2006 report of the ABA Task Force on Access to Civil Justice stated, “The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the 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.” The report goes on to note that, “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.”

Just how widespread is the problem? A 2005 report from Legal Services Corporation (LSC), *Documenting the Justice Gap in America*, estimates that four in five individuals who need, but cannot afford, legal representation in civil matters involving basic human needs go unrepresented. LSC reports that LSC-funded programs served approximately one million clients during 2004 but turned away at least an equal number who were qualified for assistance (i.e., those with an income level below 125 percent of the federal poverty level) primarily due to a lack of resources to serve them. Based on its own research and other studies, including an ABA study (Comprehensive Legal Needs Study, 1994), LSC concluded that, at most, only one in five basic legal needs of low-income persons are served either by a legal aid or private pro bono attorney.

LSC believes that in 2004, at least four million individuals with legal issues involving basic human needs were left to find their way through the complexities of the civil justice system without the help of a lawyer. Notably, the LSC report was based on research conducted before Hurricane Katrina created havoc on the Gulf Coast, leaving hundreds of thousands of people homeless and untold numbers jobless and penniless. It was also before the words “subprime mortgage” became a part of the common lexicon and threatened many thousands more with foreclosure.

An estimated 50 million people meet the definition of “low income” required to qualify for LSC representation. Yet, this is not a problem limited to the indigent. It reaches well into at least the lower middle class, where the cost of a lawyer for a child custody fight or to contest a foreclosure often can be prohibitively expensive.

The shortage of legal aid lawyers is in part attributable to the failure of Congress to adequately fund LSC. Funded in fiscal year 1995 at \$416 million (which would be \$576 million in today’s dollars), Congress funded LSC at just \$350.5 million in fiscal year 2008. The ABA has urged Congress to increase funding in this year’s appropriations bill to \$471 million, which is the amount requested by the LSC board of directors. Joining in that request were the presidents of all 50 state bar associations, together with the District of Columbia, Puerto Rico, and the Virgin Islands. The ABA, joined by Section of Litigation leaders, state bar leaders, and representatives of LSC, went to Capitol Hill last spring to lobby for the increase.

The ABA also is doing something about the need to establish a right to civil counsel. Led by then-ABA President Michael S. Greco and moved by the report of the Task Force on Access to Justice, the ABA House of Delegates unanimously adopted a

resolution in August 2006 calling on state, local, and territorial governments to establish a publicly funded right to counsel for low-income individuals in cases involving basic human needs. The resolution is in the best traditions of the ABA, which years ago heard its former President, Justice Lewis Powell, declare, “Equal justice under law is not just a caption on the façade 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.”

President Greco continued the call in 2006-07, declaring that “the overwhelming and growing legal needs of low-income Americans pose perhaps the greatest challenge to our nation’s commitment to equal justice—and equal access to justice.” Current ABA President H. Thomas Wells Jr. likewise has made access to justice a priority for his administration.

The Section of Litigation is responding to the 2006 resolution by exploring the parameters of and the obstacles to the establishment of a right to counsel in civil cases involving basic human needs.

First, the Section will explore the issues surrounding the establishment of a right to civil counsel in a symposium scheduled for December 4-5, 2008, in Atlanta. The symposium will bring together scholars, judges, lawyers, and elected officials to discuss issues ranging from an empirical assessment of the difficulties involved in creating a right to civil counsel to an evaluation of real-world challenges faced by those confronting this issue in the courts and in alternative dispute resolution proceedings. For example, one group of panelists will examine empirical issues such as identification of the data that exists and that is still needed to evaluate the cost of access. Another group will look at

those cases where counsel is most needed and the problems in calculating the benefits of providing access.

Second, the Section will fund a fellowship for a legal services lawyer to help assess opportunities to advance a right to civil counsel on a state-by-state legislative and judicial basis. The fellow will work with a broad national coalition of legal services lawyers, private law firm lawyers, academics, and others who have joined forces to address this critical need.

At the same time, recognizing that, at best, a right to civil counsel will develop in piecemeal fashion over many years, the Section will work to enhance the ability of the current legal aid structure to do more. Thus, as it did in 2008, the Section will continue to join with the ABA and others to lobby Congress for increases in funding to LSC. The Section also will conduct, as it has for many years, intensive trial skills training programs for legal aid lawyers twice a year at locations around the country, and for the first time the Section will offer a series of one-hour telephone CLE programs on basic trial skills specifically designed for legal aid lawyers. Both are offered at no charge to legal aid lawyers. This is in addition to the Section's other access to justice projects, which include a focus on issues affecting representation of children (including the right to appointed counsel), support for legal services offices both financially and through private bar fundraising training, and a program to provide access to counsel for American military personnel.

Yet, despite the best efforts of the Section, the ABA and local and state bars, as well as the heroic efforts of lawyers who work for LSC and other legal aid organizations (at considerable personal sacrifice compared with salaries offered in the private sector),

and the commitment of thousands of volunteer pro bono lawyers, it is a sad truth that this year, and likely for many years to come, millions of people in this country will not have a lawyer by their sides when they step into the unfamiliar surroundings of a courtroom to deal with a civil crisis that very likely will alter their lives—and not for the better.

It is time for that to change.