



WALKING BEFORE RUNNING: IMPLEMENTATION OF A RIGHT TO COUNSEL IN CIVIL CASES

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In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court held that indigent criminal defendants in state court felony cases have a categorical right to appointed counsel, replacing the Court's previous rule from *Betts v. Brady*, 316 U.S. 455 (1942), that made appointment of counsel a case-by-case determination. Although not explicitly mentioned in *Gideon*, the Court was apparently heavily influenced by the fact that "a succession of cases had steadily eroded the old rule and proved it unworkable." *Miranda v. Arizona*, 384 U.S. 436, 532 (1966) (White, J., dissenting).



At the same time that the *Gideon* Court acknowledged the unworkability of the *Betts* approach, it did not explain how the categorical right to counsel should be implemented to avoid any new unworkability issues. Indeed, such was not the Court's role; its job was only to determine whether the Sixth Amendment right to counsel was "a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment." *Gideon*, 372 U.S. at 340. Questions of implementation were thus left to the state legislatures. Nonetheless, implementation problems can wind up back in the courts; as the Missouri Supreme Court put it, "Beyond simply ensuring that counsel is appointed to assist every defendant who faces the possibility of imprisonment, a judge also must ensure that the defendant has *effective* assistance of counsel ... Effective representation under the Sixth Amendment requires appropriate investigation, preparation and presentation of the client's case by counsel." *State ex rel. Missouri Public Defender Com'n v. Pratte*, 298 S.W.3d 870, 875 (Mo. 2009).

The indigent defense systems that have arisen to meet the demands of *Gideon* have been staffed by

dedicated attorneys who have suffered through insufficient funding, extreme caseloads and lack of training. For instance, in *Pratte*, the Missouri Supreme Court noted that despite the imposition of statutory limits on the caseloads of public defenders, "As of July 2009, every Missouri public defender office was over its calculated capacity under 18 CSR 10-4.010." 298 S.W.3d at 880. The court noted that this problem might one day oblige the court to decide whether to require attorneys to take uncompensated appointments or force the state to fund more attorneys. *Id.* at 889.

On the civil side, the right to counsel has been significantly more limited due to the Supreme Court's 1981 decision of *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981), or perhaps more accurately due to its interpretation by lower courts. In *Lassiter*, the Court established that in the proper case or category of cases, due process may require the appointment of state-financed counsel. However, it instructed lower courts to apply the *Mathews v. Eldridge* factors (personal interest at stake, risk of erroneous deprivation, state's interest) to the case or type of case, and in cases where physical liberty is not at stake, balance these factors against a presumption that there is no right to counsel. In the decades since, many lower courts have incorrectly cited *Lassiter* for the proposition that there can never be a federal due process right to counsel except where physical liberty is at stake, ignoring the Court's mandate to apply a balancing test.

Nonetheless, every state has created (via legislation or court decision) rights to counsel in some or all of the following civil areas: termination of parental rights, dependency, and cases where personal liberty is threatened (such as involuntary civil commitment, quarantine, and paternity). But at times, these new rights have been plagued by the same implementation problems as on the criminal side, as revealed by the fact patterns of some cases challenging such systems. For instance, California requires counsel to be appointed for most

children in dependency proceedings. In *E.T. v. George*, F.Supp.2d, 2010 WL 121018 (E.D. Cal. 2010), a federal district court in California considered an appointment system where some public defenders were handling almost 400 dependency cases each and where there was an insufficient number of referees to hear the cases. The court commented that “[t]he complaint depicts a court system in which the voices of these children are not heard and their stories are not told while important decisions affecting their health and welfare are being made.”

Desiring to address the seriousness of these implementation questions, the National Coalition for the Civil Right to Counsel (NCCRC) distributed a memo to all National Legal Aid and Defender Association members entitled *Information for Civil Justice Systems About Civil Right to Counsel Initiatives*. The memo explores some of the common questions raised about implementation of new civil rights to counsel and posits some responses and approaches to such concerns. This article explores how some of the newest “on the ground” efforts, such as pilot projects in Massachusetts and California, the American Bar Association’s (ABA) Draft Model Act for the Civil Right to Counsel, and the ABA’s Draft Basic Principles for a Right to Counsel in Civil Legal Matters respond to the types of implementation issues addressed in the NCCRC memo. By their very nature, pilots and model acts are “testing-the-waters” approaches that focus on implementation planning as well as data gathering in order to answer the questions inevitably raised by expansions of the right to counsel.

What emerges is that a right to counsel can be made real in a way that is incremental, locally driven, fiscally responsible, accompanied by representation standards, appropriately timed, planned with the involvement and support of all necessary stakeholders, and integrated with existing legal services delivery systems. In fact, rather than creating more problems for legal aid, a carefully implemented and incremental civil right to counsel (created either via legislation or recognition by a state court of a constitutional right) can justify and encourage additional legal services funding by demonstrating cost efficiency, legal need, and feasibility.

Pilot Programs

In October 2009, California Governor Arnold Schwarzenegger signed into law AB 590, a bill establishing pilot programs to provide counsel in some cases involving basic human needs. The goals of the Califor-

nia pilots are to examine and demonstrate how a right to counsel could be implemented, gather information on both the scope of need for and potential savings derived from providing such counsel, evaluate the effectiveness of the model chosen, and foster new and innovative partnerships between courts and legal service providers to expand and improve representation.

The California pilots are the result of a methodical process dating back to 1994, when the California State Bar’s Working Group on Access to Justice produced a justice gap study that led to the creation of the California Access to Justice Commission (ATJC). Given that funding was tight at the time, advocates began to lay the groundwork for when the financial picture improved by taking such steps as seeking increased funding for legal aid and starting self-help centers. An important next step was the ATJC’s creation of a Model Statute Task Force, which produced the California Basic Access Act and the California Equal Justice Act. AB 590 borrowed much language directly from the California Basic Access Act (particularly in the “findings” section), further demonstrating how the pilots were the culmination of a gradual process that laid the foundation for each next step.

AB 590 enjoyed broad support from many local stakeholders across the political spectrum. It was championed by Chief Justice Ronald George and supported by the California State Bar, the Legal Aid Association of California, the California Access to Justice Commission, and even the California Chamber of Commerce (which has a seat on the Access to Justice Commission). In order to keep support broad, the pilots contain some limits to keep them fiscally acceptable. For instance, the judiciary previously increased the fee for certain postjudgment filings in order to pay for certain judicial expenses, and the bill redirects \$10 of those filing fees to the pilots starting in mid-2011. However, once the pilots end, the fees will go back to their previous level, a fact that gained the support of parts of the business community. Additionally, because the pilots draw funding from court fees, they do not decrease the state’s general revenue.

Steps were taken to gain the support of existing legal services providers. To start, Assemblyman Mike Feuer, who introduced the bill, is a former legal services director. The bill also requires the pilot projects to be a partnership between the courts and existing legal services organizations. Moreover, the funding structure does not endanger existing funding for legal services, since the bill specifically states that “[t]he services provided for in Section 5 of this act are not intended to,

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and shall not, supplant legal services resources from any other source.” The subject areas covered by the bill (housing, domestic violence, conservatorships/guardianship, elder abuse, and private child custody, with a 20% cap on the last type of case) were a compromise between and among the different legal services units (such as family law and housing) and Assemblyman Feuer, as there were competing interests for focus areas.

Accountability is central in the bill. It requires the Judicial Council (the rulemaking body for the courts) to develop an evaluation process before any funding is provided. The bill also requires each court partner to develop “court procedures, personnel, training, and case management and administration methods that reflect best practices to ensure unrepresented parties in those cases have meaningful access to justice ...” The bill also specifies the formation of an advisory committee tasked with “facilitat[ing] the administration of the local pilot project, and to ensure that the project is fulfilling its objectives.”

The Massachusetts housing pilots grew out of a 2008 Boston Bar Association Task Force report entitled *Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*, which urged the state to go further than merely endorsing the ABA’s 2006 resolution calling for a right to counsel in basic human needs cases. The Task Force, which is now implementing the pilots, has membership from across the legal spectrum: the judiciary, the IOLTA Committee, legal services, the public defenders, the state and local bar associations, academics, the pro bono community, and practitioners from small and large firms. Furthermore, the existence of strong legal services programs already in operation in certain courts was a key factor in determining where the pilots would operate.

Recognizing the tremendous number of housing cases, the pilots take a measured approach by targeting only the areas determined to be of highest need. These include: a) evictions tied to mental disability or criminal conduct; and b) cases where there is an imbalance of power between the parties combined with a viable defense. Moreover, as with the California pilots, there is no cost to the public fisc; funding is provided by the Boston Foundation, the Boston Bar Foundation, and the Massachusetts Bar Foundation.

As with the California pilots, the Massachusetts pilots emphasize the creation of evaluation standards so as to gauge in real time whether counsel is being

provided in an efficient and appropriate manner. The pilots will also be gathering data to determine actual need (and not merely estimated need) as well as actual dollars spent per case, and will be doing follow-up interviews with represented clients to learn more about the impact of the representation. And in order to determine what best to expect on the ground should a right to counsel in housing cases be implemented, the pilots are operating in both housing courts and district courts (which also have jurisdiction over housing cases). This is because the housing courts tend to feature court personnel with more specialized knowledge and greater resources (such as housing specialists serving as mediators as well as tenancy preservation projects), while the district courts handle a wide range of cases and do so with fewer resources.

The California and Massachusetts pilots are a bold step forward in the right to counsel movement. Yet at the same time they are incremental steps whose purposes are to gather information on implementation issues and dangers, collect data on true costs and cost savings involved in providing counsel, identify revenue sources, and build the alliances necessary to fully support new rights to counsel.

ABA Model Act and Basic Principles

In 2006, the ABA’s House of Delegates unanimously passed a resolution urging federal, state, and territorial governments to provide counsel in adversarial proceedings where basic human needs (such as those involving shelter, sustenance, safety, health or child custody) are at stake. In 2009, the ABA created a Civil Right to Counsel Working Group to focus on planning the next steps in advancing the right to counsel, and the Working Group produced a draft of a “Model Access Act.” Additionally, the ABA’s Standing Committee on Legal Aid and Indigent Defense (SCLAID) developed a draft of a companion document entitled, “Basic Principles of a Right to Counsel in Civil Legal Matters.” While the plan is for these documents to be introduced to the ABA House of Delegates in August 2010, they are still just drafts and are not yet ABA policy. However, their general purpose is, among other things, to provide a smoother rollout of new rights to counsel by providing flexible guidance to state legislatures and advocates on implementation questions.

In terms of working with the existing legal services delivery system, the current draft of the Act states in the “Legislative Findings” that “[t]he services provided for under this Act are not intended to and shall not supplant legal services resources supplied by any other

source, and this act does not override the local or national priorities of existing legal services programs.” Moreover, while the draft Act allows the state administering agency to contract with either legal services organizations or private attorneys as appropriate, the Act’s Commentary suggests that “appropriate” times to use private attorneys are when a) the contract legal services organizations are unable to take the case for various reasons; or b) a private attorney has a particular area of expertise or experience that “better serves the goals of effectiveness, cost-efficiency, and fair and equal access to justice.” The Commentary also says that if eligibility and scope-of-service determinations are delegated by the administering agency, LSC and IOLTA-funded entities are automatically certified to be appointed to make such determinations.

As with the pilot programs, the draft Act seeks to address the financial and administrative concerns raised by new rights to counsel. It only contemplates a right to counsel in five categories of cases (the five specified in the 2006 ABA Resolution), and suggests a cap on income eligibility at 125% of the federal poverty level. It would not provide representation in the following situations: a) in uncontested cases (unless the interests of justice require it); b) in non-adversarial proceedings (such as ones where there are relaxed rules of evidence or where the judge is more active in fact-finding) and where the opposing side does not have legal representation and the litigant is able to self-represent; or c) in pre-litigation disputes (such as where the landlord has sent a tenant a Notice to Quit but has not yet filed a complaint in court).

The current draft of the Act also suggests additional limits on the scope of representation. For instance, while both the Massachusetts and California pilots consider the merits of the litigant’s case as one factor in whether to represent, the draft Act would go a step further and impose a prerequisite merits test, albeit a fairly liberal one, for all cases at the trial level. Indigent plaintiffs would be provided counsel if a basic human need is at stake and the plaintiff has a “reasonable possibility of achieving a successful outcome,” while defendants would be provided counsel unless they lack a “non-frivolous defense.” Moreover, the draft Act would allow limits on the type of legal services provided in some cases: it distinguishes between “full representation” and “limited representation,” with an administering agency determining which classes of cases or individual cases can receive “fair and equal access to justice” with only limited representation. However, the draft Act’s Commentary calls for a presumption that

limited representation is insufficient in proceedings where representation is only permitted by an attorney and the opposing party has full representation. The Commentary also suggests that this presumption cannot be overcome unless the administering agency “finds the particular matter involves exceptional circumstances that allow the applicant to enjoy fair and equal access to justice despite this disadvantage.”

As additional feasibility insurance, Principle #6 from the draft ABA Basic Principles suggests that “[c]aseload limits are established to ensure the provision of competent, ethical, and high quality representation.” The comments to Principle #6 cite to developing ethics jurisprudence on the criminal side that attorneys with excessive workloads are obligated to decline the assignment of new cases, and the comments urge the state’s appointing authority to “set caseload standards and reasonable limits on the number of appointments a particular attorney can accept at any one time ...” At the same time, Principle #8 would require appointed counsel to be fairly compensated and to be adequately supplied with all other resources necessary for fair representation.

The drafts of both the Act and the Principles recognize the need for ongoing monitoring of the newly implemented rights. Principle #7 provides for ongoing evaluation of the performance of appointed counsel for quality, effectiveness, and efficiency. The Act suggests reporting and monitoring requirements for the administering agency that address the need for legal services, the sufficiency of the different types of legal services provided, and cost effectiveness issues.

As seen above, the draft Act may have some differences from the two pilots, but its basic goal is the same: to demonstrate how a state could adopt limits and controls on the provision of counsel, integrate a right to counsel with the existing legal services delivery system, and provide for accountability as well as awareness of the efficacy of the counsel provided. The development of the Act, like the pilots, is an incremental step towards the right to counsel, but one that can build a strong base of support for the right as well as help to avoid the implementation pitfalls that have plagued new rights to counsel in the past.

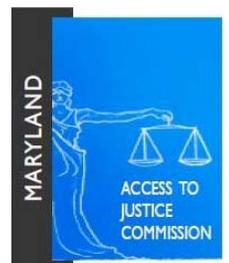
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Implementing a Civil Right to Counsel in Maryland

**MARYLAND ACCESS TO JUSTICE COMMISSION
2011**

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Letter from the Chair



In its 2009 *Interim Report*, the Maryland Access to Justice Commission recommended Maryland support the principle that low-income Marylanders should have the right to counsel at public expense in basic human needs cases.

Over the past year the Commission has explored the one question that has hampered consideration of this important initiative – how might a civil right to counsel be implemented in our State? The Commission explored a range of implementation variables – issues that would need to be resolved if a program or entity were created to provide counsel for the many individuals who would be entitled to assistance should a civil right to counsel ever be established by legislation or case law.

The Commission also asked the unthinkable question – what might it cost to provide meaningful access to counsel should the right be established?

The enclosed document contains two parts. The first provides a substantive description of how a right might be implemented. The second provides a fiscal narrative, an effort to approximate a fiscal note for a civil right to counsel in Maryland.

The Commission is publishing this document in an effort to advance the statewide conversation about a civil right to counsel, as one vehicle through which we might achieve the Commission's goal of equal access to justice for all.

Sincerely,

A handwritten signature in black ink that reads "Irma S. Raker".

Irma S. Raker
Maryland Court of Appeals (ret.)
Chair, Maryland Access to Justice Commission

FISCAL NARRATIVE: Approximating a Fiscal Note for a Civil Right to Counsel

Step One: How many cases are we talking about?

- “Basic human needs cases” would presumably include: landlord-tenant matters, domestic violence cases, divorce and family matters involving child access issues, and a broad range of administrative hearings including those involving medical assistance, health insurance for children, child support, and income maintenance. The following data is from annual reports for the Judiciary and the Office of Administrative Hearings. This is an effort to estimate the number of persons currently appearing without counsel.

Case Type	No. Filed / Yr.	Percent SRLs	Subtotal	Percent Likely Eligible*	Total
Landlord-Tenant	633,425	95	601,753	48	288,841
Domestic Violence	29091	70 x 1 40 x 1	20,363 11,636	48	9,774 5,585
Divorce or Other	42,179	70 x 1 40 x 1	29,525 16,871	67	19,781 11,303
Domestic with Child Access Issues [from WLC Study estimates]					
OAH: Medical Assistance	4495	95	4,270	100	4,270
OAH: CHIP	389	95	369	100	369
OAH: Child support	96	95	91	100	91
OAH: Income Maintenance	4,691	95	4,456	100	4,456
Total			689,334		344,470

* The percentage of SRLs who are likely eligible for legal services from MLSC-grant funded providers is based on demographic data collected by the District Court Self-Help Center (DCSHC) and the Family Law Self-Help Centers (FLSHC) operated by the Maryland courts. Approximately 48% of DCSHC users report household incomes under \$30,000 per year (Dec 2009 – Oct 2010). Approximately 67% of FLSHC users report household incomes under \$30,000 per year (FY07).

- The figures in this table represent an estimate of the *unmet* legal needs of income-eligible Marylanders – those who currently proceed without the benefit of counsel. This fiscal estimate is an effort to identify the *additional* funds required to enhance, and not replace, the existing voluntary legal services delivery system. These costs would need to be added to the amount already expended to provide the existing level of legal services. It should also be noted that there is little data available on the income status of most court users, and it is therefore difficult to extrapolate what percentage of

those who appear in these cases are indigent. To approximate this information this estimate uses household income data collected from court-based self-help centers to estimate the percentage of the self-represented likely to be income eligible in any given case type. Because of the nature of these cases, it is likely that the percentage of litigants in these case types that are indigent is likely to be higher than the percentage of those who are indigent among the general population.

- Another way of looking at the question is to look at estimates of the unmet legal needs of low-income Marylanders. MLSC has reported that approximately 1 million Marylanders are eligible for MLSC services. Of those, approximately 470,000 per year have a legal problem or may need assistance. Currently approximately 105,000 receive help through MLSC-funded grantees, which means there are probably about 365,000 additional Marylanders with unmet legal needs.
- For the purposes of this estimate we will use this smaller, more conservative figure of 344,470.

Step Two: What is the cost per case?

- **Hours.** Many thousands of Marylanders are able to resolve their legal problem or question with brief advice. Presumably many Marylanders will be able to continue representing themselves in simple case types, but will be able to do so more effectively with help from a knowledgeable and supportive provider. Those with limited abilities, high conflict matters, or critical needs, will be able to get full representation in contested proceedings. In other words, the hours spent per case will vary based on each person's legal needs. A complex custody matter can require 100 hours of assistance; a simple legal inquiry may be resolved in 15 minutes. For the purpose of this estimate we will use 4 hours per case. This rough estimate attempts to arrive at a weighted average including large volumes of relatively simpler cases (e.g., most evictions) mixed with smaller volumes of relatively more complex and time-consuming matters (e.g., custody cases contested through trial).

It should be noted that this model is based on an assumption that services will continue to be delivered in the most efficient manner possible that will achieve access to justice in basic human needs cases. Undoubtedly a right to counsel will require a substantial increase in expenditures, but the implementation model proposed does not provide for unlimited representation where the case does not warrant it.

- **Hourly Rate.** For the purposes of this estimate we will use the \$80/hour currently provided by the Judicare program. This does not include administrative costs.
- **Cost per Case.** Based on these figures, the cost per case would be \$80 x 4 hours - \$320 per case.

Step Three: Will the program generate any income?

- **One-time registration fee.** The Judicare program charges a one-time \$25 registration fee. This has enhanced client follow-through and accountability and some participating providers report it has been a positive innovation. If the program were to charge a one-time fee, it should be waived for the most indigent. For the purposes of this exercise we will assume the waiver would apply to the 8.3% of Marylanders below the federal poverty line. This would be approximately 464,000 Marylanders. MLSC estimates about 47% of the total eligible population needs legal assistance, so we might extrapolate that that same percentage (47%) of 464,000 would have a legal problem and be eligible to have the fee waived. That means 218,080 individuals would get the waiver. The total amount generated by the fee would be 365,000 – 218,080 (waiver eligible) 146,920 X \$25 = \$3,673,000, if collected.

Step Four: Putting it all together.

- Based on these assumptions, we can approximate the cost of the extension of a civil right to counsel to basic human needs cases.

344,470 individuals X \$320 / case =	\$ 110.2 million
Less revenue generated from fee:	(\$ 3.6 million)

Total Cost:	\$ 106.6 million
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- For purposes of comparison we might note that the Office of the Public Defender had an appropriation of \$ 85 million in FY10, down from \$ 90 million in FY09. The agency handled approximately 220,000 cases in FY09 and estimated it would handle slightly more than that amount in FY10.



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The National Coalition for a Civil Right to Counsel is committed to ensuring meaningful access to the courts. We work to expand recognition and implementation of a right to counsel in civil cases.

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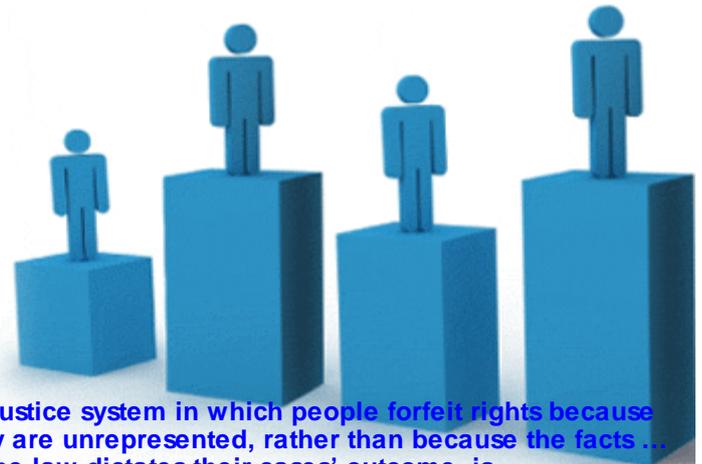
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What Happens Without a Lawyer?

After 10 years as a stay-at-home mom, Brenda King and her husband separated. He retained counsel, filed for divorce, and although he had urged Brenda to be a full-time parent, sought custody. Unable to afford a lawyer, Brenda asked for help from legal aid, which was unable to represent her. Without any legal training, and with a 9th grade education, she struggled through a five-day trial. In the end the judge, who had declined Brenda's request for appointed counsel, gave the husband primary custody of their three children. After being denied a new trial King appealed to Washington's Supreme Court, asserting a civil right to counsel under the state constitution. The court ruled 7-to-2 against her claim. King can now see her children only every other weekend.



“A justice system in which people forfeit rights because they are unrepresented, rather than because the facts . . . or the law dictates their cases’ outcome, is unacceptable.”

— Prof. Russell Engler, New England School of Law