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EDITOR’S NOTE

THis special issue of Court Review presents a topic that is central to our republic: access to justice. Most agree that the United States of America being the greatest country on Earth is primarily owing to our unique and dynamic legal system. Courts are open, decisions are made by lay juries, and the common law is rich and enduring. But our freedom and the rule of law come with a bedeviling byproduct: access to advice, representation by a lawyer, and sufficient procedural fairness are dependent on resources. Low-income citizens are provided an attorney in criminal proceedings, of course, but what about the rest? There is no guarantee that the system is open to a single mom with an unscrupulous landlord. When civil legal problems arise, many Americans are unable to do anything. So it has become a partial system—one for those who get access—and none for those who cannot. Our contributors are seasoned observers of the many aspects of this crucial subject, and show extraordinary thinking upon which we can be well-informed, and ready to reflect going forward.

Judge Jonathan Lippman has forged an illustrious career in New York state courts and beyond. His leadership has brought much-needed action to address the problems of access to justice for all people. In our lead-off article, Judge Lippman carefully outlines the story of New York’s efforts to provide a wider courthouse door. It shows a model of what can be accomplished, and inspires us to act in our own jurisdictions.

Professor Russell Engler is a renowned academic leader regarding access to justice. He has written often and brilliantly about unrepresented litigants in our legal system, including the role of judges. His important work and research in this issue provides an impressive exploration of the role of judges in access to justice issues—and for the growing efforts regarding a civil right to counsel. We are engaged to learn about how we got to where we are, and to remedy the increasing justice gaps. Our substantive understanding will be improved by Professor Engler’s article and strategic thinking.

John Pollock is the longstanding Coordinator of the National Coalition for a Civil Right to Counsel, and a much-published researcher and commentator about access to justice. His masterful piece will provide comprehensive knowledge and history of civil right to counsel law and practice. The article in this issue provides interesting and practical tools for judges to find their own right path to ensure litigants have the best access possible.

Finally, we are always gratified to present Judge Wayne Gorman’s work and scholarship. On the Canadian side, Judge Gorman reminds us of the continuous need to maintain and improve adequate criminal-indigent-defense counsel. His article reviews these issues viewed across the northern border—and will seem much like our own here in the U.S.

Access to justice is becoming a mainstay of judges’ work. The assurance of due process is not just left to the various pro bono efforts of the private bar. It is crucial that the substantive work of courts include doing what is necessary to ensure full access. This special-topic issue of Court Review may help address this ongoing challenge.—David Dreyer

Court Review is published quarterly by the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. Court Review seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for Court Review are set forth on page 51 of this issue. Court Review reserves the right to edit, condense, or reject material submitted for publication.

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On the cover: The Miami County (KS) Courthouse was built in 1899 by architect George P. Washburn as Victorian with Romanesque Revival details. The building features a tower at each corner, and a clock tower that no longer has a clock. The courthouse features porches with brick columns, and the upper windows of the building are arched with stone which continues around the building in a band. The main part of the roof and the towers are hipped, with gable ends between the towers. The courthouse was added to the National Register of Historic Places on March 1, 1973. Photo by Michael Fairchild.

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In this column, we celebrate the service of Shelley Rockwell who is retiring April 3, 2020. She has 35 Years and 10 months of service as an employee of the National Center for State Courts.

Shelley’s initial position was in “Secretariat Services”—now Association Services—in an administrative support position. She was promoted to Staff Associate in 1987; her work was pretty much the same as what she does now—managing associations, and watching over Court Review. Titles have changed along the way but Shelley has been the glue that held the AJA together in good times and bad.

Shelley has received many accolades about her excellent work effort and “superior” service to the associations she has staffed. Comments such as the following are peppered throughout her file—“Shelley is always cooperative, courteous and helpful.” “Her efficiency was beyond the call of duty.”

The following comments by some past Presidents are concurred in by all of us.

“There are few people in life who really are not replaceable. Shelly Rockwell is one of those very rare people. When I became President of AJA I sought to name her the AJA Historian. I thought my logic was impeccable after all no one knows as much about AJA’s history as Shelly. Besides surely no one would challenge the President’s choice to be the AJA Historian. I should have known better. Some judge objected claiming Shelly wasn’t eligible. So she never actually became the AJA Historian but we just kept asking her ‘what happened?’ ‘how did we get here?’ and ‘who was that judge?’ There is one other historical fact about Shelly’s service that actually is well known. She made every AJA President a lot better leader than they naturally would have been. And that is yet another reason Shelly is not replaceable.” Hon. Steven Leben

Hon. Kevin Burke

“Shelley is not replaceable that is true. She is sue generis, not only because she is so knowledgeable about AJA and NCSC which may have made her an excellent historian, but because of her character, her work ethic, her warmth and that she is always the consummate professional.” Hon. Elliott L. Zide

“When I first became active in AJA, I didn’t understand the great feeling of goodwill people had for Shelley Rockwell. Sure, she did a good job—but it was her job. What I found out over time was that Shelley never treated it as just a job. Year in, year out, day in, day out, she always put in the extra effort needed to be sure that no balls were dropped, AJAs volunteer leaders looked good, and AJA remained strong. Equally important, she kept contact with and cared about the people in AJA she has worked with, making her the connecting link that has brought so many of us together and kept us in touch literally for decades.” Hon. Steven Leben

The following are comments by the editorial board of Court Review, for which she provided expert service, and NCSC staff.

“My two cents are that Shelley is the backbone. She has been invaluable to Court Review. Her professionalism, prompt responsiveness, and knowledge all made our work with Court Review much easier. I know I am extremely grateful for her.” Eve Brank.

“Coming on board to Court Review and trying to live up to the high standards set by others, Shelley has always been a calming but insistent force helping smooth that transition. She has proven herself to be all knowing when we have questions, possessed of a bottomless well of patience for our challenges, and a reliable source of wisdom in counsel.” David Prince

“Shelley was welcoming, friendly, and extremely helpful when I started with Court Review. She was and still is essential in my ability to navigate and understand the publishing process.” Terra Garay

“With Shelley Rockwell retiring in about six weeks, I am writing to bring you up to speed on our plans for Shelley’s successor with AJA. To start with, and to state the obvious, we are all going to miss Shelley. In addition to her dedication, grace, and amazing work ethic, we will all miss the institutional knowledge that she provides to us when we make decisions about what’s best for AJA.

“Even after Shelley announced her retirement, she participated in the interviews to select her successor. We conducted an open and competitive search for the best candidates. It’s great news that we will have a full month to overlap with Shelley before she leaves us.” Jesse Rutledge

As President of the AJA, it has been my honor and pleasure to have worked with Shelley Rockwell. She will be missed by all of us. On behalf of the AJA family thank you for your dedication and service. We wish you and your husband a long and happy retirement.
When I became Chief Judge of New York State in 2009, I was struck by the fact that there was no short- or long-term plan for access to justice in our state. In fact, there was no plan at all. While our most fundamental mission was ensuring equal justice for all, I was taken aback that neither the Judiciary, the profession, nor the government in New York State was sufficiently focused on this fundamental goal for the justice system. I determined that my most important task as Chief Judge would be to seek to ensure that every single person in New York would get their day in court regardless of the amount of money in their pockets, their economic status, or the color of their skin. I took to heart the iconic words of Judge Learned Hand, “Though shalt not ration justice,” and knew that I had my work cut out for me.

During the early stage of my efforts, it was clear that new approaches and decisive action were necessary to shift the landscape on access to justice in New York. Less than 20% of the poor and people of modest means were having their legal needs met. In fact, in the heart of the financial crisis in 2009, eight out of nine people who came to the Legal Aid Society in New York, the oldest legal services organization in the country, were turned away because of a lack of resources. Situations of this kind were totally unacceptable and contrary to the values of the Judiciary and the profession. This article will try to give you a sense of how we proceeded in the face of this challenge and the progress that we made.

STATE AND LOCAL FUNDING
To increase access to justice in New York, we first had to ensure adequate funding. When we initiated the Task Force to Expand Access to Civil Legal Services in 2009, civil legal services in New York were woefully underfunded. At that time, funding for civil legal assistance consisted of a combination of state funds (mainly from the New York State Interest on Lawyer Account Fund, or “IOLA”), federal funds from the Legal Services Corporation, and private donations. Since the 1990s, federal and IOLA funding had decreased, and our economy had gone through an economic upheaval. The economic downturn presented us with a conundrum—fewer funds were available, yet more individuals needed service.

To increase funding, we decided to approach the issue by demonstrating the benefits to the New York economy overall. We argued that underserved and unrepresented litigants adversely impacted the economy by increased social services (and incarceration) costs, and demonstrated that providing civil legal services reduced those expenditures. For example, providing legal assistance to the unrepresented would help prevent evictions and homelessness, which are substantial tax expenditures for state and local governments. We proposed a plan that would incrementally result in millions of dollars for civil legal services. We recommended that the State provide these funds in a permanent and predictable fashion, and that the monies be placed in the Judiciary’s budget. We also established accountability procedures to ensure that these additional funds would be exclusively used to address the “justice gap.” Building on this initiative, and to the surprise of the legal and governmental communities in New York, we were able by the end of 2015 to meet our goal of obtaining $100 million in legal services funding.

A. OBTAINING FUNDING—HOW DID WE DO IT?
We started our mission to increase funds by demonstrating that expanding civil legal services is a good investment. We did not just argue that funding legal services helps the disadvantaged was the moral and right thing to do, which it was. Rather, we argued that increasing legal services also improves the well-being of our economy and our society by reducing the costs of litigation, increasing court efficiency, and saving taxpayers millions of dollars. To prove this, the Task Force held hearings across the state, where a wide variety of individuals representing many different interests testified. We heard from the heads of banks, landlord associations, business associations, the Comptroller of the New York, the City Council Speaker, and even New York Cardinal Timothy Dolan—a higher authority! The legislature responded enthusiastically to the hearings—the New York State Senate and Assembly endorsed them, and requested that the Task Force provide an annual report and recommendations on the financial needs for civil legal services in New York.

After the hearings and additional data collection and analysis,
the Task Force published its first report in 2010. The report demonstrated that increasing legal services in communities pays for itself many times over. We incorporated data and analysis from sophisticated economic studies, which major accounting firms and fiscal experts had agreed to provide pro bono. These studies showed that for every dollar invested in legal services, five are returned to the state. We showed that increasing legal services would save hundreds of millions of dollars in social services costs in numerous ways, such as through preventing evictions, helping domestic violence victims, and avoiding foster care. We also demonstrated that New York was losing millions of dollars in federal funding each year from lower income individuals being unable to access government programs.

Ultimately, the Task Force was able to obtain $12.5 million in funding for the Judiciary’s 2011 budget, approved by the Legislature and the Governor. We allocated these funds to legal service providers throughout the State, funding more than 50,000 cases and diverting almost 10,000 from the courts. We also obtained an additional $15 million (for a total of $27.5 million) in recovery funds for LOLA, where revenues had severely declined as the result of historically low interest rates. By the time the next budget was approved (2012-2013), the Task Force had obtained $40 million to support civil legal services, by far the highest level of state funding for civil legal services in the country. Over time, our methods continued to be effective—by 2014, New York State saw a return of more than six dollars for every one dollar of funding. By 2015, this figure grew to a return of more than ten dollars for every one dollar of funding—which by that time had reached the sought-after goal of $100 million. Legal services for unrepresented litigants had become a cottage industry in New York, with attorneys being hired at a record pace. Also in 2015, the Task Force became the New York Permanent Commission on Access to Justice.

**B. IMPACT ON THE TRIAL COURT JUDGE**

For the trial court judge, increasing state and local funds leads to fewer unrepresented individuals in the courtroom. The playing field is more level, and the Judiciary is better able to fulfill its mission and constitutional mandate of providing fair, impartial, and equal justice for all. The increase in funding also means that disadvantaged litigants have a more extensive array of legal options that results in fewer individuals having to see their legal troubles play out in the courtroom. This lessens the burden on the judiciary by clearing space on the docket.

**PRO BONO SERVICES**

While obtaining funding was critical to New York's approach to increasing legal services, it was not the only relevant factor. Pro bono services have long been a crucial component to aiding the unrepresented, not only here in New York, but throughout the country. Both bar associations and courts have contributed to pro bono work by coordinating the placement of services, providing valuable training programs, and recognizing dedicated attorneys by various awards and programs. We realized that we needed to harness this pro bono spirit to further our goal of expanding legal services. To do so, we tried to instill the value of pro bono services in the younger and older generations of attorneys by creating a mandatory pro bono requirement for New York bar admission and requiring already admitted attorneys to report their pro bono hours. We also implemented other new initiatives and programs and expanded upon those that previously existed.

**A. PRO BONO SERVICE BY LAW STUDENTS, BAR APPLICANTS, AND ADMITTED ATTORNEYS**

Pro bono service has been deeply rooted in the lives of attorneys for centuries and is a longstanding tradition in the legal profession. This same dedication to our ethical and social responsibility to volunteer our services has long been part of the law school culture as well. To bridge the gap between the professional responsibility of practicing attorneys to perform pro bono service as well as the experience of law school students, we enacted new requirements for both.

**1. The Pro Bono Requirement for New York State Bar Applicants**

Emphasizing the importance of service in the legal profession, we announced a mandatory pro bono requirement for New York State bar applicants. In fact, New York is still the only state in the country that has this requirement. Under this initiative, applicants are required to complete 50 hours of law-related pro bono work before being admitted to the New York bar. Fifty hours of pro bono work amounts to little more than a few days of service throughout a student’s law school career. However, when these 50 hours are multiplied times 10,000, the number of new attorneys who register to take the New York Bar Exam every year, the aggregate effect is clear. If every state were to enact this type of requirement, this could result in two and a half million hours or more of additional pro bono work.

With this new pro bono requirement, New York signaled that service is a necessary and crucial part of the legal profession—so much so that you must demonstrate your commitment to service before you are able to be admitted to the bar as a practicing attorney. We wanted to make pro bono service a part of the DNA of every new attorney in New York, so that the next generation of lawyers would recognize what members of the bar should do in the normal course—helping people in need and serving others. This requirement not only helps instill the core value of service but also decreases the access to justice gap by vastly increasing the number of hours of pro bono legal work. Applicants are required to work under the supervision of admitted attorneys—therefore, giving these students the ability to gain hands-on experience from their pro bono work while also building relationships with

“In 2011 alone, we were able to assist 3,557 litigants through this program and provided an estimated value of $4 million in legal services.”

2. Pro Bono Scholars and Poverty Justice Solutions

In addition to the hourly pro bono services requirement, we enacted other programs that were based on the service potential of new attorneys. The Pro Bono Scholars Program, for example, is an initiative that allows students in their final year of law school to devote their last semester of study to performing pro bono legal services for low-income clients under the supervision of a licensed attorney. This program symbolizes the relationship between the Judiciary, law schools, and the legal profession, with the goal of leveraging legal education to address the needs of unrepresented litigants. In exchange for students devoting their last term of law school to pro bono services, these students are able to take the bar exam in February, rather than wait until July after law school is completed. The beneficial results of the Pro Bono Scholars program are clear, and the Pro Bono Scholars almost universally pass the bar exam on the first try.

In addition to the Pro Bono Scholars program, we introduced Poverty Justice Solutions, a partnership between the Robin Hood Foundation, the New York State Unified Court System, and the New York City Human Resources Administration. Through Poverty Justice Solutions, 20 recent law school graduates per year were awarded two-year fellowships with civil legal service organizations. The program funded half of these graduates’ salaries, while the legal service entities provided the other half. The fellows worked full-time for the various organizations the program partnered with, reaping all of the training and hands-on experience the various civil legal provider partners had to offer. Poverty Justice Solutions is now the Jonathan Lippman Access to Justice Fellowship Program that provides one-year fellowships focusing on housing and poverty issues. Overall, both the Pro Bono Scholars Program and Poverty Justice Solutions were designed to get younger lawyers to value pro bono work and to consider a career in legal services.

3. Mandatory Reporting

In addition to the pro bono requirement for admission to the bar, we also began requiring lawyers to report their pro bono hours and charitable contributions to legal service entities on their attorney registration forms. This helped us with data to see which geographic areas, firms, and practice areas were doing the most pro bono work and where we needed to improve.

The reporting requirement generated much opposition from the organized bar at its inception, due to concerns that reporting pro bono hours would ultimately lead to a mandatory pro bono requirement for all lawyers in New York, similar to the 50-hour rule for new attorneys. Whether or not that would ultimately be a good idea, and I believe it merits serious consideration, that was not the intention at that time. In addition to providing helpful data, we hoped mandatory reporting, with heightened sensitivities, would also lead to attorneys being more proactive in performing pro bono work. That had been the experience in other states. In the end, after some refinements, the program has worked well. Peer pressure and professional pride have combined to stimulate volunteerism by the bar on behalf of the less fortunate.

B. SUPPORT FROM PRO BONO PROGRAMS

We implemented a multitude of other new initiatives and programs to achieve our goal of expanding legal services. Some key initiatives included our Volunteer for the Day Program for unrepresented litigants, the Attorney Emeritus Program, which enabled us to leverage the wisdom of veteran attorneys, and CourtHelp, an online platform designed to provide practical information about appearing in court.

1. Volunteer for the Day

One initiative that proved successful was our Volunteer for the Day Consumer Debt Program, which provides unrepresented litigants in consumer debt proceedings with pro bono attorneys who can represent them at hearings. Through this program, attorneys meet clients at the courthouse, appear on the client’s behalf during the day, and conclude the representation by the end of the day. These attorneys typically help their clients vacate default judgments and navigate settlement negotiations. In 2011 alone, we were able to assist 3,557 litigants through this program and provided an estimated value of $4 million in legal services.6

We also worked with the NYC Civil Court Consumer Services Advisory Committee to coordinate resources and training programs for attorneys in the Volunteer Lawyers Program. These lawyers do not represent clients in court, but help provide bigger picture advice about case strategy and how to navigate through the court system. We created similar programs to provide pro bono representation in New York Housing Courts, as well as free legal advice and information in the various help centers in New York City Civil Court. Additionally, we provide programs for unrepresented litigants in family and matrimonial matters.7

2. Attorney Emeritus Program

Through the Attorney Emeritus Program, we engaged those attorneys who were 55 or older and had a minimum of ten years of legal experience. This program allows this segment of the legal community, who may have retired or been slowing down their


7. While “limited representation” rules are common in most jurisdictions, judges and attorneys are well advised to check local provisions to ensure compliance.
practices, to still practice law on a pro bono basis. We require these attorneys to commit to a minimum of 30 hours of legal services a year. We connect them with legal service providers, who were able to contribute malpractice coverage, as well as the use of their offices and any necessary support and training. This program allows older lawyers to continue to use their legal skills advantageously, without requiring them to come out of retirement or commit to the full-time rigors of working in a law firm. It also allows younger attorneys at legal service providers to learn valuable skills through working with their experienced colleagues.

3. CourtHelp

We also collaborated with programs for unrepresented litigants that the court system itself provided. CourtHelp, for example, is an online resource that offers litigants step-by-step information on how to navigate the court process, as well as an exhaustive FAQ section. The resource provides numerous forms and guides to assist these individuals through the process and includes information on various types of proceedings, including those for family disputes, domestic violence, orders of protection, small claims, and eviction. New York’s CourtHelp Centers also provide direct assistance to unrepresented litigants. The Help Centers are located in the courthouse and operate on a first-come, first-served basis to any unrepresented litigant. They do not screen clients based on income and do not require an appointment. Court Attorneys and Court Clerks staff these centers and provide free legal and procedural information as well as referrals to outside organizations that may be able to assist these litigants.

C. IMPACT ON THE TRIAL JUDGE

Increasing pro bono services results in a more well-rounded professional experience as a whole, the result of which is undoubtedly seen in the trial court. The more attorneys do in public service, the more they are exposed to different types of clients and legal issues. These types of experiences allow attorneys access to real-world lessons that are often hard to come by as a practicing attorney. Attorneys steered in the ethos of our profession elevate the proceedings in our trial courts by demonstrating the nobility of what we do as judges and lawyers. Pro bono attorneys providing legal representation for disadvantaged litigants are a source of great pride for us all.

THE ROLE OF NON-LAWYERS

A. PROGRAMS FOR NON-LAWYERS

In addition to drawing upon the success of pre-existing pro bono programs and creating new opportunities for both future attorneys and seasoned veterans in the field, we tapped into the services non-lawyers could provide. While researching the potential of non-lawyers, we observed that in places elsewhere in the world, such as the United Kingdom, the use of non-lawyers had already taken hold and had seen a great positive effect. We realized that for particular niche areas, non-lawyers who were already familiar with these fields might even be able to provide stronger representation than generalist attorneys who were not specialists in that particular area of the law. To expand on the potential of non-lawyers, we created the Court Navigator program, where non-lawyers would go into the courtroom with unrepresented litigants to help them find their way through the New York court system. We then took it a step further and opened storefronts called Legal Hand in local communities, which are staffed by non-lawyers who are supervised by attorneys.

1. The Court Navigator Program

In February 2014, we began operating three separate Navigator projects in New York City: the Access to Justice Navigators Project, the Housing Court Answers Navigators Project, and the University Settlement Navigators Project. All three projects were overseen by a special new task force called the Committee on Non-Lawyers and the Justice Gap.

Through the first of the three Navigator projects, the Access to Justice Navigators Project, Navigators who volunteer “for-the-day” are trained to assist unrepresented litigants with debt or consumer collection actions. These volunteers appear in different courts throughout the boroughs, as well as in New York City Civil Court. Results from this project demonstrated that litigants receiving help from this program were 56% more likely to advocate successfully for themselves in these courts. The second project, the Housing Court Answers Navigators Project, consists of volunteers who are trained to assist unrepresented litigants with court-specific housing issues. These Navigators help unrepresented litigants use the computers in the courthouse to fill out forms for nonpayment and other proceedings, help collect and organize documents, and accompany litigants during negotiations, conferences with judges, and proceedings. Along the same vein, the University Settlement Navigators Project volunteers also appear in housing courts, but are trained caseworkers from nonprofits who agree to assist “for-the-duration” of the litigant’s case, as opposed to volunteering in court “for-the-day.” Having someone who is simply there to help, listen, and accompany these unrepresented litigants makes a world of difference and empowers these litigants to tell their side of the story.

12. See id.
2. Legal Hand

To complement the success of non-lawyers helping unrepresented litigants in the courtroom, we opened storefront centers in some of New York’s neighborhoods where litigants needed help the most. The program called Legal Hand was developed by Helaine Barnett, the Chair of our Access to Justice Commission. The idea is to train local community members who are willing to volunteer at these centers to provide free legal information and referrals to fellow community members. These storefronts provide a wide array of assistance and help with activities such as completing online legal forms, drafting form letters, and navigating the legal system overall. Legal Hand volunteers provide support for a variety of legal issues, the most common of which are housing, consumer credit, government benefits, and family law.

Although these individuals are not attorneys and cannot provide legal advice, they can provide unrepresented litigants with useful information and resources, and direct them in the right direction. We also work with various nonprofits, such as the Legal Aid Society, which coordinate with legal services attorneys to assist and oversee the Legal Hand volunteers. Currently, there are Legal Hand centers in Brooklyn, Queens, and the Bronx. Through the combination of the Court Navigators program in the court and the Legal Hand centers in the communities, we are able to have a great impact on unrepresented litigants’ lives at a minimal financial cost.

B. IMPACT ON THE TRIAL JUDGE

Programs such as the New York City Court Navigators and Legal Hand storefronts help unrepresented litigants obtain an increased number of productive court experiences. Court employees, such as clerks, court attorneys, and judges, are able to use these programs to their benefit. Court Navigators regularly interact with clerks when they accompany litigants to file paperwork or answer questions, which results in a filing process that is speedier and more efficient for all parties involved. The same is true for court attorneys and judges. Although Court Navigators cannot give legal advice, they are able to accompany unrepresented litigants to meetings with attorneys and judges. They are also able to answer any factual questions that judges direct to them. Further, Legal Hand-type storefront centers are able to serve as a sort of first-line between the litigant and the courtroom, also resulting in a more fair and efficient judicial process.

THE JUDICIARY’S ROLE & THE PATH TO A CIVIL GIDEON

As effective as our programs and policies might be, our ultimate goal of providing access to justice to all unrepresented litigants does not stop there. We designed these policies and programs with the mission of achieving a civil Gideon in mind.13 As uneven as the Gideon ruling is in application, at least it established the constitutional right of criminal defendants to an appointed attorney if they could not afford one themselves.14 All of the reforms and initiatives we have been spearheading in New York have the penultimate goal of ensuring that unrepresented civil litigants receive the same right. Such a right can be established through the constitution, public policy, or by statute.

A. CHANGING COURT RULES

To further the rights of the unrepresented, the Judiciary took the initiative on many fronts. One such area was designing new court rules to support unrepresented litigants in foreclosure and consumer credit cases. For example, in foreclosure proceedings, we standardized court forms and revised court rules to ensure that big banks were not able to “robo-sign”15 foreclosure complaints. Instead, we required lawyers to include their own affidavits that they were personally familiar with the foreclosure proceedings and had first-hand knowledge of the matter. Because of this requirement, the number of foreclosure proceedings in New York decreased dramatically.

Along a similar vein, in consumer credit cases, we changed court rules to require that lending companies put the history of the alleged debt in the complaint. We required that these lenders state exactly how much the debt was and provide a detailed history of the debt and its evolution, as opposed to a vague complaint that was designed simply to obtain a default judgment. Overall, the revised court rules in these two areas demonstrate that the Judiciary can and should be very proactive in terms of helping unrepresented litigants get their day in court. Simply put, the Judiciary should not just count cases in and count cases out, but should take affirmative steps to ensure that justice is being done.

B. THE UNIVERSAL ACCESS TO LEGAL SERVICES LAW

New York was the first city in the country to solidify its commitment to unrepresented civil litigants’ right to an attorney through statute. Building on the state court system’s funding for legal services and prior city efforts, the Universal Access to Legal Services Law was passed, a right-to-counsel law that ensures the city will provide access to legal assistance to anyone facing eviction in housing court. The New York City Council approved the bill on July 20, 2017, and it was signed into law by New York City Mayor Bill de Blasio on August 11, 2017. The law has grown in phases, representing the practical reality of not being able to implement a system overnight that could adequately address the population’s needs. By 2022, the Universal Access to Legal Services Law will be fully implemented and will offer access to representation for every tenant facing eviction in New York City.16

Under the Universal Access Law, New York City will ensure that by 2022, “all income eligible individuals . . . receive access to

13. A “civil Gideon” refers to the right to counsel, as expanded for civil matters.
15. “Robo-signing” refers to the practice where large banks routinely used affidavits and documents from employees who did not personally review the foreclosure proceedings. These employees “robo-
signed” thousands of affidavits a month stating they reviewed the relevant documents when, in reality, they did not.
full legal representation no later than their first scheduled court appearance in a [eviction] proceeding in housing court.”

Eviction proceedings are indeed life or death matters for unrepresented litigants who are all too frequently confronted with the possibility of becoming homeless. Further, housing courts are notoriously one-sided—landlords typically show up to court with an attorney, while the tenant facing an eviction typically does not. In terms of “income eligibility,” the Universal Access Law will provide an attorney for tenants with incomes below 200% of the federal poverty level facing eviction. Thus far, the results of the Universal Access Law and of increasing tenant representation in housing court overall have been significant. While only 1% of tenants had an attorney in 2013, by the end of 2018, 56% of tenants facing eviction who lived in areas where the Universal Access Law had been implemented had an attorney. There has also been a decline in the number of eviction filings, eviction warrants, and executed evictions, representing the evolution of the landlord-tenant relationship and the increase in tenants’ rights.

C. THE PATH TOWARD A CIVIL GIDEON

While New York was the first city in the United States to pass a right-to-counsel law, other cities have taken notice and followed suit. In June 2018, San Francisco passed its own right-to-counsel law for residential tenants facing eviction, becoming the second municipality in the United States to do so. In early 2019, Newark became the third. Other cities, such as Philadelphia and Washington D.C., have also been inspired—although they have not passed right-to-counsel laws, these cities took action through policy change, appropriating additional millions of dollars for eviction defense into their respective cities’ budgets.

1. How Close Are We?

The initiatives and reforms that have occurred in New York and elsewhere have gotten us closer to a civil Gideon protocol. We are now meeting as much as 40% or more of the legal needs of low-income New Yorkers. Nevertheless, that leaves a daunting challenge ahead, with universal legal representation and/or assistance still the goal rather than the reality. Despite task forces, pilot projects, court and bar-generated initiatives, statutory changes, collaboration between the Judiciary and local governments, and increased discussions surrounding access to justice, unrepresented litigants are still more often than not unable to get the legal help they need. These unrepresented civil litigants include not just the indigent, but those of moderate means as well. Although it may take time to achieve a civil Gideon via court victories or legislation, creative programs and pro bono services like those used in New York and others gaining momentum around the country can play a crucial role in garnering public and political support. Because it is unrealistic that a civil Gideon will be achieved through a United States Supreme Court case in the near future, such support will prove essential to furthering our goals.

D. IMPACT ON THE TRIAL JUDGE

Implementing right-to-counsel laws will have a significant effect on the trial judge. As demonstrated, laws like New York’s Universal Access Law dramatically reduce the number of unrepresented litigants as well as the number of court proceedings overall. Right-to-counsel laws also have the opportunity to inspire and create new generations of attorneys who are hired and trained to provide high-quality legal representation to unrepresented litigants in various areas. Similar to the increased ability of judges to interpret and strengthen critical areas of the law, this new generation of attorneys also has the power to bring transformative and thought-provoking legal arguments into the courtroom.

CONCLUSION

The New York story demonstrates what can be accomplished in access to justice when the Judiciary is proactive in the pursuit of justice, which is our constitutional and, in a real sense, our biblical mission. This kind of activism in New York by the Judiciary as an institution is just one example of what is happening around the country, in red and blue states alike.

All of the initiatives and programs discussed in this article redound to the benefit of each and every trial judge in individual courtrooms around the country. They help ensure that equal justice is served and that everyone gets their day in court. An independent Judiciary working with the organized bar, the profession and our governmental partners can contribute greatly to helping the most vulnerable in society gain full and meaningful access to the courts. Our unswerving commitment to access to justice will light the way so that, in the not so distant future, the ideal of equal justice will be a reality in courthouses and courtrooms throughout the nation.

The Honorable Jonathan Lippman, former Chief Judge of New York and Chief Judge of the New York Court of Appeals, the state’s highest court, from 2009 to 2015, is Of Counsel in the New York office of Latham & Watkins LLP. He has championed equal-access-to-justice issues in New York and around the country, made New York the first state to require 50 hours of law-related pro bono work prior to bar admission, and developed many programs to help alleviate the crisis in civil legal services.

In 2008, Judge Lippman received the William H. Rehnquist Award for Judicial Excellence. In 2013, the American Lawyer named him one of the Top 50 Innovators in Big Law in the Last 50 Years. Judge Lippman was the 2016 American Bar Association’s John Marshall Award recipient.


18. Oksana Mironova, NYC Right to Counsel: First Year Results and

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Access to Justice, Civil Right to Counsel, and the Role of the Judge

Russell Engler

It is hardly noteworthy to observe that judges play a crucial role in our adversary system, both inside and outside the courtroom. Yet, the past two decades have seen increased attention to the challenges facing the courts with the flood of unrepresented litigants in civil cases. The challenges impact the roles of each actor within the court system, including the judge. It should go without saying that the reality also creates immense challenges for the litigants themselves.

The challenges have led to an array of responses and strategies. Under the broad label of Access to Justice, responses have included a fundamental reexamination of how the courts should operate and how the various actors in the system may, or must, play their roles. Resolution 5 (2015) of the Conference of Chief Justices and Conference of State Court Administrators reafirms the commitment to Meaningful Access to Justice for All, urging states to achieve the “goal of 100 percent access through a continuum of meaningful and appropriate services.”1 Other initiatives focus on the need to go beyond more limited forms of assistance and establish a right to counsel in certain civil cases. The American Bar Association’s landmark 2006 resolution calls for the provision of legal counsel as a matter of right “where basic human needs are at stake.”2

With challenges come opportunities. This article therefore focuses on the crucial role of the judge not only in access to justice initiatives generally, but with a primary focus on the role of the judge in civil right to counsel issues. Judges will play a crucial role not only in enhancing access to justice, but also in helping to establish when a right to counsel is necessary to achieve access to justice, and often justice itself.

The article first sets the stage by exploring the access to justice and civil right to counsel backdrop for the discussion. It then discusses the many ways in which judges are involved in civil right to counsel issues. Their role in deciding civil right to counsel issues that come before them is crucial, but by no means the full extent of their role. Judges also decide cases not directly addressing right to counsel issues but creating the opportunity to explain the context in which a right to counsel may be needed. At a more basic level, judges must engage thoughtfully with their role in helping to provide meaningful access to justice for unrepresented litigants appearing before them and unable to navigate the civil proceedings alone. Outside the courtroom, judges write articles, deliver speeches, participate in Access to Justice Commissions, support legislative measures, work on bench-bar initiatives to improve access to justice and even submit amicus briefs. They serve on commissions and committees that directly or indirectly demonstrate the need for a civil right to counsel in certain settings and support calls for such a right. The article then places the right to counsel initiatives in the broader access to justice conversation, again highlighting the roles judges play in those initiatives.

THE ACCESS TO JUSTICE AND CIVIL RIGHT TO COUNSEL BACKDROP

A. UNMET LEGAL NEEDS AND UNREPRESENTED LITIGANTS

Court and bar leaders have struggled to respond to the phenomenon of unrepresented litigants flooding the courts.3 Legal needs studies consistently show that roughly eighty percent of the legal needs of the poor go unaddressed.4 The Great Recession increased the numbers of Americans whose basic human needs are at issue in legal proceedings, and need counsel.5 Even as the

Author’s Note:
Professor of Law and Director of Clinical Programs, New England Law | Boston. I am grateful for the feedback I received from Judge David J. Dreyer, Clare Pastore, and John Pollock.

Footnotes
3. Unrepresented litigants also are referred to as “self-represented” or “pro se” litigants, among other terms. In the contexts discussed in this article, I believe the word “unrepresented” is more accurate, since many litigants lack power and a voice in the legal system and should be viewed as without representation, rather than as choosing to forgo hiring a lawyer. For a further explanation of why I believe the term “unrepresented litigants” is more appropriate than “self-represented litigants,” see Russell Engler, And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks, 67 FORDHAM L. REV. 1987, 1992, n. 23 (1999).
The consequences of appearing without counsel are devastating...

These trends have given rise both to a renewed interest in achieving a right to counsel in certain civil settings and in a renewed commitment to access to justice more generally. Activity supporting a civil right to counsel increased sharply after 2003, the fortieth anniversary of *Gideon v. Wainwright*. Articles, conferences, and speeches addressed the issue, while membership increased in the newly formed National Coalition for a Civil Right to Counsel (NCCRC). Advocates pursued test cases and legislative strategies attempting to establish the right to counsel. In 2006, the American Bar Association (ABA) unanimously adopted Resolution 112A, urging the provision of “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. Many states and cities launched pilot projects to test the efficacy of innovations. In 2017, New York City adopted a right to counsel for indigent tenants facing eviction through its Universal Access program, with impressive first-year results. San Francisco, Newark, Cleveland, Philadelphia, and Santa Monica have announced the

**B. THE SURGE IN CIVIL RIGHT TO COUNSEL AND ACCESS TO JUSTICE ACTIVITY**

sis, with its attendant problems of high unemployment, home foreclosures and family stress, has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and has pushed many families into poverty for the first time.”


8. See LEGAL SERVS. CORP., DOCUMENTING 2009, supra note 5, at 5-8.

9. See LEGAL SERVS. CORP., DOCUMENTING 2017, supra note 4, at 42-45. “Low-income Americans will receive insufficient or no legal help for an estimated 1.1 million eligible problems this year alone.” Id., at 45. “A lack of available resources accounts for the vast majority of eligible civil legal problems that go unserved or underserved.” Id.


11. Id.

12. Id.

13. Id.


17. For example, the Spamer Symposium held on March 28, 2006, was titled “Civil Gideon: Making the Case.” The *Temple Political and Civil Rights Law Review* published papers presented at the conference in its symposium issue *Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 501-800 (2006). The inaugural Symposium of the University of Baltimore Law Review, held on April 5, 2007, was dedicated to the topic of *A Right to Counsel in Civil Cases: Civil Gideon in Maryland and Beyond*, producing the Symposium issue at supra, note 16. Leigh Goodmark, *Forward, a Right to Counsel in Civil Cases: Civil Gideon in Maryland and Beyond*, 37 U. BALT. L. REV. 1 (2007).


19. See, e.g., Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, HUM. RTS., Summer 2005, at 8, 9. The Coalition’s website is an invaluable resource on the topic, with information about cases, articles, speeches, conferences at which the Coalition has participated—http://civilrighttocounsel.org/.


22. ABA Resolution 112A, supra note 2.


C. SCHOLARSHIP AND EMPIRICAL WORK

The scholarly attention to civil right to counsel and access to justice topics has increased dramatically. The Winter 2019 issue of *Daedalus* was devoted entirely to the topic of access to justice. The twenty-four essays included in the volume illustrate the breadth of topics under the broad label of access to justice:

“Access to Justice”—the first open access issue of *Daedalus*—features twenty-four essays that examine the national crisis in civil legal services facing poor and low-income Americans: from the challenges of providing quality legal assistance to more people, to the social and economic costs of an often unresponsive legal system, to the opportunities for improvement offered by new technologies, professional innovations, and fresh ways of thinking about the crisis.

With respect to civil right to counsel scholarship, the comprehensive bibliography of the National Coalition for a Civil Right to Counsel’s website includes almost 400 articles.

Initiatives that form the access to justice backdrop often have been accompanied by efforts to develop data to evaluate the work. With the increased use of hotlines and the development of pro se clinics and self-help centers, reports emerged describing the initiatives, reporting data and evaluating their success. The late Richard Zorza’s Access to Justice Blog often included reports of such efforts. The National Center for Access to Justice developed the Justice Index as a tool to begin to measure access to justice and allow for comparisons across jurisdictions. The Center recently announced the creation of an Access to Justice Scholarship Project to focus on “growing the field of AtJ scholarship and building an agenda for AtJ research by identifying scholars doing pertinent work in diverse fields.”

An important component of the research includes efforts to

25. The “Status Map” on the website of the National Coalition for a Civil Right to Counsel is an invaluable resource for keeping abreast of the fast-changing landscape. See, http://civilrighttocounsel.org/map (subject area “Housing-Evictions”). As the status map reflects, jurisdictions are adopting the right by different vehicles. For example, San Francisco adopted the right to counsel by ballot initiative in June 2018. See, http://civilrighttocounsel.org/major_developments/1179. Legislation to establish a right to counsel for evictions (with varying income limits or other limitations in certain jurisdictions) has been introduced in Connecticut, Massachusetts, Minnesota, and Los Angeles. See, e.g., http://www.massrtc.org/national.html.

26. For example, the State Access to Justice Commission chairs now meet annually, under the auspices of the American Bar Association’s Section on Legal Aid and Indigent Defense. See, e.g., https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/annual_meeting/.


29. See https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/atj-commissions/.


31. See https://justiceindex.org/.


33. See https://www.amacad.org/daedalus/access-to-justice.

34. See http://civilrighttocounsel.org/resources/bibliography/comprehensive_bibliography.


37. The Justice Index’s website is available at https://justiceindex.org/.

evaluate the impact of counsel, as well as the effectiveness of more limited forms of assistance, including self-help programs. Not all the research has been met with open arms by those working in the access to justice and civil right to counsel communities. For example, some empirical work raised questions about the validity of previous studies on which many widely held views about the importance of lawyers rested. At the same time, some empirical work raised questions about the effectiveness of limited assistance or self-help programs. Critics questioned whether the data actually supported the conclusions being preferred or the methodologies used were valid. Other scholars focus instead on limitations as to what the studies show us even where valid. A different thread of research focuses on the economic benefits that flow from provision of effective legal assistance, including full representation by counsel.

It is beyond the scope of this article to explore the scholarly debate over what lessons to draw from the body of empirical work. I have analyzed elsewhere how the effectiveness of representation relates to a variety of factors beyond simply whether a party has a lawyer. Those factors include: the representatives and the tactics they use; the forum, including the judge or hearing officer, and the court or agency; the applicable law, both procedural and substantive; the alternatives to full representation in a particular setting; and the litigants. Those variables combine to underscore the crucial role of power and power imbalances in the legal system. They also provide important clues as to the settings in which full representation by a skilled advocate—and often a right to counsel—is likely to be needed to provide meaningful access and those in which other forms of assistance might suffice.

**CIVIL RIGHT TO COUNSEL AND ROLES FOR JUDGES A. CASES**

The United States Supreme Court’s 2011 decision in *Turner v. Rogers* sets forth the fourteenth amendment framework govern-
ing right to counsel decisions in civil cases. Turner relied in its analysis on the Court’s decision thirty years before in Lassiter v. Department of Social Services. This section describes the Lassiter and Turner decisions before turning to state court decisions.

i. Lassiter v. Department of Social Services

In the wake of the landmark case of Gideon v. Wainwright and its progeny, the United States Supreme Court did extend the right to counsel to certain civil settings. The hope that the Court might continue to extend the categorical right to counsel to other civil settings was dealt a devastating blow with the Court’s 1981 Lassiter decision. The Court’s decision came only two years after the European Court of Human Rights construed a provision requiring a “fair and public hearing” to require appointment of civil counsel in an action for marital separation.

Lassiter held that due process under the United States Constitution did not require a categorical right to counsel for a parent facing termination of parental rights. Under Lassiter, whether a litigant is entitled to counsel as a matter of due process turns on the application of the familiar Mathews v. Eldridge test to the particular case. The Mathews test, relied upon by the court in Lassiter and later in Turner, requires consideration of “(1) the nature of ‘the private interest that will be affected,’ (2) the comparative ‘risk’ of an ‘erroneous deprivation’ of that interest with and without ‘additional or substitute procedural safeguards,’ and (3) the nature and the magnitude of any countervailing interest in not providing ‘additional or substitute requirement[s].’” Applying the Mathews factors, a bitterly divided court held that there was no categorical right to counsel as a matter of federal due process law in termination of parental rights proceedings.

In dissent, Justice Blackmun criticized the majority for avoiding “what seems to me the obvious conclusion that due process requires the presence of counsel for a parent threatened with termination of parental rights,” reversing “an ad hoc approach thoroughly discredited nearly 20 years ago in Gideon v. Wainwright…” Although the majority and dissent both follow a “markedly similar” analysis in analyzing the three Mathews factors, “the Court abruptly pulls back” and calls for a case-by-case analysis, rather than an analysis of different contexts; “[i]t is conclusion is not only illogical, but it also marks a sharp departure from due process analysis consistently applied heretofore.” The dissent sets forth in detail the difficulties the petitioner faced attempting to represent herself, and notes the difficulty and exasperation the trial court experienced in conducting the hearing, which Justice Blackmun attributed “in large measure, if not entirely, to the lack of counsel.” The dissent found “virtually incredible the Court’s conclusion today that her termination proceeding was fundamentally fair.”

Lassiter at most establishes a presumption under the fourteenth amendment against a categorical right to counsel in civil cases where physical liberty is not at stake. Courts following Lassiter were still obligated to determine whether the facts of a particular case required appointment of counsel. Yet, “[i]n practice, Lassiter sounded a death knell for efforts to recognize a meaningful civil right to counsel as a matter of federal due process.”

ii. Turner v. Rogers

Thirty years after Lassiter, the Court stepped back into the civil right to counsel fray in Turner v. Rogers. Turner involved the appeal of the defendant, Michael Turner, who had been held in civil contempt for his failure to make child support payments to an unrepresented plaintiff, Rebecca Rogers, the mother of their child. Turner repeatedly failed to pay the amount due and was required the government to provide free counsel to indigent civil litigants. A more nuanced interpretation reads Airey as determining that Article 6 requires “effective access to the court,” which means “representation by an attorney, or a proceeding simple enough that a layperson could handle it without a lawyer.” Raven Lidman, Civil Gideon: A Human Right Elsewhere in the World, 40 CLEARINGHOUSE REV. 288, 290-91 (July-August 2006).

51. See, e.g., In re Gault, 387 U.S. 1 (1967) (holding that due process in “juvenile delinquency” proceedings includes the right for the child and his or her parents to be represented by counsel and to have counsel appointed if they cannot afford counsel); see also Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254 (1980)(finding a right to assistance of a qualified representative when prisoners are transferred to mental health facilities). Four justices believed that “it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill.” 44 S.Ct. at 498. Justice Powell, providing the fifth vote, agreed that “qualified independent assistance must be provided,” but believed that the requirement did not always demand “that a licensed attorney be provided.” Id.
52. Airey v. Ireland, 2 Eur. Ct. H.R. (ser. A) 305, 309 (1979). The Airey Court construed Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in reaching its result. Some commentators have interpreted Airey as recognizing a right to counsel in civil cases. See, e.g., Earl Johnson, Jr., Will Gideon’s Trumpet Sound a New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases, 2 SEATTLE J. FOR SOC. JUST. 201 (2003) (interpreting Airey as holding that the guarantee of a “fair hearing” in civil cases required the government to provide free counsel to indigent civil litigants). A more nuanced interpretation reads Airey as determining that Article 6 requires “effective access to the court,” which means “representation by an attorney, or a proceeding simple enough that a layperson could handle it without a lawyer.” Raven Lidman, Civil Gideon: A Human Right Elsewhere in the World, 40 CLEARINGHOUSE REV. 288, 290-91 (July-August 2006).
53. See Lassiter, supra note 49.
55. See id. at 27–31.
57. See, Lassiter, supra note 49, at 27-34.
58. Id. at 35.
59. Id., at 49.
60. Id. at 56-57. Dissenting separately, Justice Stevens agreed with the conclusion reached by Justice Blackmun that the Mathews analysis requires appointment of counsel in this type of case, but also believed that “issue is one of fundamental fairness, not of weighing the pecuniary costs against societal benefits.” Id., at 60.
sentenced on numerous occasions to imprisonment for failure to pay; Turner was jailed three times, the final time for a year.\textsuperscript{63} Turner was unrepresented at his civil contempt hearings but, while incarcerated, retained a pro bono attorney to challenge the failure of the South Carolina court to appoint counsel for him.\textsuperscript{64} On appeal, a unanimous Supreme Court held that the Due Process Clause did not automatically require appointment of counsel on the facts presented.

Relying on \textit{Lassiter}, the majority applied the \textit{Mathews} test to the \textit{Turner} facts.\textsuperscript{65} The majority first found that the freedom from bodily restraint, the private interest affected, “argues strongly for the right to counsel that Turner advocates.”\textsuperscript{66} However, the Court declined to hold that the balance of factors required appointment of counsel in all civil contempt proceedings involving child support in which incarceration is threatened for three reasons. First, on the critical issue of the defendant’s ability to pay the underlying obligation, “when the right procedures are in place, indigence can be a question that in many—but not all—cases is sufficiently straightforward to warrant determination \textit{prior} to providing a defendant with counsel.”\textsuperscript{67} Second, since the person opposing the defendant was “not the government represented by counsel but the custodial parent unrepresented by counsel,” the Court noted that a requirement that the state provide counsel to the alleged contemnor “could create an asymmetry of representation that would ‘alter significantly the nature of the proceeding’”; the Court felt that doing so might not only mean “a degree of formality or delay that would unduly slow payment” but also “could make the proceedings less fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive.”\textsuperscript{68}

Third, the Court believed that “there [was] available a set of ‘substitute procedural safeguards’ . . . which, if employed together, [could] significantly reduce the risk of an erroneous deprivation of liberty” without incurring drawbacks inherent to an automatic right to counsel.\textsuperscript{69} The Court identified four such safeguards:

1. notice to the defendant that his “ability to pay” is a critical issue [in the contempt proceeding] . . . ;
2. the use of a form (or the equivalent) to elicit relevant financial information . . . ;
3. an opportunity [for a] hearing for [the defendant] to respond to statements and questions about his financial status; and
4. an express finding by the court that the defendant has the ability to pay.\textsuperscript{70}

The majority concluded that, since the “record indicate[d] that Turner received neither counsel nor the benefit of alternative procedures” like those the majority had described, Turner’s incarceration violated the Due Process Clause.\textsuperscript{71}

\textbf{iii. Categorical Rights under State Law}

With \textit{Lassiter} and \textit{Turner} illustrating the Supreme Court’s reluctance to recognize a federal due process categorical right to counsel in the civil cases before it, the expansion of the right to counsel has occurred almost exclusively at the state and local levels. States have passed hundreds of laws and court rules guaranteeing the right to counsel in civil cases, including in family law, involuntary commitment, and medical treatment cases.\textsuperscript{72} The recent trend creating a right to counsel in eviction cases has occurred at the city level, by ordinance or ballot initiative.\textsuperscript{73} The NCCRC website tracks the status of current bills through a variety of tools.\textsuperscript{74} As discussed below, judges play important roles in furthering and supporting legislative initiatives.

The more direct way that judges have been involved in the expansion of the civil right to counsel, of course, is in their decisions from the bench. Clare Pastore has provided an overview of state right to counsel decisions.\textsuperscript{75} The cases most easily accessed after \textit{Turner} did not appear “to increase[] the accuracy of the decisions concerning ability to pay or alter[] the outcome in cases where the obligor lacked the ability to pay.” Elizabeth G. Patterson, \textit{Turner in the Trenches: A Study of How Turner v. Rogers Affected Civil Contempt Proceedings}, 25 \textit{Geo. J. on Poverty L. Policy} 75, 113 (2017).

are those from the state appellate courts, including the state supreme courts. Termination of parental rights cases are the largest category of reported right-to-counsel cases; other decisions involve contexts of civil contempt, civil commitment, and paternity. Where state courts have found a right to counsel, they have sometimes done so through use of the Matthews factors, but concluding that the application under state due process analysis to a particular context compels the finding of a categorical right to counsel. Other decisions look beyond state due process, exploring theories based on equal protection, the court’s “inherent power” or state “pauper” statutes.

The NCCRC also tracks the status of state litigation around the country recognizing a right to counsel in civil contexts. Several courts have parted ways with Turner either by distinguishing it or relying on their state constitutions. Other significant civil right to counsel decisions since 2014 include the Supreme Court of Pennsylvania’s decision interpreting its statutory law to require right to counsel for children in termination of parental rights cases; the Supreme Court of New Jersey’s decision recognizing a constitutional due process right to counsel for parents in private adoption cases, and the Massachusetts Supreme Judicial Court’s decisions recognizing a state constitutional right to counsel for parents in private guardianship proceedings both when the guardianship is initially established and with petitions to modify or terminate the guardianship. The Montana Supreme Court held that, under the state constitution’s equal protection clause, all parents have a right to counsel in adoption cases. The Hawaii Supreme Court held that all Hawaii parents have a right to counsel in abuse/neglect and termination of parental rights cases. The Indiana Supreme Court held that not only do parents have a statutory right to counsel in abuse/neglect cases, but the failure to appoint counsel automatically requires reversal.

Judges also make powerful statements through concurring and dissenting opinions in cases where a right to counsel issue is presented and either not reached by the court or rejected by the majority. For example, in Frase v. Barnhart, the Court of Appeals of Maryland invalidated visitation and housing conditions placed on the mother having custody of the child, but declined to reach the issue of whether the mother was entitled to appointment of counsel. In a concurring decision for three judges, including the Chief Judge, Judge Cathell objected to the majority’s decision declining to reach the right to counsel issue, noting that “[i]t is, in my view, an important function of this Court to answer questions such as is presented in this case…” as opposed to leaving the question to the political process. Judge Cathell cited decisions from other states finding a right to counsel in important civil contexts, observed how difficult it must be for poor litigants to navigate the legal system, and noted that the issue, which involves “protection of the family,” is fundamental and will not go away, before concluding:

I would reach the … issue. More important I would resolve it by holding that in cases involving the fundamental right of parents to parent their children, especially when the parent is a defendant and not a plaintiff, counsel should be provided for those parents who lack independent means to retain private counsel.

In King v. King, the Washington Supreme Court rejected a case presenting the question as to whether counsel should be appointed for the mother in a private custody dispute where the father was represented by counsel. The court concluded that “fundamental constitutional rights are not implicated in a dissolution proceeding.” It concluded further that, in contrast to a termination of parental rights case, the “State’s involvement is meaningfully different,” since proceeding is between private parties, where “the state neither applies its resources against either party nor instigates the proceeding.”

In a scathing dissent, Justice Madsen rejected the majority’s reasoning, noting that “[c]ivil marriage is an institution that is created, maintained, and controlled by the State to serve state interests” and that the “State controls access to the institution…” Moreover, the “fundamental interest at stake in this dissolution proceeding has long been recognized, that is, a parent’s fundamental interest in the day-to-day companionship, care and charge of his or her children.” Justice Madsen analyzed the gov-

76. Id., at 190.
77. Id., at 197-189.
78. Id., at 193-194.
79. The Coalition’s Status Map is available at http://civilrighttocounsel.org/map.
80. See, e.g., Commonwealth v. Diaz, 191 A.3d 850 (Pa. Super. 2018) (right to counsel for those facing incarceration in civil contempt proceeding for inability to pay court fees/fines owed to the government and not a private party); DeWolfe v. Richmond, 76 A.3d 1019, 1029 (Md. 2013) (reaffirming pre-Turner state constitutional case law on right to counsel and stating that “the right attaches in any proceeding that may result in the defendant’s incarceration”); State v. Stone, 268 P.3d 226 (Wash. App. 2012) (right to counsel in proceedings to enforce legal financial obligations to the state where incarceration is a possibility).
86. G.P. v. Indiana Dept. of Child Servs, 4 N.E.3d 1158 (Ind. 2014).
87. Frase, supra note 20.
88. Id., at 133-34.
89. Id., at 142.
90. King, supra note 20.
91. Id., at 664.
92. Id., at 663, 668.
93. Id., at 672.
erning state court precedent, and explained “the very real effect of what happens when one parent is denied primary residential placement after she has been the primary caregiver of her child.”

Justice Madsen described further the difficulties Ms. King encountered in attempting to navigate the proceeding without the assistance of counsel, and empirical studies showing that “indigent litigants without counsel receive less favorable outcomes than those with counsel,” before concluding:

These studies and comments highlight the serious consequences of litigating child placement issues without legal representation. It is a fact of life that a pro se parent cannot navigate the legal channels in a custody dispute with the degree of success that a lawyer can. It is simply unfair to a parent to require her to face a represented opponent in a court of law when her relationship with her children is at stake.

iv. Cases Decided by State Judges Involving Non-categorical Rights

1. Finding a Right to Counsel on a Case-by-Case Basis

As the preceding section illustrates, the most widely cited state cases involving whether a categorical right to counsel exists in a certain context are decided by state appellate court judges, and in particular state Supreme Court justices. State trial court judges arguably are best positioned to decide whether counsel must be appointed for a particular litigant in a particular case. Given the volume of cases they handle, state trial court judges should have more frequent opportunities to confront the question. Yet, many, and perhaps most, state trial court judges might be surprised to learn they have not only the authority to appoint counsel, but also an obligation to consider the issue. Despite a presumption against a right to counsel in Lassiter and Turner, those decisions did not hold that there is no federal constitutional right to counsel in these settings. Rather, Lassiter states that a litigant may overcome that presumption on a case-by-case basis by demonstrating that the Mathews factors favor appointment of counsel. Nothing in Turner undercuts this portion of Lassiter.

Despite the governing doctrine and the enormous number of pro se litigants, there is no evidence that judges follow the holdings of Lassiter and Turner and actually analyze whether individual cases require appointment of counsel. As Clare Pastore observes “[d]etermining how, and how often, the trial courts actually perform this due process analysis is a remarkably difficult task . . . .” Busy judges may not recognize litigants’ assertions that they are ill-equipped to handle their cases without a lawyer, or frustrations with their inability to obtain counsel, as raising a question as to whether counsel should be appointed. The reality may flow from the high volume of unrepresented litigants flooding the courts, the crowded dockets of judges in the state courts, and the absence of a dedicated funding stream to pay for counsel on a case-by-case basis. The result is that, while the governing doctrine on its face requires judges to perform the requisite analysis when facts suggest that an unrepresented litigant might be deprived of due process, it is the exception, rather than the norm, when a judge actually does so.

The Alaska Superior Court case of Gordanier v. Jonsson is one noteworthy example of a trial court working through the constitutional analysis and concluding that counsel must be provided for a particular litigant in a civil setting. The case involved a custody dispute, where Mr. Gordanier had retained private counsel. Ms. Jonsson was forced to represent herself, having twice had her case rejected by the local legal services office, and being unable to secure counsel from any other source. The Court found that Ms. Jonsson could not afford counsel, that no statute provided a basis for appointment of counsel, and that the fact that there might be pro bono services available did not relieve the court of its obligation to perform the requisite constitutional analysis. The Court worked through the guiding Alaska Supreme Court decisions on state due process, which included analysis of the Mathews factors, concluding that state due process required appointment of counsel. The Court found additional authority under state and federal equal protection provisions.

A decade later, a Massachusetts Housing Court judge followed Lassiter and Turner in concluding, based on the particular facts of the case before her, that the tenant should be appointed counsel in an eviction proceeding tied to a related criminal prosecution. The Court recognized the untenable position the unrepresented tenant faced, being forced to choose between defending against the summary eviction proceeding and waiving his privilege against self-incrimination in the process, or preserving his privilege but thereby being unable to present a defense in the eviction proceeding. The Court found its authority both from the due process analysis and from “sound administrative of justice principles,” which required appointment. The Court’s due process analysis involved a straight application of Lassiter and Turner, first acknowledging that while there “is no automatic right to counsel in civil proceedings,” the question of whether due process requires appointment of counsel is “to be answered

94. Id.
95. Id., at 679-80.
96. See Pastore, supra note 75, at 186. “Without a detailed analysis of trial court minute orders, records, and perhaps even transcripts, how often pro se litigants request counsel, much less how courts handle such requests in the vast bulk of unappealed cases, is impossible to tell.” Id.

Alaska Supreme Court.
98. Id., at 4-5.
99. Id., at 5-11.
100. Id., at 11-15
101. Worthy Apartments v. Kremer, No. 16-SP-3216, Rulings and Order on Appointment of Counsel and Motion to Extend Stay (December 8, 2017) (Housing Court Department, Western Division) (decision available at http://civilrighttocounsel.org/major_developments/1288).
The inequality in representation deprives tenants of their legal rights...’"

in the first instance by the trial court, subject, of course, to appellate review.”

In this case, the tenant’s significant private interest in his subsidized housing, the risk of self-incrimination in the related criminal case, and the tenant’s disability and demonstrated difficulty navigating the complexity of conducting a trial without counsel, combined to persuade the court that nothing short of appointing counsel suffices to protect the tenant’s rights under the federal and state constitutions.

The Court further noted that no “substitute procedural safeguards” as envisioned by Turner would allow the tenant to defend himself effectively: “Rather, any defense in this case requires an understanding of complex legal issues, and the expert skills needed to apply that understanding to the facts and the evidence offered.”

2. Acknowledging Context

Even when cases do not directly raise the question of whether counsel should be appointed, judges may be presented with opportunities to write decisions that reveal the challenges unrepresented litigants may face obtaining meaningful access to justice. These decisions can shape the direction of access to justice and civil right to counsel jurisprudence. For example, twenty-five years before the right to universal access to counsel in eviction cases in New York City became a reality, Civil Court Judge Marcy S. Friedman was faced with motion to set aside a settlement agreement in 144 Woodruff Corp. v. Lacrete. The agreement was reached between a represented landlord and an unrepresented tenant in which the tenant had agreed to pay a monthly rental amount over two times greater than the legal regulated rent for her rent-stabilized apartment. The decision is remarkable not only for the holding, but for the extensive context Judge Friedman provides. She first reviews the governing New York case law under which a court-approved stipulation may be set aside where a party has been without counsel, demonstrating that the good cause standard extends to situations where a stipulation is unduly harsh or unjust and the parties may be returned to their prior status. As Judge Friedman illustrates, the application of the governing standards to the facts of the case warrants setting aside the agreement.

The decision could have ended there. Instead, Judge Friedman writes at length about the plight of unrepresented tenants in Housing Court and how the issue “has become the subject of increasing concern and consideration by the chief administrators of the courts and distinguished committees of the bar.” Judge Friedman discusses many of the studies that have connected the lack of representation to “increasing concern and led one Commission to call for mandatory pro bono.” She quotes a different study concluding that “the inequality in representation deprives tenants of their legal rights... and that the ‘provision of counsel to persons facing eviction constitutes the single indispensable reform required in the Housing Court.’” The Court cites from these reports at length before showing how the facts of the case before her fit squarely into the scenarios identified by the Committees and Commissions. After demonstrating the untenable position faced by Housing Court judges asked to approve agreements between represented landlords and unrepresented tenants, the Court observes that the “critical problems caused by lack of representation for tenants in Housing Court can only be addressed from a number of perspectives.” Judge Friedman discusses different fixes, noting that: “[g]reater availability of counsel is the obvious but crucial long-term solution.”

In 2019, the Massachusetts Supreme Judicial Court followed a similar path in Adjartey v. Central Division of the Housing Court Department. Adjartey involved an appeal from pro se litigants alleging bias in certain aspects of the operation of the Central Housing Court in Worcester. Although the Court did not ultimately grant the appellants the relief they requested, the Court, in a decision authored by Chief Justice Gants, issued a 35-page decision, with a 23-page Appendix, explaining the challenges unrepresented litigants face in summary process eviction cases in Massachusetts courts. Under a heading labeled “The complexity and speed of summary process cases, and the disparities in legal representation between landlords and tenants,” the court addresses the broader context: “the unique nature of a summary process eviction.” The Court notes that “summary process cases are complex, fast-moving and generally litigated by landlords who are represented by attorneys and tenants who are not.” After discussing the nature of summary process cases, and the data showing the disparity in representation between landlords and tenants, the Court observes: “[t]he result, in most cases, is that the landlord has an attorney who understands how to navigate the eviction process and the tenant does not.” The court notes further that legal services organizations are severely under-resourced, and the wealth of information online is an inadequate substitute for representation. The court adds that the assistance of nonlawyers may be the only option “[i]n a complex, high-stakes process where the right to counsel is not guaranteed and professional assistance is not universally available.”

The decisions in Adjartey and 144 Woodruff Corp. v. Lacrete used cases that did not present a right to counsel issue to illus-
trate how counsel is essential in a particular context. The decisions echo and support legislative initiatives that seek to address the problems faced by the courts where parties are forced to appear without counsel. For example, the legislative findings that helped support California legislation that established the Sargent Shriver Civil Counsel Act\textsuperscript{116} include:

Many judicial leaders acknowledge that the disparity in outcomes is so great that indigent parties who lack representation regularly lose cases that they would win if they had counsel.\textsuperscript{117}

In some cases, justice is not achievable if one side is unrepresented because the parties cannot afford the cost of representation. The guarantees of due process and equal protection as well as the common law that serves as the rule of decision in California courts underscore the need to provide legal representation in critical civil matters when parties cannot afford the cost of retaining a lawyer.\textsuperscript{118}

B. THE BULLY PULPIT

\textit{i. Articles, Speeches and Amicus Briefs}

The potential role for judges to help identify the context where a civil right to counsel is necessary extends far beyond the cases they decide. Judges have been in the forefront of the efforts to shape our understanding of the need for a civil right to counsel through their writings. Judge Robert Sweet played an important role in restarting the conversation about the need for a civil \textit{Gideon} with his published writings toward the end of the 1990s.\textsuperscript{119} Justice Earl Johnson pressed the case for a civil right to counsel both through his writings\textsuperscript{120} and his judicial opinions\textsuperscript{121} while on the California Court of Appeal building on ideas he promulgated before joining the bench.\textsuperscript{122} Judges Denise Johnson,\textsuperscript{123} Lora Livingston,\textsuperscript{124} Jon Levy,\textsuperscript{125} Mark Juhas,\textsuperscript{126} David Dreyer\textsuperscript{127} and Ron Spears\textsuperscript{128} are among others who have helped make the case for a civil right to counsel in law review articles, bar journals, and other writings in recent years.

Whether by using the bully pulpit, appointing task forces, or using other tools, state Chief Justices can play a crucial role in providing momentum and leadership for an expanded civil right to counsel. Chief Judge Jonathan Lippmann of New York played a crucial role in the initiatives that led New York City to become

\textsuperscript{116} See Assembly Bill 590 (2009), available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200920100AB590 &search_keywords=shriver. See also Note, \textit{California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parties}, 123 HAW. L. REV. 1532 (2010). “Many Californians are unable to meaningfully access the courts and obtain justice in a timely and effective manner. The effect is that critical legal decisions are made without the court having the necessary information, or without the parties having an adequate understanding of the orders to which they are subject.” \textit{Id.}, §1(b).

\textsuperscript{117} \textit{Id.}, §1(g). “A growing body of empirical research confirms the widespread perception that parties who attempt to represent themselves are likely to lose, regardless of the merits of their case, particularly when the opposing party has a lawyer, while parties represented by counsel are far more likely to prevail.” \textit{Id.}

\textsuperscript{118} \textit{Id.}, §1(k). The findings noted further that “[t]he adversarial system of justice relied upon in the United States inevitably allocates to the parties the primary responsibility for discovering the relevant evidence, finding the relevant legal principles, and presenting them to a neutral judge or jury. Discharging these responsibilities generally requires the knowledge and skills of a legally trained professional. The absence of representation not only disadvantages parties, it has a negative effect on the functioning of the judicial system.” \textit{Id.}, §1(i).


\textsuperscript{120} See, e.g., Johnson, \textit{Will Gideon’s Trumpet Sound A New Melody?}, supra note 52, Johnson, \textit{Three Phases}, supra note 18.

\textsuperscript{121} See, Quail v Municipal Court, 171 Cal App. 3d 572 (1987) (Johnson, J., concurring in part and dissenting in part), Justice Johnson dissented from the portion of the court decision upholding the denial of the request for appointed counsel, both on appeal and at the trial court level, identifying various grounds for recognizing a right to counsel in civil cases, including due process, equal protective, incorporation of English common law that had recognized such a right, and the court’s inherent authority.


\textsuperscript{123} Denise Johnson, \textit{Bridging the Gap}, APP. J. NEWS 11 (2006). Justice Johnson was an Associate Justice of the Vermont Supreme Court at the time her article was published.

\textsuperscript{124} Laura Abel and Judge Lora Livingston, \textit{The Existing Civil Right to Counsel Infrastructure}, JUDGES’ J., Fall 2008, at 24. Justice Livingston was the Presiding Justice of the 261st District Court in Texas when she co-authored this piece.

\textsuperscript{125} Hon. Jon Levy, \textit{The World Is Round: Why We Must Assure Equal Access to Civil Justice}, 62 ME. L. REV. 561 (2010). Justice Levy was an Associate Justice of the Maine Supreme Court when he published this article, and later was appointed to the United States District Court in Maine.

\textsuperscript{126} Mark Juhas, \textit{On the Anniversary of Gideon, an Argument for Free Civil Representation}, L.A. LAW., Sept. 2013, at 44. Judge Juhas serves as a judge of the California Superior Court, County of Los Angeles.

\textsuperscript{127} Hon. David J. Dreyer, \textit{Deja Vu All Over Again: Turner v. Rogers and the Civil Right to Counsel}, 61 Drake L. REV. 639, 651 (2013). Judge Dreyer is a judge of the Marion County Superior Court in Indiana.

\textsuperscript{128} Hon. Ron Spears, \textit{An Adversary System Without Advocates}, 101 ILL. B.J. 592 (Nov. 2013) Judge Spears was a resident judge of the Fourth Circuit in Christian County, Illinois at the time the article was published.
the first jurisdiction to adopt a right to counsel for tenants facing eviction. Judge Lippmann used law review articles and speeches\(^\text{129}\) to help make the case for the right to counsel, while appointing task forces that explored the issues and helped demonstrate the need.\(^{130}\) Judge Lippmann continued to press the cause after his retirement in 2015, becoming an important voice in the successful New York City initiative.\(^{131}\) Other Chief Justices, including Chief Justice Broderick of New Hampshire,\(^{132}\) Chief Justice Gants of Massachusetts,\(^{133}\) Chief Justice George of California,\(^{134}\) Chief Justice Chase Rogers of Connecticut,\(^{135}\) and Jess Parker, Presiding Judge of the Supreme Court of Mississippi,\(^{136}\) have raised the importance of the need for representation to level the playing field in their state courts.

Judges have seized other opportunities to present their unique perspective on issues relating to unrepresented litigants, the challenges they face in achieving fairness in the courts, and the need for counsel. For example, eleven sitting and retired judges from the Milwaukee and Dane County Circuit Courts in Wisconsin filed an amicus brief in *Kelly v. Warpinski*.\(^{137}\) In *Kelly*, petitioners asked the Wisconsin Supreme Court to take original jurisdiction and rule on their argument that the state constitution conferred a right to appointed counsel in civil cases. Without taking a position on the appropriate remedy, the judges drew from their experience and explained how unrepresented civil litigants represent a significant and growing burden on the judicial system, which is not well-equipped to deal with them. They discussed how “pro se litigants” are a significant and growing part of state trial courts’ caseloads, how unsophisticated and inexperienced pro se litigants complicate the process, and how the inherent power of the trial courts to appoint counsel has not been an effective means of addressing the problem.\(^{138}\) Sixteen retired judges in Washington State similarly filed an amicus brief in the Washington State

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\(^{131}\) See, e.g., *History of the Right to Counsel NYC Coalition*, available at https://d3n8a8pro7vhmx.cloudfront.net/righttocounselncy/pages/10/attachments/original/1517948094/history_of_RTC.pdf?1517948094.

\(^{132}\) In remarks to the National Access to Justice Conference in Minneapolis, Minnesota in 2008, Chief Justice Broderick described having appointed a Citizens Commission to examine the New Hampshire State Courts, which recommended that New Hampshire “examine the expansion of legal representation to civil litigants unable to afford counsel and study the implementation of a civil *Gideon* for the poor threatened with the loss of shelter, safety, sustenance, health, and custody of a child (speech on file with author).

\(^{133}\) Among other initiatives, Chief Justice Gants led a project management team that developed the Massachusetts Justice for All Strategic Action Plan, which in part calls for Massachusetts to consider following the lead of New York City in instituting a right to counsel for tenants in most eviction cases and providing the funding necessary to implement that right. See http://www.mass2j.org/a2j/wp-content/uploads/2018/01/Massachusetts-JFA-Strategic-Action-Plan.pdf.(hereinafter “MA SAP”). In his 2019 State of the Judiciary speech, Chief Justice Gants referred to the “legislative efforts afoot here in Massachusetts to provide legal counsel for all indigent parties in eviction proceedings” and stated, “I hope that by next year these efforts may finally come to fruition.” See https://www.mass.gov/news/supreme-judicial-court-chief-justice-ralph-d-gants-delivers-state-of-the-judiciary-speech-2019.

\(^{134}\) The report to the ABA House of Delegates in support of ABA Resolution 112a, at 10, quoted Chief Justice Ronald George’s State of the Judiciary Speech to the California Legislature, 2001: “[E]very day the administration of justice is threatened . . . by the erosion of public confidence caused by the lack of access.” See https://www.americanbar.org/content/dam/aba/administrative/legal-aid_indigent_defendants/ls_sclaid_resolution_06a112a.pdf.

\(^{135}\) At a meeting of the Connecticut Bar Association, Justice Rogers stated that a civil right to counsel is an issue “we need to confront,” and added that “it’s time for Connecticut to accelerate serious and comprehensive discussions regarding representation for people who cannot afford counsel in certain types of cases. I say this in full recognition of the financial limitations that exist in contemplating civil *Gideon*, but also in the hope that a dialogue with the bar as a very active participant will lead to further enhancement of access to justice.” See, http://civilrighttocounsel.org/major_developments/939. The first recommendation of the resulting task force was that the legislature should “establish a statutory civil right to counsel in three crucial areas where the fiscal and social cost of likely injustice significantly outweighs the fiscal cost of civil counsel.” See, Report of the Task Force to Improve Access to Legal Counsel in Civil Matters, at 4 (2016) (report available at http://www.rc.com/upload/O-Hanlan-Final-Report-of-CT-Leg-Task-Force-12_2016.pdf).


\(^{137}\) *Kelly*, supra note 20.

Supreme Court in support of a right to counsel in contested custody matters in King.139

ii. Commissions and Committees

Nor are the views of judges by any means limited to the context of litigation. The resolutions of the Conference of Chief Justices include important calls for reform of state court proceedings to lower barriers to access. The landmark Resolution 5 (2015) reaffirms the Commitment to Meaningful Access to Justice for All.140 Judicial responses to survey questions may also bolster the case for a right to counsel. For example, a survey of Massachusetts judges revealed that lack of representation slows procedures, forces repeat appearances and filings, and causes an increase in court staff time in assisting unrepresented litigants.141 Sixty-one percent of the judges responding to the survey reported that the lack of representation “negatively impacts the court’s ability to ensure equal justice to unrepresented litigants.”142

Using the broader lens of access to justice, which often intersects with and supports right to counsel efforts, individual judges play important roles in the state access to justice commissions. Some Commissions have endorsed the concept of a right to counsel in certain civil contexts, while others have studied the right to counsel as part of their work.143 The Commissions usually are created by order of a state’s highest court and typically include a number of judges from throughout the court system among their members.144 Many commission chairs or co-chairs are sitting or retired judges.145

Judges have served on, and often chaired, other committees and entities that have called for the implementation of a right to counsel or studied the challenges for unrepresented litigants in court exposing, at a minimum, the need for systemic change to remove barriers to meaningful access. Justice Howard H. Dana, Jr. of the Maine Supreme Court chaired the ABA Task Force on Access to Civil Justice that produced the landmark ABA Resolution calling for a civil right to counsel where basic human needs are at stake.146 The reports to the Connecticut Supreme Court and to Chief Judge Lippmann in New York that described the barriers to meaningful access and supported the call for a right to counsel in certain civil contexts are among the many examples.147

CONNECTING A CIVIL RIGHT TO COUNSEL AND ACCESS TO JUSTICE

Before concluding an article focused on the judge’s role in civil right to counsel initiatives, it is important to connect a civil right to counsel to broader access to justice issues. Some literature suggests a tension between the ideas, recognizing that in certain contexts, access to justice initiatives short of a right to counsel might lead to second-class justice.148 Some critics of a civil right to counsel point to problems with the criminal justice system, Mexico, South Carolina, and Texas have studied civil right to counsel at one time or another.” See http://civilrighttocounsel.org/about/what_do_judges_think.


145. Id.

146. See https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

147. See, e.g., nn. 129-31, 135, supra.

148. See, e.g., Richard Zorza, The Relationship of the Right to Counsel and Self-Represented Litigant Movements, MGMT. INFO. EXCHANGE J., 47, 49 (Summer 2012) (“Right to counsel advocates are much more skeptical of the practical ability of self-represented litigants to obtain fair outcomes”); Steinberg, supra note 41, at 457, 505 (2011) (reporting on findings from an empirical study that ‘support a hypothesis that the unbundled services model might not provide benefits to all assisted clients in all circumstances, as has been presumed’) (“Unbundling should promote equal justice and not just equal access”); John Pollock and Michael Greco, It’s Not Triage if the Patient Bleeds Out, 161 U. PA. L. REV. ONLINE 40, 48 (2012) (“[A]ll solutions, not just the right to counsel, ought to be studied to determine their effectiveness; if pro se assistance is ineffective in a given situation, it is not the right solution merely because it costs less”).
including inadequate funding, high caseloads, and the prevalence of ineffective assistance of counsel, as reasons to question whether a civil right to counsel is even a desirable goal.\textsuperscript{149} One way to read \textit{Turner v. Rogers} is as a civil right to counsel loss, but an access to justice win.\textsuperscript{150}

Rather than viewing the concepts of access to justice and civil right to counsel as in conflict, it is more appropriate and constructive to recognize the approaches as connected. A civil right to counsel in certain scenarios becomes as a key component of an overarching access to justice strategy. This approach gives meaning to Resolution 5\(\text{a}\) goal of achieving “100 percent access to effective assistance for essential civil legal needs … through a continuum of meaningful and appropriate services.”\textsuperscript{151} The concepts of a continuum of services and service pyramids are among the vehicles that those working on access to justice issues use to help match the universe of resources to assist those with legal problems.\textsuperscript{152}

My preferred formulation, articulated elsewhere, is to synthesize these ideas in a three-pronged access to justice strategy:

1. changes in the operation of the forum, including the expansion of the roles of the court system’s key players, such as judges, court-connected mediators, and clerks, to require them to assist unrepresented litigants as necessary to prevent a forfeiture of important rights;

2. the use of assistance programs, rigorously evaluated to identify which most effectively protect litigants from the forfeiture of rights; and

3. the adoption of a civil right to counsel where the expansion of the roles of the key players and the assistance programs do not provide the necessary help to vulnerable litigants.\textsuperscript{153}

The three-pronged approach serves as a reminder that each of the three areas of focus must be utilized as part of the solutions to access to justice problems. Since Prong 1 focuses on the forum, judges necessarily play a vital role. How judges manage their courtrooms and handle cases involving self-represented litigants is a crucial factor in how successfully the courts provide meaningful access to justice. As the analysis of \textit{Lassiter} and \textit{Turner} above reveals, this includes having judges recognize the scenarios in which they must perform the analysis to determine whether due process and meaningful access require appointment of counsel in a particular case before them.

A great deal of scholarly attention has focused on judicial ethics and the tools judges need to be active and engaged while remaining neutral.\textsuperscript{154} The past fifteen years have seen the development of training materials and guidance designed to help judges navigate these tricky scenarios.\textsuperscript{155} Increased acceptance of the idea that neutrality does not mean passivity has led to modifications to key provisions of the Model Code of Judicial Ethics and equivalent provisions in many states.\textsuperscript{156} The need is para-

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Benjamin H. Barton, Against Civil Gideon (and for Pro Se Court Reform), 62 FLA. L. REV. 1227 (2010).
\item See Resolution 5, supra, note 1; MA \textit{SUPRA}, supra note 133.
\item See, e.g., MA \textit{SUPRA}, supra note 133, at 17-18
\item See, e.g., \textit{Russell Engler, Towards a Context-Based Civil Gideon Through Access to Justice Initiatives}, 40 CLEARINGHOUSE REVIEW 196 (July-August 2006). For an explanation of the three prongs, see, \textit{id.}, at 42-43. I have also explored how the pieces of the comprehensive strategy are in place and tremendous activity is occurring, primarily at the state level, with activities at each of the three prongs. Engler, supra note 150, at 45-50.
\item See, e.g., CYNTHIA GRAY, REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS (2005), available at https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/Judicial-Ethics-and-Self-Represented-Litigants.aspx. Since October 1990, Cynthia Gray has been Director of the Center for Judicial Ethics, now part of the National Center for State Courts (NCSC), a national clearinghouse for information about judicial ethics and discipline; she summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, and writes a weekly blog (at www.ncscjudicialethicsblog.org). Curricula relating to “Access to Justice for the Self-Represented Litigant,” developed jointly by the Self-Represented Litigants Network (SRLN) and the NCSC, are available at https://www.srln.org/node/202/judicial-curricula-access-justice-self-represented.
\end{enumerate}
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mount for greater research and information aimed at increasing our understanding of the roles of state judges in civil cases where a large number of litigants are unrepresented by counsel.\textsuperscript{157}

Nor is the need for judicial leadership to expand access to justice limited to the courtroom. Components of access to justice initiatives that fit squarely in Prong 1, involving the operation of the forum, include:

- moves toward simplification, including with revised pleadings and forms;
- increased use of technology in the courthouse;
- the advent of self-help centers, pro se clerks, and facilitators; and
- the focus on clerks and court-connected mediators.

The Strategic Plan for the Trial Courts in Massachusetts has included a high-level strategy involving Access to Justice and User Experience. The tactics to implement the strategy include simplifying and standardizing court forms and accompanying self-help materials, ensuring that all court users have equal access to all court programs, an expansion of interactive self-help assistance by court personnel, and expanded interactive self-help assistance by court staff.\textsuperscript{158} Judges play a crucial role in pushing for, and helping to implement, these changes.

Although Prong 1 suggests a focus on the courts, administrative agencies cannot be ignored as fora in which important rights of many people are adjudicated, but where they often appear without counsel. Moreover, access to justice initiatives increasingly add an “upstream” focus to try to identify and resolve legal problems in advance of court.\textsuperscript{159} Finally, whether initiatives at Prongs 1 and 2 will be sufficient to provide meaningful access should be informed by reliable empirical work.\textsuperscript{160}

Judges also provide crucial leadership and understanding at Prong 2, involving assistance programs. Successful lawyer for the day programs require judicial support. For example, the proliferation of these programs in Massachusetts followed the recommendation of a Supreme Judicial Court Steering Committee on Self-Represented Litigants, whereas only a decade before, efforts to create lawyer-for-the-day programs in the Massachusetts Housing Court met stiff resistance from the Court’s Chief Justice.\textsuperscript{161} Where jurisdictions have approved “unbundled legal services” or expanded roles for lay advocates in proceedings, judicial resistance has provided a crucial impediment, and while judicial support has led to the implementation of successful programs.\textsuperscript{162}

Prong 3, involving representation by lawyers, including a right to counsel where necessary to provide meaningful access to justice, has been the focus this article. Initiatives at Prong 3 also embrace efforts to expand funding for legal aid and increase pro bono participation among lawyers, initiatives in which judges often play crucial roles.\textsuperscript{163} Consistent with an overall access to justice strategy, the three-pronged analysis underscores the fact that a civil right to counsel has never meant a goal of providing, at public expense, lawyers for all litigants in all civil cases.\textsuperscript{164} Rather, the analysis recognizes the imperative of creating a right to counsel where basic human needs are at stake in the proceedings, but embraces a full range of access to justice initiatives for the overall operation of the courts and administrative agencies.

**CONCLUSION**

One goal of this article has been to describe the range of actions that many judges have undertaken to help move forward important initiatives designed to provide meaningful access to justice and equal justice under the law. Individual judges will have different levels of comfort or interest in stepping into the various roles described in this article. Yet, in contexts in which


158. Massachusetts Trial Court, Strategic Plan 2.1, 27-29, available at https://www.mass.gov/files/documents/2019/04/10/sp2.1.pdf. (Strategic Plan 2.0 was issued in October 2016. Strategic Plan 2.1 added a Diversity, Equity and Inclusion Domain in April 2018). Id.


160. See, supra, nn. 39-43 and accompanying text.


162. See, e.g., Steinberg, supra note 41, at 455-56, 465-70.

163. See generally, Part III.B., supra. Many of the Commissions and Committees discussed in that section involve not only the issue of a civil right to counsel, but more generally the need for an expansion of legal services and increased use of pro bono attorneys, among other responses to the access to justice challenges.

164. This is one of the reasons that many proponents of an expanded civil right to counsel avoid the term “civil Gideon.”

Part of that nomenclature preference relates to the problems with the implementation of Gideon: It is our hope, and our mission, to ensure that new rights to counsel are accompanied by sufficient funding in order to avoid the nightmare caseload scenario that has plagued indigent defense. But also, the scope of the right we pursue is markedly different. For one, Gideon ensures a right to counsel for all indigent criminal defendants (provided they face jail time), whereas our movement focuses only on cases implicating basic human needs.

nothing short of representation by a lawyer can achieve access to justice, judges inevitably will play a crucial role. Without leadership from individual judges, and the judiciary collectively, the ideals of meaningful access to justice and equal justice under the law will remain aspirational, with little hope of their becoming reality.

Professor Russell Engler directs the clinical programs for New England Law/Boston and serves as advisor for its Public Interest Law concentration. He writes about ethical issues, the delivery of legal services to the poor, Civil Gideon, and legal education. He directs the Public Service Project of the law school’s Center for Law and Social Responsibility. Before joining the New England Law faculty in 1993, he was the director of the Housing Law Unit at Brooklyn (New York) Legal Services. He clerked for the Honorable Francis D. Murnaghan, Jr., of the U.S. Court of Appeals for the Fourth Circuit. During the 1999–2000 academic year, he was a lecturer on law at Harvard Law School. Professor Engler serves on the Massachusetts Access to Justice Commission and is a member of the Steering Committee for the National Coalition for a Civil Right to Counsel.

Dear Editor:

Regarding Judge Timothy J. Schutz’s excellent review of “Unexplained Courage” by US District Court Judge Richard Gergel, the book memorializes the courage of US District Court Judge J. Waites Waring, in his rulings against the racial atmosphere that infested the South for decades leading up to the US Supreme Court decision in Brown v. Topeka Board of Education (1953) which reversed the sanctioned Separate But Equal Doctrine.

It reminded me of my experience in the late 1990’s as a Judge of the District Court of Nassau County, a majority white conservative county on Long Island, a suburb of New York City.

I began sitting in the Arraignment Part on cases in which defendants received Desk Appearance Tickets in lieu of arrest for minor offenses. Arresting police officers had the discretion to issue Desk Appearance Tickets, or they could impose “precinct bail” upon defendants to ensure appearance in court for arraignment.

After a few days, it appeared to me that black defendants were required to post precinct bail in a disproportionate rate than white defendants for the same offenses. I decided to make a statistical analysis of this practice.

After 2 weeks, the statistics showed that precinct bail was imposed upon black defendants at a much higher rate than upon white defendants. I reported my findings to the Administrative Judge, who passed them along to the Nassau County Executive, and ultimately to the County Police Commissioner. The disparity suddenly ended.

That was more than 20 years ago, and about 45 years after the Brown decision. The American Judges Association should look into racial disparity in today’s judicial system to see the extent that remnants of racial disparity may still exist in some corners of the judicial system. That would further memorialize the courage of Judge Waring.

Sincerely,

Justice Ira J. Raab

Retired Justice of the NY State Supreme Court

Former National Treasurer and Member of the Board of Governors of AJA

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Appointment of Counsel for Civil Litigants:
A Judicial Path to Ensuring the Fair and Ethical Administration of Justice

John Pollock

In 2015, a pro se litigant named Aikiam Floyd brought a race discrimination claim in federal court against his former employer. However, his claim faced a motion to dismiss for being allegedly time barred. Jack Weinstein, who has been a federal judge in the Eastern District of New York since 1967, asked Floyd “a series of leading questions” to elicit the facts demonstrating the claim was not in fact time barred. Judge Weinstein then sua sponte recused himself, stating, “[T]he judge has intervened on plaintiff's behalf. While no partiality could be construed in rejecting defendant's motion for summary judgment based on timeliness, recusal now is desirable to avoid the appearance of partiality by the undersigned judge in future decisions in the case.” He expressed his frustration succinctly by commenting, “In many cases, pro se justice is an oxymoron.” The judge’s actions were so notable that they received a writeup in the New York Law Journal.

Judge Weinstein's dramatic step reflects the seeming ethical dilemma in which many state court trial judges find themselves. On the one hand, providing justice is a primary responsibility of all judges: as noted by Resolution 5 of the Conference of Chief Justices and Conference of State Court Administrators, “The promise of equal justice is not realized for individuals and families who have no meaningful access to the justice system and [j] the Judicial Branch has the primary leadership responsibility to ensure access for those who face impediments they cannot surmount on their own...” On the other hand, judges must remain “fair and impartial”, which limits the assistance they can directly provide to a pro se litigant. While the American Bar Association’s Model Code of Judicial Ethics has been modified to loosen this restriction to some degree, many judges might be uncomfortable following Judge Weinstein’s lead of trying to guide a pro se party in this fashion.

However, Judge Weinstein’s opinion also suggested the way out of this dilemma: “Without representation by counsel, it is probable, to some degree, that adequate justice cannot be served in this case.” He quoted Supreme Court Justice Hugo Black's words that “[T]he fundamental importance of legal representation in our system of adversary justice is beyond dispute,” then cataloged some of the efforts to advance the right to counsel in civil cases in different jurisdictions, calling them “important, continuing efforts to fill the void.” Such efforts include work towards a “right to counsel” (or, previously, “civil Gideon,” referring to Gideon v. Wainwright, the case establishing a right to counsel in criminal cases) and focus on the right to counsel for indigent litigants in civil cases involving basic human needs—such as housing, child custody, domestic violence, and civil incarceration.

This article describes the need and justification for appointment of counsel in some civil cases, including how such appointments fit within the judicial obligation to ensure access to justice. It then explores a number of sources of law, some well known and some less so, that require or authorize state trial judges to

Author’s Note:
Coordinator, National Coalition for a Civil Right to Counsel. The author thanks Justice Earl Johnson (ret.), who reviewed this draft, and also Clare Pastore and Russell Engler, who provided extensive feedback. The author also thanks Lisa Brodoff, who provided some of the basic structural framework for claims under the Americans with Disabilities Act.

Footnotes
2. Id. at 561.
3. Id. at 561-62.
4. Id.
8. Rule 2.2, governing impartiality and fairness, was amended to add Comment [4], which states: “It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.” American Bar Association, Model Code of Judicial Conduct (2014), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2_rule2_2impartialityandfairness/commenton_rule2_2/.
9. Id.
10. Id. at 561-63.
appoint counsel where needed. Finally, it looks at how various judicial actors at all levels have advanced this vital access-to-justice issue. In the end, establishing a right to counsel and/or utilizing existing authorization on appointment of counsel can provide the judiciary with the tools necessary to dispense actual justice in their courts, removing judges from the discomfiting (and at times unethical) position of remaining quiet even when fundamental fairness is at risk. Ultimately, judges will need to play a key role in helping to ensure that counsel is provided where it is necessary to avoid miscarriages of justice.

WHAT IS THE CURRENT LANDSCAPE FOR PRO SE CIVIL LITIGANTS, AND HOW DOES APPOINTING COUNSEL HELP JUDGES ENSURE ACCESS TO JUSTICE?

The consequences of many types of civil proceedings are dramatic and severe, and can include:

- Eviction.
- Hospitalization due to domestic violence.
- Incarceration or other loss of liberty.
- Permanent loss of child custody.
- Complete loss of autonomy due to the imposition of a guardianship.

Indeed, it was U.S. Supreme Court Justice Neil Gorsuch who recently pointed out that litigants in civil cases often face consequences as dire as those faced in criminal cases:

"If the severity of the consequences counts when deciding the standard of review, shouldn’t we also take account of the fact that today’s civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today’s “civil” penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are “punitive civil sanctions . . . rapidly expanding,” they are “sometimes more severely punitive than the parallel criminal sanctions for the same conduct.”

Moreover, many civil cases frequently implicate multiple basic needs at one time. For instance, an evicted tenant stands to lose not just her home, but also potentially her employment, access to her children, and if subjected to homelessness, her belongings, physical liberty (due to arrest), and physical health.

Yet civil litigants routinely face these life-altering consequences without counsel. The National Center for State Courts (NCSC), which has studied the “landscape” of civil litigation, has pointed out that “The traditional view of the adversarial system assumes the presence of competent attorneys zealously representing both parties,” but at the same time, “[o]ne of the most striking findings in the Landscape dataset ... was the relatively large proportion of cases (76 percent) in which at least one party was unrepresented, usually the defendant.” The NCSC concluded that “The idealized picture of the adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is, more often than not, an illusion.” Moreover, pro se litigants are ill equipped to proceed alone. In the case previously described, Judge Weinstein pointed out Mr. Floyd’s limitations (which are common to most pro se litigants): he did not know the rules of civil procedure, he lacked a college degree or any law training, and he was completely unfamiliar with the procedural or substantive aspects of his claim (in this case, time barring of Title VII claims), including the technical rules of discovery.

Additionally, the risk to fundamental fairness is substantially worsened in cases where the other side has counsel, as was the situation in Mr. Floyd’s case. In a study of Virginia litigants, the NCSC found that when only plaintiffs are represented in civil cases, their win rate is 60 percent, but when both parties are represented, that figure drops to 20 percent, demonstrating that the asymmetry of representation is almost determinative. Where such asymmetry exists, not only is there a massive power imbalance, but also a specific risk that the side with counsel will use the Rules of Evidence to block the pro se litigant’s attempts to try her case. Worsening the problem is that this asymmetry is present in so many critical civil cases: for instance, in housing court, tenants are typically represented less than 10 percent of the time.
Economic and Other Benefits

Economic Return on Investment of Providing Counsel in Philadelphia

See, e.g., Stout Risius Ross, The Financial Cost and Benefits of Establishing a

analysis company in New York City concluded that the City

providing counsel can save money by avoiding negative conse

likely to prevail than a litigant proceeding pro se, and for cases of

complexity, a litigant with a lawyer was up to 14 times more

meta study compiled the results of dozens of previous studies

likely to prevail than a litigant proceeding pro se, and for cases of

average procedural complexity, 148 times more likely. The

The findings of the meta-analysis are striking ... they reveal a

potentially very large impact of lawyer representation on

arate about how cases are matched with representation, a synthesis of

available evidence reveals that expanding access to attorneys could radically change the outcomes of adjudicated
civil cases. This potential impact is notable when lawyers' work is compared to that of nonlawyer advocates ... and

spectacular when compared to lay people's attempts at self-

representation.

Similarly, many studies have been done demonstrating that

providing counsel can save money by avoiding negative conse

Just recently, a study by a major corporate financial

analysis company in New York City concluded that the City

would realize $320 million in net savings by providing a right to

counsel in eviction cases (through avoided shelter use, retention of

affordable housing, and avoidance of unsheltered homeless-

ness costs tied to law enforcement and healthcare), and

Philadelphia would see $45 million in savings via a $3.5 million

investment. That said, while cost considerations are relevant to

due-process right-to-counsel analysis, they are not a determina-

factor. In fact, courts that have recognized a categorical right to
counsel have not attempted to determine how much funding is necessary or where it will come from, leaving that

question to be answered by their state legislatures (which typi-

cally respond soon afterwards by codifying the right and provid-

funding allocations).

While the basic human needs at stake, the proven efficacy of

representation, and the potential for avoided consequences are

justification enough, providing counsel also improves the admin-

istration of justice: it ensures more accurate decision making by

having full information provided from both sides, and eliminates

the headaches for judges and court staff caused by the waves of

pro se questions and inadequate filings. Thus, appointment of
counsel meets the needs and obligations of the judiciary, as well as

the pro se litigants.

THE JUDICIARY’S DUTY TO ACT TO PROTECT PRO SE LITIGANTS

Section IV of this article outlines a number of different

appointment-of-counsel powers potentially available to state
courts, and gives many examples of where courts have utilized

these powers to increase access to justice. In doing so, these
courts have responded to the U.S. Supreme Court’s strong sug-

gestion that trial courts have an affirmative obligation to ensure

justice and not simply wait for a litigant to raise an access issue.

While the Court in Turner v. Rogers declined to recognize a right
to counsel in the particular context of civil contempt proceedings

e.g., the guidelines in Delaware (Rule 4.3, https://courts.delaware.gov/Supreme/AdmDir/ad178guidelines.pdf) and Massachusetts (Rule 3.2, https://www.mass.gov/guides/judicial-guidelines-for-civil-hearings-involving-self-represented-litigants-with-commentary#-3-guidelines-for-conducting-hearings-with-commentary-). See also Blair v. Maynard, 324 S.E.2d 391, 396 (W Va. 1984). (“The fundamental tenet that the rules of procedure should work to do substantial justice, ... commands that judges painstakingly strive to insure that no person’s cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules. ... The court should strive [] to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake. Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not.”)


22. See, e.g., Laura Abel and Susan Vignola, Economic and Other Benefits Associated with the Provision of Civil Legal Aid, 9 SEATTLE J. SOC. JUST., 139 (2010) (meta study analyzing other studies), available at https://digitalcommons.law.seattleu.edu/ssjs/vo19/iss1/5/.


25. 452 U.S. at 28.

26. For instance, while Lassiter ruled against the right to counsel for termination of parental rights, the Court commented that the government’s fiscal interest, while “legitimate,” was “hardly significant enough to overcome private interests as important as those here.” Id.
initiated by a private party, it considered “what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair”. It then ultimately held that courts had to employ “substitute procedural safeguards” in civil contempt proceedings to ensure such fairness, such as ensuring the defendant understood what issues were critical. This holding was not only an encouragement for state courts to look proactively at the fairness of civil proceedings, but was itself a proactive action on the Court's part: as noted by Justice Thomas's dissent, “Although the Court agrees that appointed counsel was not required in this case, it nevertheless vacates the judgment of the South Carolina Supreme Court on a different ground, which the parties have never raised” and which was “outside the question presented.”

Courts around the country have recognized this duty and harmonized it with the judicial rules of ethics. Model Rule 2.2, governing impartiality and fairness, was amended to add Comment 4, which states: “It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.” In 2013, the Indiana Court of Appeals relied on this change to sua sponte protect the rights of a vulnerable litigant through appointment of counsel. In the case, after a company appealed a small-claims ruling in favor of a pro se plaintiff, the small-claims court sua sponte set a hearing to determine whether [plaintiff] needed counsel. The company objected, arguing that the Indiana statute permitting discretionary appointment of counsel in any civil case requires the party seeking counsel to request counsel and demonstrate efforts to find counsel. But the appellate court replied:

We summarily reject KOA's suggestion that our small claims courts cannot sua sponte set a hearing to determine the propriety of appointing counsel for a small claims litigant who is faced with the daunting task of moving from the informal small claims forum to the complexities of appellate law. Here, the court held a hearing to address whether Matheison had sufficient means to defend the appeal. This hearing was informal, of course, but that is in the nature of all small claims proceedings.... As recognized below by the small claims court, Rule 2.2 of our Code of Judicial Conduct provides: “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” Comment 4 to this rule explains further: “It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.” This was precisely the course taken by the small claims court, which acted within its discretion by appointing appellate counsel. Finally, we are compelled to observe the obvious fact that KOA suffered no cognizable harm by the appointment of counsel. This equitable action by the court simply allowed KOA's opponent to be fairly heard on appeal.

At other times, courts have acted affirmatively to appoint counsel to protect the needs of particularly vulnerable litigants. For example, a New Jersey Superior Court first held that a minor plaintiff in a domestic violence case was entitled to appointment of a guardian ad litem pursuant to various New Jersey court rules. But then it went further to state that “Given plaintiff's age and status as a legal minor, this court sua sponte raised the issue of whether the court should implement any special procedures at final hearing in order to provide plaintiff with adult representation in the courtroom.” The court ultimately held that where such minor plaintiff was opposed by an adult defendant represented by counsel, the guardian ad litem had to be an attorney. To bolster its holding, the court explained:

Family court is a court of equity. This court cannot and will not turn a blind eye to the inherent inequity of requiring an unrepresented minor to conduct a domestic violence hearing by herself against a represented adult. Parents patriae is the power of the State of New Jersey, by its judicial branch, to protect the interests of those who are incapable of protecting themselves. . . . The common law doctrine of parents patriae imposes upon the state the affirmative duty to protect the interests of minors.

27. 564 U.S. at 444.
28. Id. at 447-48.
29. Id. at 450, 455 (Thomas, J., dissenting).
32. Ind. Code § 34-10-1-2.
33. See also In re Appeal in Yavapai County Juvenile Action No. J-8545, 680 P.2d 146 (Ariz. 1984) (holding that due process required appointment of independent attorney for child in a particular case involving temporary custody and dependency, then adding that “the trial court shall appoint independent counsel, upon request of an interested party or sua sponte, where such counsel would contribute to promoting the child's best interest by serving an identifiable purpose such as advocating the child's position in the dispute or ensuring that the record be as complete and accurate as possible, or it shall state why such appointment is unnecessary”); In re Williams, 779 N.W.2d 286, 298 (Mich. Ct. App. 2009) (per curiam) (taking up question sua sponte of trial court's failure to appoint counsel for nonoffending parent in termination-of-parental-rights case as required by statute, and noting that “we cannot ignore a process that casts serious doubt on the integrity of the proceedings and would risk substantial injustice if allowed to stand unexamined”).
34. 29 A.3d 752 (N.J. Super. Ch. 2010).
35. Id at 754.
36. Id at 756.
A RIGHT TO COUNSEL PURSUANT TO THE DUE PROCESS CLAUSE

In Gideon v. Wainwright,39 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. Brady40 that had 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, as Supreme Court Justice Byron White put it, “a succession of cases had steadily eroded the old rule and proved it unworkable.”41

The Court has been less receptive to the idea of a right to counsel in civil cases, ruling against such a right for both termination-of-parental-rights cases (Lassiter, 1981)42 and privately initiated child support civil contempt proceedings leading to incarceration (Turner v. Rogers, 2011).43 However, state courts and legislatures have done much to fill in the gap. Indeed, Lassiter was roundly rejected by state courts, which en masse have recognized such a right post-Lassiter pursuant to their state consti-tutions due to their recognition of the seriousness of permanent severance of parental rights.44 And while it is too soon to know what the overall national response to Turner will be, a number of state courts have already declined to follow Turner under their state constitu-tions or have recognized a right in situations outside the scope of Turner (i.e., where the government is the plaintiff).45

Moreover, it is the norm in most states to guarantee counsel (either by statute or state constitution) for parents in child welfare and termination-of-parental-rights proceedings, civil contempt, adults in guardianship cases, and those facing civil commitment due to mental health issues.46 Additionally, as detailed by Russell

38. See infra note 46.
40. 316 U.S. 455 (1942).
44. John Pollock, The Case Against Case-By-Case: Courts Identifying Cate-gorical Rights to Counsel in Basic Human Needs Civil Cases, 61 Drake L.J., at 781-83 (2013). Since this article was published, other state courts have followed suit. See, e.g., In re T.M., 319 P.3d 338 (Hawaii 2014).
45. See, e.g., Moore v. Moore, 11 N.E.3d 980 (Ind. Ct. App. 2014) (relying on In re Marriage of Stariha, 509 N.E.2d 1117 (Ind. Ct. App. 1987) to reaffirm right to counsel in civil contempt cases); DeWolfe v. Rich mond, 76 A.3d 1019, 1029 (Md. 2013) (relying on Rutherford v. Rutherford, 464 A.2d 228 (Md. 1983), which had found right to counsel in civil contempt proceedings under Maryland Constitution, and stating that “[t]he principle set forth in Rutherford, that the due process right to counsel under Article 24 of the Declaration of Rights is broader than the right to counsel under Article 21 or the Sixth Amendment has been reaffirmed by the Court on numerous occasions”); State v. Churchill, 454 S.W.3d 328 (Mo. 2015) (citing to State ex rel. Family Support Div.-Child Support Enforcement v. Lane, 313 S.W.3d 182, 186 (Mo. App. 2010), for proposition that “for purposes of triggering a defendant’s right to counsel under the due process clause, the distinction between a ‘criminal’ and ‘civil’ proceeding is irrelevant if the outcome of the civil proceeding is imprisonment”); Commonwealth v. Diaz, 2018 Pa. Super. LEXIS 417 (Pa. Super 2018) (holding that defendants facing incarceration for failure to pay court-imposed fees/finances have right to appointed counsel; court relied on caselaw from other jurisdictions, distinguished Turner v. Rogers since government was plaintiff, and noted that defendant was “at risk of immediate incarceration”); In re McCoy-Jacien, 2018 VT 116 (2018) (stating “Respondent has a right to be represented by an attorney at this hearing and if she cannot afford an attorney, she has the right to request that an attorney be appointed for her by this Court,” and citing to Russell v. Armitage, 166 Va. 392, 397 (1997)); State v. Stone, 268 P.3d 226 (Wash. App. 2012) (holding that due process requires appointment of counsel for those with legal financial obligations (LFOs) stemming from criminal convictions at LFO enforcement proceedings if incarceration is possibility; and extending Tetro v. Tetro, 544 P.2d 17, 19 (Wash. 1975), which had found right to counsel in civil contempt proceedings). See also Ashley Robertson, Revisiting Turner v. Rogers, 69 Stan. L. Rev. 1541, 1552, 1555-56 (2017), available at https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/04/69-Stan-L-Rev-1541.pdf (noting that twelve states provide right to counsel pursuant to statute or state constitutional law, while sixteen states had pre-Turner decisions recognizing federal constitutional right to counsel, and many of those are still in force).
46. For a survey of the right to counsel in many types of civil cases, see Pollock, supra n. 44. For the latest status in all 50 states, visit http://www.civilrighttocounsel.org/map (click the “Right to Counsel Status” view). And for a bench-book-type guide outlining appointment of counsel laws for each state, see the American Bar Association’s DIRECTORY OF LAW GOVERNING APPOINTMENT OF COUNSEL IN CIVIL CASES, available at http://ambar.org/civilrighttocounsel.
Engler's article in this issue, there have been recent groundbreaking decisions recognizing a constitutional right to counsel in proceedings such as private child guardianships, involuntary adoptions, and dependency/termination-of-parental-rights cases. And in 2019, a state trial court in New Jersey recognized a constitutional right to counsel for those facing driver’s license suspension due to inability to pay child support, holding that suspension of a driver’s license was a “consequence of magnitude such that “[B]oth due process and fundamental fairness” required appointed counsel. This was the first court anywhere to recognize a right to counsel in the driver’s license suspension context.

B. RULEMAKING AUTHORITY: A HIGH COURT TOOL FREQUENTLY USED TO ESTABLISH NEW RIGHTS TO COUNSEL IN CRITICAL CIVIL CASES

State high courts have the rulemaking authority, and frequently have used such authority, to establish a right to counsel where such right does not already exist by virtue of statute or constitutional decision. Some rights to counsel established in this manner, such as those established in Michigan, New Jersey, Pennsylvania, Tennessee, and Utah, are somewhat limited in scope or impact. But the rights established in five particular states are powerful examples of how this power can be used to correct the asymmetry of representation in critical types of civil cases, and the story of how these some of rules have been funded should provide encouragement to other courts looking to pursue a similar path.

- In Delaware, the Delaware Supreme Court in 2002 modified its Rules of Family Court to provide for appointment of counsel in dependency and termination-of-parental-rights cases. Rule 206 required the court to “notify parents in writing that they may be represented by counsel,” while Rule 207 added, “[a] parent determined by the Court to be indigent may have counsel appointed by the Court during the parent’s initial appearance on a petition, or such other time as deemed appropriate by the Court.” While this language might seem to have made appointment discretionary, the high court clarified, “In 2002, the Family Court Civil Procedure Rules were amended to provide for mandatory appointment of an attorney in the case of an indigent party if so requested by that party.”


48. See, e.g., Schoenwvgel ex rel. Schoenwvgel v. Venator Grp. Retail, Inc., 895 So. 2d 223, 234 (Ala. 2004) (recognizing authority derived from Alabama Constitution “to make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts,” but noting that power is shared with Legislature); Ariz. Const., Art. V, §5, Cl. 5 (“the Supreme Court shall have . . . power to make rules relative to all procedural matters in any court”); Turner v. Kentucky Bar Ass’n, 980 S.W.2d 560, 562 (Ky. 1998) (“[T]he making of rules and practice in courts, as well as out of courts, in matters pertaining to the rights of individuals under the law, is currently possessed by courts and judges”).

49. For instance, in Michigan, while M.C.L.A. § 722.904(2)(c) provides that a court must appoint “an attorney or guardian ad litem” for minors seeking a judicial waiver of the parental consent requirement to have an abortion, Mich. R. Spec. P. MCR 3.615(F) and (G) provides for the right to appointment of both an attorney and a guardian ad litem upon request by the minor. According to Legal Services of South Central Michigan (LSSCM), typically only one lawyer is appointed. In New Jersey, N.J. R. Ch. Div. Fam. Pt. R. 5.8A states, “in all cases where custody or parenting time/visitation is an issue, the court may, on the application of either party or the child or children in a custody or parenting time/visitation dispute, or on its own motion, appoint counsel on behalf of the child or children.” The rule adds, “Counsel may, on an interim basis or at the conclusion of the litigation, apply for an award of fees and costs with an appropriate affidavit of services, and the trial court shall award fees and costs, assessing same against either or both of the parties.” The Comment to the rule states, “These rules are not intended to expand the circumstances when such appointments are to be made,” but no statute providing a similar appointment mechanism for children could be located. In Pennsylvania, Pa. R. Civ. P. No. 1915.11(a) provides that in actions for custody, partial custody, or visitation of children, “[t]he court may on its own motion or the motion of a party appoint an attorney to represent the child in the action. The court may assess the cost upon the parties or any of them or as otherwise provided by law.” In Texas, Tex. R. Civ. P. 308a permits a court to appoint an attorney to represent a person claiming violation of an order “for child support or possession of or access to a child.” The fee for the attorney is a discretionary matter for the court, and is adjudged against the party who violated the order. In Tennessee, Tenn. R. Juv. P. Rule 36(b) specifies that a right to counsel at “all stages of the proceedings” includes the appellate stage. Additionally, Tenn. R. S. Ct. Rule 13 § 1(d)(2)(C) and (d)(2)(D) refer to appointing a guardian ad litem for children in abuse/neglect and termination proceedings. Both sections of this rule go on to say, “The child . . . shall not be required to request appointment of counsel,” which is a likely reference to the requirement that the GAL is an attorney, as Tenn. R. Juv. P., Rule 2 specifies that a GAL is a “lawyer appointed by the court.” In private custody proceedings, Tenn. Sup. Ct. Rule 40A(3)(a) provides that “the court may appoint a guardian ad litem when the court finds that the child's best interests are not adequately protected by the parties and that separate representation of the child's best interests is necessary. Such an appointment may be made at any stage of the proceeding.” Section 40A(1)(c) defines “guardian ad litem” as “a licensed attorney appointed by the court to represent the best interests of a child or children in a custody proceeding.” Finally, in Utah, Utah R. Juv. P. Rule 60(c) provides that for judicial bypass of the parental consent requirement for a minor to have an abortion, the court shall “consider appointing an attorney under Utah Code Section 78A-6-1111 and/or the Office of Guardian ad Litem under Section 78A-6-902. If the court appoints an attorney, it may also appoint the Office of Guardian ad Litem.”

50. However, in 2015, the Court amended the rules again, this time to state in Rule 206 that

(a) A parent, determined by the Court to be indigent, may have counsel appointed by the Court during the parent’s initial appearance on a petition, or at such other time as deemed appropriate by the Court.

(b) In considering the appointment of counsel, the Court shall
of such a rule inevitably leads to questions about how the appointed attorneys are compensated. According to a staff attorney for the Delaware Family Court, family court judges saw the need for appointment of counsel prior to the termination phase and spoke to justices on the Delaware Supreme Court. The Delaware Supreme Court spoke to the Delaware Bar Foundation, which began funding appointments of counsel. A year or so later, the General Assembly began to provide funding as part of the Judiciary budget, apparently in conjunction with the passing of the court rule. The staff attorney commented the state’s small size made it easier for the judiciary, legislature, executive branch, and bar to all work together.51

- In Idaho, a statute governing Child Protective Act proceedings states, “If the parent or guardian is without counsel, the court shall inform them of their right to be represented by counsel and to appeal from any disposition or order of the court.”52 This statute provides only a right to privately retained counsel.53 However, the Idaho Court of Appeals has noted that “Idaho Juvenile Rule 37 grants the parent a right to court-appointed counsel if the parent is financially unable to pay for legal representation during the CPA proceedings.”54 According to Legal Counsel for the Idaho Supreme Court, appointments are the responsibility of the local public defender that contracts with each county, and the counties have always been on board with the idea that they are responsible for the costs of “court personnel.”55

- In Kentucky, a court rule provides that in a civil suit against a prisoner, “If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he or she is unable to make defense.”56 According to the Kentucky Office of General Counsel, an attorney-guardian ad litem appointed pursuant to the rule is paid depending on the type of action initiated against the prisoner. If it is a type of action for which there is a statutory provision for attorney’s fees (like a dependency or termination of parental rights), then that statute governs. If there is no governing statute, then Ky. Stat. 453.060(2) specifies the fee is taxed as costs and paid by the plaintiff.57

- In Rhode Island, a court rule specifies that upon a filing of a petition for termination of parental rights, “A preliminary hearing shall be held on said petition for the court to: … Appoint an attorney to represent the parent(s) and any person having such care or custody of such child when said parent(s) or custodian are unable to afford such representation….”58 The Rhode Island Supreme Court has noted the “lack of a constitutional mandate” to provide counsel for parents, but has pointed out the court rule guarantees appointed counsel for the parent.59

- Finally, in Washington State, there is no absolute right to counsel for minors in dependency proceedings. However, King County,60 Hell’s Canyon Circuit,61 and Benton/Franklin County62 provide for mandatory appointment of counsel for some children in dependency cases. These rules codified what had been an existing practice that grew over time, with the support of the counties paying for the appointed counsel.63

C. SUPERVISORY AUTHORITY: ANOTHER STATE SUPREME COURT POWER TO ESTABLISH A RIGHT TO COUNSEL TO “ADMINISTER JUSTICE”

Called at various times “supervisory authority,”64 “superintending power,”65 or “administrative authority,”66 all state supreme courts have power to administer the affairs of the court system.67 As with rulemaking authority, this power is broad and...
can be used to address the crisis of pro se litigants by providing counsel even where the legislature has not acted. Minnesota is a prime example of judicial supervisory authority providing the civil right to counsel.

Minnesota courts have construed Article III (the separation-of-powers provision of the Minnesota Constitution), together with the description of judicial powers outlined in Article VI, to include the grant of a strong supervisory power to the Minnesota Supreme Court. The state’s highest court has described its supervisory power in the following manner:

The fundamental functions of the court are the administration of justice and the protection of the rights guaranteed by the constitution. It follows that the court has not only the power, but the responsibility as well, to make any reasonable orders, rules or regulations which will aid in bringing this about.

In 1979, the Minnesota Supreme Court first flexed this supervisory power to hold there is a right to counsel for indigent defendants in paternity suits. The defendant, an eighteen-year-old indigent high school student without legal representation, signed an agreement with the county attorney that admitted his paternity, waived his rights as the father, and consented to future adoption. According to the defendant, the county attorney told him that unless he signed this agreement, he would be charged with forcible rape. Upon reaching the Minnesota Supreme Court, the issue presented was “whether an indigent defendant in a paternity action is entitled to court-appointed counsel where the complainant mother is represented by the county attorney.” The court answered in the affirmative, holding that counsel must be provided to indigent defendants in all paternity adjudications when the complainant is represented by the county attorney.

Although the defendant argued that due process and/or equal protection required the appointment of counsel in these paternity cases, the court declined to decide the constitutional issues, finding that its conclusion in the case “renders resolution of such a dubious contention unnecessary.” The court instead relied on its supervisory power, the purpose of which is “to ensure the fair administration of justice.” The court found that justice could only be served in these types of paternity cases if it exercised its supervisory power to require appointed counsel, stating that “absent . . . a legislative approach and solution, it appears . . . that the accurate determination of paternity, given the present adversary nature of the proceeding, is best promoted by a system that ensures the competent representation of both sides to the controversy.” Although the court did not apply Lassiter, it essentially relied on the Lassiter factors (from Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976)) in finding a right to counsel: the significant risk of erroneous deprivation, the strength of the interest of the child and putative father (including a risk of incarceration for the latter), and the pressure on the state to establish paternity to avoid losing federal funding.

Importantly, the state supreme court rejected the argument that the right to counsel could not exist in paternity actions due to their classification as civil proceedings. Conceding that the court answered in the affirmative, holding that counsel must be provided to indigent defendants in all paternity adjudications when the complainant is represented by the county attorney.

The court pointed to the multitude of different interests at stake:

The paternity defendant, of course, has a substantial interest in the accuracy of the adjudication. He has a direct financial interest, for as an adjudicated father he will be ordered to contribute to the support of the child throughout its minority. Similarly, in light of recent case law, the adjudicated father’s estate can also be burdened by the child’s claims to inheritance, workers’ compensation benefits, and insurance proceeds. In addition to his financial...
interests, the defendant, if found to be the father, is also indirectly threatened with loss of liberty, since incarceration may be imposed for criminal nonsupport under § 609.375... Finally, the social stigma resulting from an adjudication of paternity cannot be ignored.82

The court did remind that its holding "in no way affects the right of indigent defendants in other civil actions to court-appointed counsel."83

Although the Minnesota Supreme Court did not address compensation for appointed attorneys, it clearly expected the Legislature to respond to its ruling. For instance, it stated, "Assuming that the legislature in addressing the questions presented to us in these cases determines that the adversary system for determining paternity should be retained and that counsel should be provided for indigent defendants, the question of establishing standards of eligibility for appointment of counsel in these noncriminal proceedings is, we acknowledge, clearly a legislative function."84 And indeed a statute that went into effect one year after this case was decided provides that the public defender represents defendants in these cases.85

Five years later, the Minnesota Supreme Court used its supervisory authority to hold that the right to counsel applies to an indigent person facing a civil contempt charge for failure to make child support payments.86 As with the prior case on paternity, the court held that "we do not deem it necessary" to rule on the due process right to counsel.87 The court reiterated the reasoning from the paternity case that given the adversarial nature of the proceedings, the right to counsel established the best method to protect the important interests at hand.88 Furthermore, it noted that "[a]n indigent facing civil contempt has a greater need for a court-appointed attorney than a paternity defendant."89 It also said that "the reasoning applies equally as well to those cases where the custodial parent has private counsel as to where the county attorney represents such parent."90 The court again did not address compensation, but simply said, "The local units of government shall determine how to provide such counsel in accordance with local practice."91

D. DISCRETIONARY APPOINTMENT STATUTES/ CASELAW: A BROAD AUTHORITY TO APPOINT COUNSEL WHERE JUSTICE REQUIRES IT

Statutes in Illinois,92 Indiana,93 Kentucky,94 Missouri,95 New

82. Id.
83. Id.
84. Id. at 348.
85. Minn. Stat. § 257.69.
86. Cox v. Slama, 355 N.W.2d 401, 403 (Minn. 1984).
87. Id. at 403.
88. Id.
89. Id.
90. Id.
91. Id. at 404.
92. 735 ILCS § 5/5-105(g) (“A court, in its discretion, may appoint counsel to represent an indigent person, and that counsel shall perform his or her duties without fees, charges, or reward.”).
93. Ind. Code Ann. § 34-10-1-2 is the lengthiest discretionary appointment statute by far:

“(a) This section may not be construed to prohibit a court from participating in a pro bono legal services program or other program that provides legal services to litigants:
(1) without charge; or
(2) at a reduced fee.
(b) If the court is satisfied that a person who makes an application described in section 1 [IC 34-10-1-1] of this chapter does not have sufficient means to prosecute or defend the action, the court:
(1) shall admit the applicant to prosecute or defend as an indigent person; and
(2) may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.
(c) The factors that a court may consider under subsection (b) include the following:
(1) The likelihood of the applicant prevailing on the merits of the applicant’s claim or defense.
(2) The applicant’s ability to investigate and present the applicant’s claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.
(d) The court shall deny an application made under section 1 of this chapter if the court determines any of the following:
(1) The applicant failed to make a diligent effort to obtain an attorney before filing the application.
(2) Applicant is unlikely to prevail on the applicant’s claim or defense.
(e) All officers required to prosecute or defend the action shall do their duty in the case without taking any fee or reward from the indigent person.
(f) The reasonable attorney’s fees and expenses of an attorney appointed to represent an applicant under section 1 of this chapter shall be paid from the money appropriated to the court:
(1) appointing the attorney, if the action was not transferred to another county; or
(2) from which the action was transferred, if the action was transferred to another county.”
94. Ky. Stat. § 453.190(1) (“A court shall allow a poor person residing in this state to file or defend any action or appeal therein without paying costs, whereupon he shall have any counsel that the court assigns him.”).
95. Mo. Stat. Ann. § 514.040 (“[I]f any court shall . . . be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay all or any portion of the costs and expenses thereof . . . the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without fee or reward as the court may excuse; but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court.”) In terms of the definition of a “poor person,” “Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons.” Mo. Ann. Stat. § 205.590.
York, 96 Tennessee, 97 Texas, 98 and Virginia 99 provide trial courts with the broad authority to appoint counsel in any civil case. These statutes are generally part of a state’s in forma pauperis provisions, and are a leftover from English statutory law that guaranteed appointment of counsel for indigent plaintiffs. 100 The statutes do not create a right to appointed counsel, and the case-by-case approach has serious flaws. 101 Nonetheless, these statutes provide opportunities for judges to intervene where a litigant stands little chance to receive justice without counsel.

The statutes themselves, and interpretive caselaw, provide some minimal guidance as to when appointments are appropriate. In Virginia, the consideration is whether a party would be “unconstitutionally be denied either access to the Court system or a significant civil right,” 102 whereas in Missouri, the court should “examine the plaintiff’s petition to see if it is patently and irreparably frivolous or malicious on its face.” 103 In Indiana, those seeking appointed counsel must demonstrate “exceptional circumstances” 104 (an extremely high bar for a pro se litigant to meet) and are denied if they are “unlikely to prevail” in the case. 105 The factors a court may consider in Indiana include: “(1) The likelihood of the applicant prevailing on the merits of the applicant’s claim or defense. (2) The applicant’s ability to investigate and present the applicant’s claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.” 106 In New York, the power to appoint is “broad … in the proper case,” 107 and a “proper case” is one where “indigent civil litigants face grievous forfeiture or loss of a fundamental right.” 108 A finding of merit in New York “does not call for a showing of substantial probability of success,” but instead requires that court be satisfied a claim is not frivolous. 109 Finally, in Texas, “Some courts of appeals … have concluded that the discretionary boundary of section 24.016 is similar to a court’s inherent power to appoint counsel—counsel may be appointed in cases in which exceptional circumstances exist.” 110

One question that has arisen is compensation for the attorneys appointed pursuant to these statutes, and specifically whether concepts of constitutionality (it concerns itself with poor plaintiff’s [sic] but ignores poor defendants, for example),” the court identified the progression of legislative and judicial determinations that keep this English chapter in force in Pennsylvania and concluded that it was, in fact, still effective. The court accepted that it was “fundamental that no lay person can adequately represent himself pro se in civil litigation. For a lay person to have meaningful access to our courts, he must have a skilled lawyer to represent him.” Id. at 462. See also Thompson v. Garden Court, Inc., 419 A.2d 1238, 1240 (PA. Super. 1978) (11 Hen. 7 “is part of the common law of Pennsylvania”); In re Community Legal Services, Inc., 43 Pa. D. & C.2d 51 (1967) (“The right to appointed counsel in civil cases was hallowed at common law. Henry VII’s Statute of 1495, 11 Henry VII, c. 12, established the right of poor civil plaintiffs to proceed without prepayment of costs or security and with appointed counsel. That statute was adopted by the Colonies. See e.g., the Papers of Thomas Jefferson, II, 628.320, 658-61, and was respected in their courts, e.g., Morris, Select Cases of the Mayor’s Court of New York City, 1674-1784, pp. 176-77 (1935). Indeed, the statute has been adopted in Pennsylvania: Report of the Judges, 3 Binney 593, 617 (1808); Roberts, Digest of British Statutes in Force in Pennsylvania, pages 116-17 (2d ed., 1847)”).

101. In fact, this author wrote an article about such flaws. See Pollock, supra n. 44.
104. Ind. Code § 34-10-1-2(b).
106. Ind. Code § 34-10-1-2(c).
they can be compelled to serve without compensation. Three states provide for the possibility of payment: Indiana (from the court system), Missouri (from the defendant, if the plaintiff prevails), and Virginia (from the opposing side, if successful). The Illinois Supreme Court has observed in the criminal case context that appointed attorneys cannot necessarily expect compensation:

The defense of indigents is one of the traditional services that members of the bar have provided upon court request, for to defend the indigent is to assist the court in the business before it and is therefore an obligation and a duty of those in the profession to both the court and the public. On this basis or the related ground that acceptance of a license to practice law includes consent to appointment and uncompensated service to indigents, a large majority of courts have held attorneys appointed to represent indigents have no right to compensation in the absence of a statute or court rule requiring compensation.

However, the court noted that it had previously provided for compensation in “the unusual circumstances of [a] case where appointed counsel were suffering extreme hardships from loss of private practice and income, and were compelled to expend large out-of-pocket sums in the course of the trial.” In Kentucky, uncompensated appointments in criminal cases are unconstitutional (although there is no apparent ruling on appointments under the discretionary civil appointment statute) and in Missouri, the high court has said that “The courts of this state have no inherent power to appoint or compel attorneys to serve in civil actions without compensation.” Conversely, in Tennessee, counsel is not entitled to payment because “Where a lawyer takes his license he takes it burdened with these honorary obligations.” Finally, New York has conflicting caselaw on whether the court can compensate appointed counsel.

Beyond these statutes authorizing appointment for any civil case, a number of states have statutes or court rules granting discretion in certain circumstances. These include Alaska (indigent parent of child with a disability), California (any case where military service member is party and does not appear or does not have counsel), Delaware (for state employees when they are defendants in cases related to their employment), Minnesota (complainants in discrimination cases), and New Jersey (any case where military service member is party and does not appear or does not have counsel).

111. Ind. Code Ann. § 34-10-1-2(f) (“(f) The reasonable attorney’s fees and expenses of an attorney appointed to represent an applicant under section 1 of this chapter shall be paid from the money appropriated to the court: (1) appointing the attorney, if the action was not transferred to another county; or (2) from which the action was transferred, if the action was transferred to another county.”). Requiring the court to compensate the appointed attorney creates a serious conflict of interest, since courts will not want to often dip into their own budget.

112. Mo. Stat. Ann. § 514.040 (attorney “shall perform their duties in such suit without fee or reward as the court may excuse; but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court.”).

113. Va. Code Ann. §17.1-606 (no fees paid by indigent person for attorney services “except what may be included in the costs recovered from the opposite party.”).


115. Id.


117. State ex rel. Scott v. Roger, 688 S.W.2d 757 (Mo. 1985).

118. House v. Whitis, 64 Tenn. 690 (1875).

119. Compare People v. Richardson, 603 N.Y.S.2d 700 (1993) (“The inherent power of the court to assign counsel to indigent persons includes the power to assign counsel with or without compensation”) with Garcia, 561 N.Y.S.2d 867, 868-69 (“[W]hile the court has discretion to assign counsel under CPLR 1102, if it were to assign such counsel in this civil action, there is no mechanism by which the court may direct the county, the state or any other agency to pay his fee.”).

120. There are a few statutes that require appointment for certain categories of litigants. For instance, Md. R. 2-202 and 3-202 require a circuit court and district court, respectively, to appoint counsel when a person under disability is sued and has no guardian or. In West Virginia, W. Va. R. Civ. P. Rule 17(c) requires a court to “appoint a discreet and competent attorney at law as guardian ad litem for an infant, incompetent person, or convict not otherwise represented in an action, or shall make such other order as it deems proper for the protection of the infant, incompetent person, or convict.” Finally, as mentioned earlier, a Kentucky court rule, Ky. R. Civ. P 17.04, requires the appointment of an attorney ad litem in any civil suit against a prisoner where the prisoner fails or is unable to defend an action.

121. Alaska Stat. § 44.21.410(a)(10). Given that “child with a disability” is defined in this provision as having the “meaning given in AS 14.30.350,” and given that AS 14.30.350 is within an article on education for children with disabilities, it is possible that this discretion is limited to educational matters.

122. Cal Mil & Vet Code § 402(d).

123. 10 Del. C. § 3925 (“Any public officer or employee, in a criminal or civil action against the person arising from state employment, shall be entitled to petition the court for a court-appointed attorney to represent the person’s interests in the matter. If the judge, after consideration of the petition, examination of the petitioner and receipt of such further evidence as the judge may require, determines that the petition has merit, the judge shall appoint an attorney to represent the interests of such public officer or employee. The court-appointed attorney shall represent such person at all stages, trial and appellate, until the final determination of the matter, unless the attorney is earlier released by such person or by the court. The court may first appoint an attorney from the Department of Justice. If the court determines that the Department is unable to represent such public officer or employee, the court may appoint an attorney from the Office of Defense Services in criminal actions only, and in civil actions may appoint an attorney licensed in this State. This section shall also apply to all federal courts within this State.”).


E. INHERENT AUTHORITY TO APPOINT: A WELL-ESTABLISHED POWER FOR TRIAL COURT JUDGES TO ENSURE JUSTICE FOR INDIVIDUAL LITIGANTS

While not every state supreme court has explicitly spoken on whether a court has inherent authority to appoint civil counsel, those that have taken up the question have generally found that trial courts have such inherent power to promote the administration of justice—although they may differ on whether courts can appoint unwilling attorneys or compensate appointed attorneys from state funds. As with the discretionary appointment statutes, trial courts exercising their inherent power do so on a case-by-case basis and do not create a right to counsel, but in theory this can nonetheless be useful in addressing the need in individual cases involving basic human needs.

• The Utah Supreme Court clarified the scope of this power in 2005. It referred to Bothwell v. Republic Tobacco Co., a well-known federal district court case, to provide a thorough analysis of the inherent authority possessed by courts to appoint counsel and the manner in which that general authority relates specifically to the appointment power. Bothwell had commenced its analysis by outlining three separate categories of inherent judicial authority: (1) powers necessary to maintain independence from other branches of government, (2) powers necessary to exercise all other vested powers, and (3) powers to ensure “the pursuit of a just result.” Bothwell then concluded that, although the power to appoint counsel falls most readily into the third category, the appointment power actually furthers all of the functions covered by the three categories. Bothwell then made the broad pronouncement that, while there may not be a constitutional right to counsel in the context of a civil dispute, “counsel nevertheless may be necessary in a particular civil proceeding to ensure fairness and justice in the proceeding and to bring about a fair and just outcome.” The Utah Supreme Court cited the above reasoning outlined in Bothwell with approval, and went on to hold that a court may appropriately appoint counsel to represent even an absent non-indigent civil defendant.

• The Wisconsin Supreme Court has held “a circuit court possesses inherent authority to appoint counsel for indigent litigants ... circuit courts possess the inherent power to appoint counsel for the representation of indigents and that the power of appointment 'is not tied to any constitutional right that the indigent may have to counsel.'”

• The Montana Supreme Court recently reminded trial courts of this power where a mother whose child was subject to a permanent guardianship proceeding sought appointed counsel. The trial court refused on the grounds that it lacked statutory authority. The Montana Supreme Court first ordered the trial court to respond to the petitioner's arguments that there is a due-process right to counsel. When the trial court failed to do so, the high court ordered the trial court to appoint pro bono counsel for the mother and reminded the trial court that it always has the inherent authority to appoint pro bono counsel in appropriate cases.

- The Louisiana Supreme Court touched on inherent authority in a case about whether a family court had authority to order the Department of Health and Human Resources to pay the attorneys’ fees to an indigent parent's attorney:

Among the purposes for which inherent judicial power may be exercised are the issuance of needful orders in aid of a court's jurisdiction and the regulation of the practice of law. In aid of these purposes, a court has the inherent power to require an attorney to represent an indigent, with or without compensation, as an obligation burdening his privileges to practice and to serve as an officer of court. The court's power to furnish counsel for indigents necessarily includes the power, when reasonably necessary for effective representation, to issue an order requiring the state, its appropriate subdivision, department, or agency, to provide for the payment of counsel fees and necessary expenses.

Consequently, even in the absence of legislative or executive authorization, a court may, when reasonably necessary, appoint counsel for an indigent and award the attorney a reasonable fee to be paid from a source which the court deems appropriate. In deciding whether the state or one of its subdivisions, departments, or agencies should pay the fee, a court must act with comity toward the other branches of government and with sensitive regard for the concepts of functional differentiation and the checks and balances implied by the separation of powers doctrine.

Important considerations for a court taking such action include the following: the structure and scheme of existing legislation which may be applied by analogy, the ability of an entity to budget and finance such expenditures, the entity's responsibility for incurring the need for legal services or for administering the program out of which the need arises, and the existence of any custom or informal practice regarding the payment of such fees.

- In a case before it, the Supreme Court of California found that an indigent prisoner deprived of both personal attendance and representation by counsel in a suit threatening his property interest was essentially denied access to the courts. The court then addressed the remedies available to secure the

129. Id. at 1227.
130. Id. (citation omitted).
131. Burke, 122 P.3d at 539.
134. Id.
The court recognized that appointment of counsel might be the only solution in some instances.

The access right . . . comes into existence only when a prisoner is confronted with a bona fide legal action threatening his interests. If a prisoner is merely a nominal defendant with nothing of consequence at stake, no need emerges for an appointed attorney. Thus, before appointing counsel for a defendant prisoner in a civil suit the trial court should determine first whether the prisoner is indigent. If he is indigent and the court decides that a continuance is not feasible, it should then ascertain whether the prisoner’s interests are actually at stake in the suit and whether an attorney would be helpful to him under the circumstances of the case. The latter determination should be comparatively simple: if the prisoner is not contesting the suit against him, or any aspect of it, there is no need for counsel; but if he plans to defend the action and an adverse judgment would affect his present or future property rights, an attorney should be appointed.

Six years later, the Supreme Court of California revisited this issue in considering the right of an indigent prisoner to court-appointed counsel to defend him in a wrongful death action. After reaffirming the guidelines previously established, the court addressed whether the prisoner had a threatened interest given that he had no assets to pay any judgment for damages. The court recognized that interpreting the guidelines to include the expectation of remote future property interests would significantly expand the right to appointed counsel. However, it held that a trial court must nevertheless consider whether the defendant’s future economic fortunes would be affected by a judgment against him. In addition, the court found that, in considering the ability of counsel to be helpful to the prisoner, the court must look to the issue of damages, not just liability. Thus, the court concluded that the trial court should not have ignored that the codefendants, jointly and severally liable, would likely attempt to assign all responsibility on the prisoner. Given these findings, the court returned the matter to the trial court for reconsideration of the question of the prisoner’s access to the courts.

- The Arizona Supreme Court has held that the court “has authority to require a lawyer’s services, even on a pro bono basis, to assist in the administration of justice,” although it added in a later opinion that “a county is not liable for fees and disbursements to counsel assigned to [an indigent party] in the absence of statute regulating such compensation.”

- The Oklahoma Supreme Court commented in the context of a divorce case that “A trial court may certainly appoint counsel to represent an indigent in a civil matter if it sees fit, but it is entirely discretionary.” Despite this supportive language, no decisions appeared to expound on a court’s discretion in this area, and it is unclear whether the court was referring to the power to appoint pursuant to due process or inherent authority.

- Finally, the Arkansas Supreme Court has held that it will appoint counsel “in those cases where the appellant is able to make a substantial showing that he is entitled to relief and that he cannot proceed without counsel.” Arkansas courts have subsequently considered the appointment of counsel in cases involving parole and prisoner’s rights violations, although all the cases are unpublished and lack precedential value. In a later case, the Arkansas Court of Appeals recognized a trial court’s inherent authority to appoint an attorney ad litem in a guardianship case (the litigant had her own retained counsel, but the trial court appointed a separate attorney ad litem due to a belief that her retained attorney might have a conflict of interest) to “command an orderly, efficient, and effective administration of justice.”

Additionally, there are several instances where intermediate courts have passed on the question of inherent authority:

The South Carolina Court of Appeals held that “Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. Accordingly, we hold that this power must

137. Id. at 924.
138. Id.
139. Id. (citations omitted).
141. Id. at 587-88.
142. Id.
143. Id. at 588.
144. Id.
145. Id.
146. Id.
necessarily include the power to appoint lawyers to serve without compensation where it appears reasonably necessary for the courts to do justice." The case involved two attorneys who were appointed to represent an inmate in a state penitentiary who had raised several civil actions against the state concerning his incarceration. The attorneys contested their appointment by claiming, first, that the inmate did not enjoy the right to counsel as a matter of law, and second, that the court could not require the attorneys to represent an indigent civil plaintiff without compensation. The attorneys claimed that the court appointment deprived them of constitutional rights pursuant to the Fifth and Fourteenth Amendments of the United South Carolina Constitution. In rejecting these claims, the South Carolina Court of Appeals further noted that the appointed lawyers may “be compensated from public funds, thus transferring the burden to the state where it belongs.”

The Michigan Court of Appeals, rejecting due process and equal protection as legitimate bases for a trial court to appoint counsel for a prisoner in the prosecutor’s appeal of a parole board’s decision to grant parole, turned to inherent power to appoint counsel. After noting the statute governing the parole appellate process was silent on appointment of counsel for the prisoner, the court held that

[A] circuit court has broad authority to facilitate the fair and orderly disposition of cases and controversies such that it has discretion to appoint counsel for indigent inmates responding to an appeal of a Parole Board decision. . . . Included within a court’s inherent discretionary powers is the power to appoint counsel to represent indigent litigants to render justice in the face of exceptional circumstances. . . . As noted, a circuit court has broad authority to manage its own affairs in order to achieve the orderly and expeditious disposition of cases. . . . An exercise of the court’s inherent power may be disturbed only upon a finding that there has been a clear abuse of discretion. . . . The circuit court in this case did not abuse its discretion by exercising its authority to appoint appellate counsel for Hill. . . . [T]he circuit court found that appointing appellate counsel to represent Hill was important for the administration of justice. While no single factor is outcome-determinative when deciding whether to appoint counsel in such cases, in this case the circuit court noted that Hill was involved in a complex parole proceeding. The complexity of the parole proceeding required review of an extensive Department of Corrections file dating back to 1998 that included multiple reports. The appeal also required the circuit court to determine whether the Board adhered to the constitution, statutes, and a myriad of administrative rules and regulations. . . . Moreover, this case involved an inmate who had a learning disability. It was therefore a reasonable and proper exercise of the circuit court’s discretion to conclude that appointing appellate counsel would facilitate the efficient and fair administration of justice.

F. THE AMERICANS WITH DISABILITIES ACT: A REQUIREMENT FOR APPOINTED COUNSEL WHERE NECESSARY TO ACCOMMODATE VULNERABLE LITIGANTS

The Americans with Disabilities Act (ADA) requires courts to provide reasonable accommodations for litigants with disabilities. With regard to litigants with cognitive, intellectual, or developmental disabilities, the ADA in some situations requires the appointment of counsel as a reasonable accommodation.

The ADA’s definition of “disability” is extremely broad: a “person with disability” is defined as someone who “(1) has a physical or mental impairment that substantially limits that person in one or more major life activities of such individual; (2) has a record of such a physical or mental impairment; or (3) is regarded as having such a physical or mental impairment.” Title II of the ADA then provides that no disabled individual shall be excluded from participation in services, programs, or activities of a public entity based upon his or her disability, and the definition of “public entity” includes “any state or local government, any department, agency, special purpose district, or other instrumentality of the state or states or local government.” All state court systems, as state governmental agencies, must ensure all of their services, programs, and activities are available to qualified individuals with disabilities.

To prove that a public program or service violated the ADA, a person need only show that (1) she is a “qualified individual with a disability,” (2) she was either excluded from participation in or denied the benefits of a public entity’s services, programs, or activities, or was otherwise discriminated against by the public entity, and (3) such exclusion, denial of benefits, or discrimination was by reason of her disability. Upon receiving a request for accommodation, the public entity is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation, and “mere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement; the Acts create a duty to gather sufficient informa-

154. Id. at 443.
156. Id. at 422.
158. 42 U.S.C. §§ 12102(1).
immigration detainees with cognitive disabilities are entitled to appointment of a ‘qualified representative’...

[A] California federal court held that all immigration detainees with cognitive disabilities are entitled to appointment of a ‘qualified representative’ under the Rehabilitation Act, which is the equivalent of the ADA that is applicable to federal courts. In its ruling, the court explicitly rejected the concept that provision of such was either a “fundamental alteration” or an “undue burden”:

[T]he plaintiffs argued, and Judge Gee agreed, that legal representation would not be a “fundamental alteration” to a removal proceeding because attorneys already practice in immigration court.... Although having appointed counsel would offer immigrants with mental disabilities an advantage over immigrants without mental disabilities, U.S. Airways, Inc. v. Barnett demonstrates that preferences are sometimes necessary to achieve the “basic equal opportunity goal” of the Rehabilitation Act, and “[b]y definition any special ‘accommodation’ requires the employer to treat an employee with a disability differently, i.e. preferentially.”

The government also argued that finding and paying for qualified representatives for immigrants with severe mental disabilities would create an undue burden on the government. Even if the cost of appointing counsel were great, however, the Ninth Circuit found that under the ADA, when “[f]aced with[ ] a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs’ favor.” Furthermore, the number of immigrants who are incompetent due to mental disabilities is small compared to the overall population of immigrants in removal proceedings. Therefore, appointment of counsel for this vulnerable group would constitute only a “small fraction of [the agency’s] annual expenditures.” Also, providing qualified representatives could make removal proceedings more efficient, and thus save the government money.

The above statutory law, regulations, and caselaw notwithstanding, the states of California, Connecticut, Florida, Hawaii...


164. See 28 C.F.R. § 35.160(b) (7) (stating that public entity has burden of proving these exceptions apply).

165. 28 C.F.R. § 35.130(b) (7) (stating that public entity has burden of proving these exceptions apply).


168. 171 Connecticut, 172 Florida, 173 Hawaii, 174


170. See http://www.courts.ca.gov/14362.htm (“[T]he court cannot provide free legal counsel as a medical accommodation.”). See also Access and Fairness Advisory Committee, Judicial Council of California, Questions and Answers About Rule of Court 1.100 for Court Users, available at http://www.courts.ca.gov/documents/access-fairness-QandA-for-persons-with-disabilities.pdf (“[T]he court cannot provide free legal counsel as a medical accommodation. (For specific cases, free legal counsel is mandated by law to provide legal assistance, but it is not an accommodation for a disability.)”).

171. See https://jud.ct.gov/ADA/ADA_Accomm_Reqeust_Procedure.pdf (“the ADA does not require the Judicial Branch to provide services or devices of a personal nature, such as... legal representation”).

172. See http://www.ltcourts.org/core/fileparse.php/243/urlt/ADA-Model-Request-Form.pdf (“Examples of aids or services the Florida State Courts System cannot provide as an accommodation under Title II of the Americans with Disabilities Act include: . . . Legal counsel or advice.”).

173. See http://www.courts.state.hi.us/services/ada/ada_accommodations (“Required accommodations do not include . . . attorney services or legal research and advice.”).
counsel is a reasonable accommodation. The individualized nature of an accommodation request cannot be avoided, however, by adopting a blanket policy of appointing legal counsel in all cases where a “process interpreter” is requested …

Historically, the appointment of qualified legal counsel has been sufficient to assist individuals in understanding and participating in the judicial proceedings. Counsel serves the function of advising clients about the judicial process …

Because of the significant role of attorneys in advising clients with mental impairments about judicial proceedings as well as the legal and ethical obligations on attorneys who represent impaired clients, appointment of counsel (at no cost to the unrepresented party) may provide “other effective means of communication,” see Moto v. City of Union City, 177 FRD at 309-310, or an appropriate “modification of policies and procedures” in cases where the mentally impaired party does not appear to be able to understand the judicial proceedings. 186

Depending on the facts related to a request for a “process interpreter,” a court may determine that representation by

175. A PowerPoint posted on the Michigan State Court Administrative Office website (http://courts.mi.gov/Administration/SCAO/Offices Programs/Documents/access/ADA-PowerPoint.pdf) has a slide that states, “Services the Court Is Not Required to Provide . . . : Legal counsel or advice.”

176. See https://www.nycourts.gov/accessibility/courtusers_guide lines.shtml (“Some examples of aids and services the court system cannot provide as an ADA accommodation include such things as legal counsel or legal advice”).

177. See https://www.tncourts.gov/administration/human-resources/ada-policy (“The Tennessee judicial branch ADA program cannot provide assistance that would change the basic nature of the judicial system . . . . The appointment of an attorney to represent a party to a civil case cannot be required.”).

178. See https://www.utcourts.gov/admin/ada/ (“The court cannot disregard the law to grant a request for an accommodation. For example, the court cannot extend the statute of limitations for filing an action for a person with a disability. The court also cannot provide a free attorney as an accommodation.”).

179. See https://wicourts.gov/services/public/docs/qaqs.pdf (“Required accommodations do not include: attorney services or legal research and advice”).

180. Duval v 260 F.3d at 1139.

181. In Sidiakina v. Bertoli, No. 12-17235 (9th Cir. 2014), a pro se liti- gant denied counsel sued the California Judicial Council in federal court, then appealed to the Ninth Circuit after the district court dismissed the case on abstention grounds, but after the Ninth Circuit appointed counsel for the litigant so that she could argue her case before that court, the Ninth Circuit ultimately dismissed the case due to mootness.


185. See, e.g., Taylor v. Team Broadcast, 2007 U.S. Dist. LEXIS 29581 (D.D.C. 2007) (unpublished) (plaintiff argued defendant company violated ADA by firing him when he had sleep apnea; court denies summary judgment for defendant based on genuine dispute of fact, then says relevant factors for appointment of counsel, which it borrows from Title VII appointment standard); Blatch v. Hernandez, 360 F.Supp.2d 595 (S.D.N.Y. 2005) (“Where . . . the tenant is incapable of representing himself or herself competently, comprehending the proceedings or securing appropriate representation for himself or herself, the Constitution requires that NYCHA do more than make the deprivation determination on the basis of its Law Department’s one-sided pre- sentation. At a minimum, NYCHA is obligated to investigate appropriately the question of whether the tenant’s mental faculties are sufficient to enable the tenant, personally or by a representative secured by the tenant, to present the tenant’s side of the issue. Where that investigation indicates that the tenant lacks such ability, due process requires that NYCHA reach out to a suitable representative, possibly including a competent family member, or appoint or seek judicial appointment of an advocate or guardian, before conducting the hearing and proceeding to a determination adverse to the tenant.”).

“Supporting the principle of a right to counsel is not equivalent to stating that there is a constitutional right to such representation.”

OTHER OPPORTUNITIES FOR THE JUDICIARY TO ADVANCE THE APPOINTMENT OF COUNSEL

A. JUDGES SUPPORTING RIGHT TO COUNSEL IN THE PUBLIC DISCOURSE

Besides issuing rulings and enacting court rules on the subject of right to counsel, judges and justices at all levels of state courts have been frequent commentators on the issue of access to counsel, and the right to counsel, for indigent civil litigants. While judges have at times laid out their beliefs about right to counsel within a case opinion, this section focuses on situations where judges and justices have spoken out in other fora. Such work is part of “improvement of the law,” which is activity encouraged by the Model Code of Judicial Conduct and is no different from working to address such systemic problems as overly high filing fees, the need for interpreters, or access to justice in rural areas.

As a threshold matter, it is necessary to dispense with the suggestion that speaking out on right to counsel risks “prejudging” an issue that may come before a court (i.e., the constitutional right to counsel) is based on a misunderstanding of what endorsing a right to counsel means. Supporting the principle of a right to counsel is not equivalent to stating that there is a constitutional right to such representation. And in fact, judges who remain on the sidelines while at the same time witnessing the grave injustice of pro se litigants being deprived of basic human needs due primarily to their opponents being represented by counsel may be unwittingly aiding that injustice: “impartiality” must not become a shield against the responsibility of judges to ensure the proper administration of justice.

It is also worth understanding what is meant in modern times by the term “civil right to counsel,” because a misunderstanding of its actual scope and approach might raise concerns. The current national movement to establish a right to appointed counsel in civil cases has three basic prongs: 1) a focus on basic human needs cases, with the determination of what constitutes a “basic human need” resting with stakeholders in each jurisdiction; 2) a focus on indigent litigants; and 3) an incremental approach that seeks to establish new rights one at a time in one jurisdiction at a time. This nuanced, three-prong aspect of the civil-right-to-counsel movement is the reason advocates have largely eschewed the term “civil Gideon,” a term that evokes the desire to establish a right to counsel for all civil cases everywhere all at once.

Additionally, contrary to what some might believe, pursuing a right to counsel is not antithetical to exploring other types of legal reforms, such as simplification of court processes and forms, the establishment of self-help centers, authorization of nonlawyer advocates, or the use of technology. New England Law/Boston Professor Russell Engler, who also contributes to this issue of Court Review, has written frequently about how all of these different approaches, including the right to counsel, fit along an access-to-justice “continuum.” Some judges/justices

187. For instance, Russell Engler’s article in this issue addresses the powerful concurrence in Frase v. Barnhart, 840 A.2d 114 (Md. 2003), which was joined by then-Chief Judge Robert Bell. He also notes that sixteen retired Washington State judges filed an amicus brief supporting a right to counsel in King v. King, 174 P.3d 659 (Wash. 2007) (en banc).

188. The American Bar Association’s Model Code of Judicial Conduct Rule 3.7(A) specifies, “Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice.” The Commentary to Rule 3.1 adds, “To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects.”

189. The focus on basic human needs cases is consistent with the American Bar Association’s 2006 resolution calling for states and local governments to establish a right to counsel in such cases. American Bar Association, Resolution 112A (Aug. 2006), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l5_sclaid_06A112A.authcheckdam.pdf. As examples of basic human needs it listed shelter, safety, sustenance, health, and child custody; but there are others that would fit this description, such as education, immigration, and civil incarceration (such as what can occur when a person is unable to pay court fees/fines or child support). One reason that Resolution 112A did not mention civil incarceration is because it was assumed that the U.S. Supreme Court’s prior decision in Lassiter v. Dept of Soc. Servs., 452 U.S. 18 (1981) provided the basis for a federal constitutional right to counsel when physical liberty is at stake. However, that notion was partially dispelled by Turner v. Rogers, 564 U.S. 431 (2011) (declining to find right to counsel for parent incarcerated for civil contempt due to inability to pay child support, where government did not initiate contempt). So, in 2018 the ABA enacted another resolution calling for a right to counsel whenever physical liberty is at stake regardless of the nature of the proceeding or the plaintiff. American Bar Association, Resolution 114 (2018), available at https://www.americanbar.org/content/dam/aba/images/abane.ws/mym2018res/114.pdf.

190. For more on this incremental approach, see John Pollock and Michael Greco, It’s Not Triage if the Patient Bleeds Out, 161 U. PENN. L.R. 40, 50-53 (2012), available at https://scholarship.law.upenn.edu/penn_law_review_online/vol161/ssl/11/. Also, to see the most current expansion efforts, which will demonstrate the types of cases currently focused on and the scope of eligible litigants, visit http://www.civilrighttocounsel.org/map (click the “Recent Activity” view).

191. However, it is critical to ensure that these alternatives are subjected to the same rigorous testing as full representation to ensure that they actually deliver meaningful results. The fact that they are cheaper and can serve many people should not be the end of the inquiry.

have written about this as well.\textsuperscript{193} The need for a continuum is clear. For one, the right-to-counsel movement, even if completely successful, will for the most part\textsuperscript{194} only meet the needs of indigent litigants, and many litigants who are not technically “indigent” are nonetheless priced out of the legal market. Additionally, there will always be some types of civil matters that will fall outside the auspices of “basic human needs.” Services along the continuum may help meet these needs.

Turning to examples of judicial leadership in the public fora, it is a little-known fact that it was a judge, Robert W. Sweet of the Southern District of New York, who reignited the modern civil right-to-counsel movement with a groundbreaking law review article in 1998.\textsuperscript{195} In his article, Judge Sweet coined the term “civil Gideon,” and laid out many of the basic principles that drive modern efforts. For instance, Judge Sweet quoted his colleague, Judge Jack Weinstein, for the principle that “Accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this fundamental protection through the courts, most of the rest of our promises of liberty and justice of [sic] all remain a mockery for the poor and oppressed.”\textsuperscript{196} He also observed how a civil right to counsel already exists in many of our European counterpart countries and commented that he “believe[d] there is a constitutional requirement to meet what appears to be an almost universal right among developed nations. Such representation will guarantee the diversity of interests that are essential to a fully developed justice system.”\textsuperscript{197} Finally, he demonstrated the broad public support by pointing out that at the time, 71% of Americans favored using tax dollars to fund a right to counsel (as well as the fact that 79% believed such a right already existed). Judge Sweet ended by calling for the reversal of Lassiter, “just as the Supreme Court in Gideon in 1963 reversed its holding in Betts v. Brady twenty-one years earlier and found for a right to counsel in all criminal proceedings.”\textsuperscript{198}

Yet Judge Sweet’s article was not the earliest judicial support for a right to counsel. Justice Earl Johnson, Jr., who served on the California Court of Appeals, wrote a famous concurrence/dissent in 1985 that made constitutional and common-law arguments supporting a right to counsel in civil cases.\textsuperscript{199} He has continued to write frequently on the subject for decades, often pointing out how the United States lags behind its European counterparts with respect to a civil right to counsel.\textsuperscript{200} That fact has been a powerful tool for right-to-counsel advocacy across the country. Furthermore, many other judicial leaders at the state supreme court,\textsuperscript{201} (2010), available at https://ir.lawnet.fordham.edu/ulj/vol37/iss1/2/; and Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?, 9 Seattle J. for Soc. Just. 97 (2010), available at https://digitalcommons.law.seattleu.edu/sjsj/vol9/iss1/4/.

193. See, e.g., Jon D. Levy, Associate Justice, Supreme Judicial Court of Maine, The World Is Round: Why We Must Assure Equal Access to Civil Justice, 62 Me. L. Rev. 361, 375 (2010), available at https://digitalcommons.mainelaw.maine.edu/cgi/viewcontent.cgi?article=1227&context=mlr (“A spectrum approach to civil legal assistance is responsive to two fundamental realities. First, public financial support for civil legal assistance is critically important and should be invested in targeted ways that account for the degree of legal assistance that is needed to effectively respond to the legal problem that is presented. Second, the public’s failure to adequately invest in civil legal assistance will, over the long-term, result in increased social and economic costs for everyone.”).

194. The right to counsel established for San Francisco tenants facing eviction has no income limit. See http://selectio ns.sfgov.org/sites/default/files/Documents/candidates/Legal_Text_No_Eviction_With out_Representation.pdf. However, this is by far the exception to the rule.


196. Id. at 506 (quoting Jack B. Weinstein, The Poor’s Right to Equal Access to the Courts, 13 Conn. L. Rev. 651, 655 (1981)).

197. Id. at 504-5.

198. Id.


201. Remarks of the Honorable Ronald D. Castille, Chief Justice, Supreme Court of Pennsylvania, to the Senate Judiciary Committee (May 23, 2013), available at https://www.palegalaid.net/sites/default/files/2013-05-23%20Chief%27s%20Testimony.pdf (“Realistically, how can a person effectively defend himself or herself in the face of often complicated legal challenges in the usually unfamiliar and daunting environment of a courtroom before a sitting judge? How can that person effectively assert his or her legal rights without a skilled advocate, learned in the law, who will assert those rights for them in the court system? And what consequences can flow from self-representation? This combined effort by the Legislature and organized attorney associations will explore what has often been referred to as ‘Civil Gideon.’ “); Jess H. Dickinson, Presiding Justice, Mississippi Supreme Court, A Look at Civil Gideon: Is There a Constitutional Right to Counsel in Certain Civil Cases?, 37 U. Ark. Little Rock L. Rev. 543, 547 (2013), available at https://lawrepository.uarl.edu/cgi/viewcontent.cgi?article=1964&context=lawreview (“I believe that when one person uses the law, the government, its facilities, and its power in an attempt to take away an indigent person’s life, liberty, or property—which includes children, shelter, livelihood, and the basic right to dignity—that indigent person is constitutionally entitled to have a lawyer... “)
appellate,202 and trial level203 have taken up the clarion call from Judges Johnson and Sweet for equal access to justice through the recognition of a right to counsel in civil cases.

There are also some notable examples where judicial leaders have become actively involved in civil-right-to-counsel efforts. For instance, New York Chief Judge Jonathan Lippman, who had written frequently about the need for a right to counsel in civil cases,204 testified in support of New York City’s bill to provide the first-ever right to counsel in housing court,205 and worked behind the scenes to support the bill. Additionally, one year after the new law went into effect, a number of New York City housing court judges testified in support, and Judge Jean Schneider, the citywide supervising judge of the New York City Housing Court, stated at the hearing that “our court is improving by leaps and bounds.”206 Similarly, in 2019, bills were introduced in Massachusetts to establish a statewide right to counsel in eviction cases, and Supreme Judicial Court Chief Justice Ralph Gants pub-

“There are also some notable examples where judicial leaders have become actively involved in civil right to counsel efforts.”

appellate, just as they are in a criminal case”). Justice Denise Johnson, Vermont Supreme Court, Bridging the Gap, App. Judges News (2006) (discussing access-to-justice gap and suggesting that to bridge the gap, “First, as judges, we must recognize that some cases should not proceed without legal counsel”; article notes that ABA resolution calls on right to counsel where basic human needs at stake and “This is an important normative step and one that the judiciary should endorse”); Margaret H. Marshall, Chief Justice, Supreme Judicial Court of Massachusetts, Provide Legal Support to Those Most Vulnerable, B. Globe (Oct. 29, 2011), available at https://www.bostonglobe.com/opinion/2011/10/28/provide-legal-support-those-most-vulnerable/chPE1k6c0CRP6cppjOxZ9M/story.html (“Access to justice is best secured by—and perhaps requires—a lawyer”; while right to counsel exists for criminal cases, “there is no similar guarantee of representation for thousands of our most vulnerable residents confronted with non-criminal civil actions in which their most basic rights are also at stake. We do not provide lawyers for example, to families threatened with wrongful eviction, or to battered women seeking restraining orders, or to senior citizens who challenge the improper denial of Medicare benefits. They are often on their own, left to fend themselves without legal assistance in a complex adversarial system in which the party with a lawyer has the clear advantage. These impoverished litigants need the help of lawyers just as much as those accused of committing a crime”); Hon. Richard B. Sanders, Washington Supreme Court, “Access to Justice”: A Noble Principle in Beggar’s Rags, 1999 Washington State Access to Justice Conference (June 25-27, 1999), available at http://www.justice sanders.com/writings/ATJ062599.htm (“If it is a legitimate role of the government to build courthouses and hire judges, is it not only a difference in degree, not kind, to assure litigants adequate representation so they may properly present their case when they go to court? Indeed, is not legal representation a practical necessity that those knowledgeable in the law would have to admit: that the man who represents himself has a fool for a client? . . . [I]t is a contradiction of the access to justice principle to guarantee the right of counsel to indigent criminal defendants on the one hand while refusing to recognize a sometimes equally important, if not paramount, interest to legal representation in civil matters.”).

202 Hon. Anna Blackburne-Rigsby, Associate Judge, District of Columbia Court of Appeals, Ensuring Access to Justice for All: Addressing the “Justice Gap” Through Emphasis on Attorney Professionalism and Ethical Obligations in the Classroom and Beyond, Geo. J. L. Ethics (2014), available at https://abadsj.files.wordpress.com/2015/01/9448b-judgeblackburne-rigsbyguestarticle-ensuringac cessjusticelawroll.pdf (arguing for inclusion of access to justice in professional responsibility courses because “access to justice issue is not simply a problem for a select few to grapple with; rather, it is our shared duty as legal professionals,” and noting that while there is no civil right to counsel that corresponds to Gideon, “civil cases deal with many matters that we hold perhaps just as dear as our own personal freedom, including custody of our children, our physical safety, our ability to work, and our need for shelter.”).

203 Judge Mark Juhas, Los Angeles Superior Court, On the Anniversary of Gideon, an Argument for Free Civil Representation, L.A. Law. (2013), available at https://www.lacha.org/docs/default-source/full-back-issues/2013-issues/september-2013.pdf?sfpage=46 (noting in support of right to counsel in eviction cases that “most judges would prefer a contested case in which the adversaries are skilled professionals who can spot and frame the real issues in the case, as compared with a case in which one party is almost totally clueless about legal procedures and legal rights. Cases involving pro se litigants often take much more court time than cases staffed by attorneys. An unrepresented party’s unfamiliarity with court procedures tends to clog court calendars, leading to much less efficient courtrooms”); Judge Emily Jane Goodman, New York State Supreme Court, Facing Evictions—Without the Right to Counsel, Gotham Gazette, June 30, 2008, available at https://www.gotham gazette.com/index.php/development/4014-facing-evictions-%20without-the-right-to-counsel (postulating that it is safer to be accused of crime and face prison than to be tenants facing eviction, because “all criminal defendants have a right to legal representation and tenants do not”). Judge Leonard Edwards, Santa Clara Superior Court (ret.), Engaging Fathers in the Child Protection Process: The Judicial Role, Juv. & Fam. Ct. J. 15-16 (2009), available at http://www.judgeleonardedwards.com/docs/EdwardsEngagingfathers/journal09.pdf (urging courts to appoint counsel for fathers in child protection cases because “Appointing counsel for the father is critical to his involvement in the court process. Counsel can help identify and locate the father. Counsel can take the time to explain in detail the father’s rights, the consequences of the proceedings, and the urgency of taking timely action with regard to services. Counsel can inform the court about problems the father is experiencing that otherwise would escape the court’s notice. Counsel can facilitate communication between the father and the caseworker, and ensure that the father’s rights are upheld. The earlier the court makes the appointment, the more valuable counsel’s contributions will be to the father and to the court process”); Judge David J. Dreyer, Maranon Superior Court, Deja Vu All Over Again: Turner v. Rogers and the Civil Right to Counsel, 61 Drake L.R. 639, 664 (2013), available at https://lawreviewdrake.files.wordpress.com/2015/06/irvole01-3_dreyer.pdf (“We are delaying due process because of purported practical realities. But if practical realities were weighed when Gideon was decided, indigent criminal defendants would be no better off today than indigent civil litigants. Hopefully, new efforts to establish reliable, empirical evidence can show the widespread dire consequences of denied advice and representation in even the so-called simplest matters”); Judge Jed S. Rakoff, District Judge for the Southern District of New York, Why You Can’t Get Your Day in Court (It’s a New America), N.Y. Rev. Books, Nov. 24, 2016, available at https://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/ (“Indi-
licity endorsed the bills. In 2009, Supreme Court of California Chief Justice Ronald George publicly declared his support for a right to counsel in civil cases implicating basic human needs, then successfully advocated for then-Governor Schwarzenegger to sign legislation (known as the Shriver Civil Counsel Act) establishing statewide pilots to expand civil representation.

Finally, in 2015, Connecticut Supreme Court Chief Justice Chase Rogers charged the Connecticut Access to Justice Commission with studying the right to counsel in civil cases. In support of this, she noted the high percentage of those who represented themselves, and asked,

Is there less at stake if someone faces jail over child support payments? Is there less at stake if litigants face domestic violence or risk losing their home? The civil Gideon question of whether litigants in certain types of non-criminal matters should have court-appointed attorneys paid for by the state is an issue that we now need to confront.

B. JUDICIAL ACCESS-TO-JUSTICE COMMISSIONS AS KEY CONTRIBUTORS

Another key judicial player in right to counsel work has been access-to-justice commissions. Although quasi-independent, these entities are typically court-created, operated by judiciary staff, and feature judges as members of the commission. While many of the commissions focus on raising funding for legal services organizations, some have gone further to explore or support the right to counsel in civil cases. For example, the access to justice commissions in Arkansas, Maryland, Massachusetts, North Carolina, and Wisconsin have endorsed the 2006 ABA Resolution calling for a right to counsel in civil cases implicating basic human needs, while the commissions in Arkansas, California, Connecticut, Hawaii, Maryland, New Mexico, North Carolina, South Carolina, Texas, and Wisconsin have had civil-right-to-counsel subcommittees at one point or another in their histories.

Some access-to-justice commissions have taken on the task of mapping out how a right to counsel would work in their jurisdictions:

- In 2012, the Maryland Access to Justice Commission issued a report mapping out an implementation plan for a full right to counsel in the state. The Commission also produced a cost/benefit analysis that found legal services generated $9.9 million in direct federal benefits for clients (yielding $12.6
authorized the creation of a task force to draft a model statute providing for a right to counsel in civil cases for those too poor to afford private counsel: a civil Gideon. The commission created the task force not with the idea that such a statute would become law or even be introduced in the legislature anytime soon but with the commitment to begin thinking through the issues so that if and when the opportunity arises—in California or elsewhere—to expand the rights of indigent litigants by statute, advocates can hit the ground running. The task force set out to consider the large and small questions that must be answered if the legislature were ever to enact a civil Gideon.\footnote{218}

This led to the production of two documents suggesting different paths for implementing a civil right to counsel (the Basic Access Act and the Equal Justice Act),\footnote{219} which in turn led to the passage of the aforementioned Shriver Civil Counsel Act.

- In Arkansas, the Access to Justice Commission established a “civil right to counsel initiative” in 2011 whose purpose was “To identify cases in which the lack of counsel denies the constitutional rights of equal protection and due process to pro se litigants and to advocate for judicial recognition of and/or leg-

islation that establishes a civil right to counsel in such situations.” The initiative identified adoption as an area in need of counsel, and the subsequent year the Commission supported pro bono attorney recruitment for litigation to establish a right to counsel in adoption cases.\footnote{220}

- In North Carolina, the Equal Access to Justice Commission proposed legislation in 2010 that would have given state trial judges broad discretion to appoint counsel in any civil case and provided grants to three judicial districts to determine the most efficient way to provide counsel to those who needed it. Although the legislation, HB 1915, did not advance, the Commission has remained active on the subject, and at present lists “establish the right to counsel in civil matters affecting basic human needs” as a priority on its webpage.\footnote{221}

- Finally, in Illinois, the Access to Justice Commission sponsored statewide legislation in 2013 to create pilot projects for tenant representation in eviction cases. Such pilots are a key step on the way toward right to counsel, as they provide critical data about the effectiveness of full representation and potential cost savings. The bill, HB3111,\footnote{222} enacted by the legislature and signed by Governor Quinn, provided more than $4 million in funding for the pilots through an increase in filing fees.\footnote{223} However, due to separation of powers concerns, the legislation “encourage[d]” rather than required the Illinois Supreme Court to develop the pilots, the Court elected not to institute the collection of the fees, and the pilots were never funded or initiated.

C. COURTS INCREASING THE NUMBER OF ATTORNEYS AVAILABLE FOR APPOINTMENT

The inherent authority section of this article discusses what state courts have had to say about appointing attorneys without compensation. However, there are other ways to incentivize attorneys to participate as volunteers.

Similar to the state-level discretionary statutes mentioned earlier, a federal statute, 28 U.S.C. § 1915, authorizes federal courts to “request”\footnote{224} counsel in any civil proceeding. However, while the state statutes have gone largely unutilized due to the lack of funding and volunteers, most of the federal district courts have affirm-


\footnote{219} The California Model Statute Task Force, State Basic Access Act (Feb. 8, 2008), State Equal Justice Act (Nov. 3, 2006).

\footnote{220} Lucas v. Jones, 2012 Ark. 365 (2012) (declining to review denial of counsel on the merits based on court’s position that mother failed to preserve issue of denial of counsel at the trial court level). Although the Commission did not officially appear in the case, it lent its support to the petitioner behind the scenes.


\footnote{224} A federal court does not have the power under the statute to “appoint” an attorney: rather, the court can only “request” that an attorney represent the indigent person. Mallard v. U.S. District Court for Southern District of Iowa, 490 U.S. 296 (1989) (contrasting “may request an attorney” language with statutes from 12 states that speak of “appointment” or “assignment” of counsel). However, federal courts often use “request” and “appoint” interchangeably, which contributes to the confusion.
tively developed pro bono plans so as to better ensure attorneys are available when necessary. The Eighth Circuit has stated:

Even if funds are not available, “we think it incumbent upon the chief judge of each district to seek the cooperation of the bar associations . . . to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations . . . .” We reemphasize that the chief judge for each district must be resourceful in finding competent attorneys for pro bono or contingency basis cases by working with bar associations, establishing a pro bono expense fund or making other appropriate arrangement to assist those prisoners having a claim arising under federal statute or constitution. The district court may not shift the burden to indigent prisoners who by definition do not have the resources or other skills necessary to obtain counsel on their own.225

These plans use a variety of creative methods to recruit attorneys, such as formally recognizing these volunteers at events,226 requiring attorneys to volunteer to access certain court-offered training services,227 reimbursing attorneys for out-of-pocket costs,228 or offering limited-scope representation opportunities to reduce the burden of volunteering.229 Additionally, some district courts have required that attorneys admitted to practice in the court accept pro bono assignments.230 State courts could look to these plans to develop ideas for how to make attorneys available when using one of their powers to appoint counsel that is not accompanied by funding (such as the discretionary appointment statutes, inherent authority, or rulemaking authority).

CONCLUSION

The plight of pro se litigants in the United States should concern all quarters of the legal community, including members of the judiciary. As this article outlines, there are opportunities for judges at the state high court, appellate court, and trial court level to improve the administration of justice through the promotion or provision of access to counsel, whether through joining the public discourse, establishing new rights to counsel through rulemaking, being aware of and exercising the existing requirements or powers to appoint counsel for indigent litigants, or working with state access-to-justice commissions to figure out how best to advance the issue in one's own jurisdiction. Only with the participation of all stakeholders, including the judiciary, will the basic human needs of all litigants be fully protected.

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225. Reynolds v. Foree, 771 F.2d 1179, 1181 (8th Cir. 1985).
227. See, e.g., District of Ohio General Order #261 (Amended Pro Bono Program) (“Volunteer lawyers will be eligible to attend CLE/train-
ing courses on litigating civil rights cases in the federal courts at no cost.”).
228. See, e.g., Western District of Texas, Pro Bono Appointments, https://www.tw wd.uscourts.gov/for-attorneys/pro-bono-civil-appointments/index.html (“Litigation expenses may be reimbursed upon application up to $1,500.00. Attorney fees, however, are available only to prevailing parties and recovery may be further limited by statute depending on the claims in issue.”).
230. See, e.g., W.D. N.Y. Loc. R. Civ. P. 83.1(f) (“Every Member of the bar of this Court who maintains, or whose firm maintains, an office in this District, shall be available upon the Court’s request for appointment to represent or assist in the representation of indigent parties”); SDIL-LR 83.1(f) (“In testimonial proceedings arising out of matters pending before this Court, every member of the bar of this Court, as defined in subparagraph (a) of this rule, shall be available for appointment by the Court to represent or assist in the representation of those who cannot afford to hire an attorney. Appointments shall be made in such a manner that no member of the bar of this Court shall be required to accept more than one appointment during any twelve month period”); D.C. LR 83.10 (“Attorneys who are members in good standing of the Bar of this Court shall be required to assist or represent the needy in civil matters before this Court whenever requested by the Court and, if necessary, without compensation and to accept appointments under the Criminal Justice Act unless exempted by rule or statute”); E.D & W.D. Ark. L.R. 83.7 (“These appointments shall be mandatory.”); E.D. Mo. L.R. 12.01(f) (“Attorneys who are members in good standing of the bar of this Court will be required to represent without compensation indigent parties in civil matters when so ordered by a judge of this Court. . . . Statutory fees and expenses may be awarded as provided by law to an attorney appointed under this rule.”); Ct. L.R. 83.10 (requiring all attorneys who have appeared as counsel in at least one case since Jan. 1, 2015 to be included in “assignment wheel,” with some exceptions).
Access to Justice in Canada:
The Unrepresented Accused and the Role of the Trial Judge

Wayne K. Gorman

In this edition’s column, I intend to look at the issue of access to justice from the perspective of the role of a Canadian trial judge conducting a criminal trial with an unrepresented accused. I will consider what is expected of a Canadian trial judge in such a situation and review some of the avenues open to a Canadian trial judge when the accused wishes to represent themselves and declines available legal representation.

THE ROLE OF THE TRIAL JUDGE WHEN THE ACCUSED IS UNREPRESENTED:

The Canadian Judicial Council, in its Statement of Principles on Self-represented Litigants and Accused Persons, has indicated that “[j]udges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation.”

It has been noted that “[t]raditionally, self-represented litigants were required to bear the full risk of appearing in court without legal representation. They were essentially required to fit into the system without much expectation that the system would or could accommodate any special…circumstances resulting from their lack of representation.” However, it is “being increasingly recognized that a judge has a responsibility to be proactive in the way he or she manages the litigation to ensure that a self-represented litigant can effectively present or defend against the case and, by means of that treatment, perceive the process as being balanced and fair” (see Cabana v. Newfoundland and Labrador, 2018 NLCA 52, at paragraphs 44 and 46).

How pro-active must a judge be? When will being too pro-active raise an apprehension of bias? In Ontario v. Criminal Lawyers Association of Ontario, 2013 SCC 43, the Supreme Court of Canada indicated that while “trial judges are obliged to assist unrepresented litigants, they are not permitted to give them strategic advice.” Similarly, in R. v. Wyatt, 2018 BCCA 162, the British Columbia Court of Appeal indicated that “[p]roviding the necessary minimal judicial assistance to a self-represented accused can be difficult. …A judge presiding over a criminal trial with a self-represented accused must remain neutral and cannot become the lawyer for the accused” (at paragraph 12).

Thus, we are called upon to assist an unrepresented accused, but without affecting our neutrality, or its appearance. This can be a difficult balance to achieve. However, some guidance can be found in appellate court decisions in which the judge’s role in a criminal trial with an unrepresented accused became the focus of the appeal.

Footnotes
1. See, cfjc-fcjc.org › action-committee.
APPELLATE COURT DECISIONS:

In R. v. Breton, 2018 ONCA 753, for instance, a self-represented accused was convicted of a number of offences. On appeal, he argued that the trial judge failed to provide him with adequate assistance.

The Ontario Court of Appeal indicated that it “is well settled that where an accused is self-represented at trial, the presiding judge… must provide assistance to aid the accused in the proper conduct of his defence and to guide him, as the trial unfolds, in such a way that the defence is brought out with its full force and effect” (at paragraph 13).

The Court of Appeal also held that a trial judge has a responsibility to “assist a self-represented accused” to “raise Charter issues on the judge’s own motion” (at paragraph 15).

The Court of Appeal ordered a new trial, concluding that there was evidence supporting a breach of section 10(b) of the Charter, but the trial judge failed to raise or otherwise alert the accused to the issue.

In Wyatt, the accused was convicted of the offence of aggravated assault. He was unrepresented. He appealed from conviction, arguing that the trial judge failed to provide him with adequate assistance. Interestingly, the Crown agreed.

In allowing the appeal, the British Columbia Court of Appeal suggested that the accused’s “lack of knowledge of the trial process was apparent.” The Court of Appeal pointed out that the accused appeared to believe that the victim’s evidence had to be “corroborated” and that “his denial of the offences would be in evidence, without the necessity of him testifying” (at paragraph 10).

The Court of Appeal held that trial judges “have an obligation to provide some minimal assistance to self-represented accused persons.” The Court of Appeal noted that providing “the necessary minimal judicial assistance to a self-represented accused can be difficult” and that a trial judge “presiding over a criminal trial with a self-represented accused must remain neutral and cannot become the lawyer for the accused” (at paragraphs 11 and 12).

The British Columbia Court of Appeal held that the trial was “unfair” because the trial judge failed to address Mr. Wyatt’s apparent misconception that various witness statements were “in the file” and “were something he could rely upon” (at paragraph 16).

The Court of Appeal concluded that “some step was required by the trial judge to correct the two important misconceptions held by Mr. Wyatt as to the law and process, as these were fundamental to his ability to bring out his defence…the failure to provide assistance to Mr. Wyatt in this regard made the trial unfair” (at paragraph 17).

Recently, in R. v. Forrester, 2019 ONCA 255, a different result was reached. In this case, the accused was convicted of trafficking in a controlled substance. On appeal, he argued that “the trial judge failed to assist him in his defence.”

In assessing this ground of appeal, the Ontario Court of Appeal noted that a “trial judge has a duty to assist a self-represented accused and to guide him or her throughout the trial so that his or her defence is brought out with its full force and effect…The scope of the duty depends on the particular circumstances of the case and is circumscribed by what is reasonable. … A trial judge, of course, has other duties, one of which is to ensure that the trial is effective, efficient and fair to both sides. … This includes ensuring that the trial does not become mired in irrelevant evidence and that the rules of evidence are applied fairly to both parties” (at paragraphs 15 and 16).

The appeal was dismissed. The Court of Appeal pointed out that “at the outset of the trial, six days before the appellant was arraigned, the trial judge provided him with a detailed 22-page memorandum concerning trial procedures, important principles of criminal law, the essential elements of the offences with which he was charged, his right to examine witnesses and to call evidence, and certain rules of evidence, among other things” (at paragraph 19).

CONCLUSION-ASSISTING THE UNREPRESENTED ACCUSED:

What are we as trial judges to take of these decisions? We are cautioned about avoiding “becoming the lawyer” for an unrepresented accused, but encouraged to provide assistance, including pointing out and encouraging Charter applications. It is impossible to set out any hard and fast rules as to what a trial judge should or should not do when an accused person is unrepresented at trial. However, these appellate court decisions make it clear that a Canadian trial judge must take an active role in assisting the accused; including explaining the process and ensuring that any defences are presented. This can be difficult because it runs the risk of the trial judge taking over the defence case and creating a reasonable apprehension of bias against the Crown.

Having said this, there are some cases in which our assistance to an unrepresented accused will not be sufficient. In those cases, we must consider appointing counsel to represent the accused.

THE APPOINTMENT OF COUNSEL:

One of the obvious ways to alleviate the concerns raised by an unrepresented accused is to appoint counsel to represent him or her. In Canada, this can be achieved through statutory provisions or through the Constitution.

STATUTORY PROVISIONS:

There are statutory provisions that allow a Canadian judge to appoint counsel to represent an accused person.

The Youth Criminal Justice Act, R.S.C., 1985, for instance, allows a youth court judge to appoint counsel to represent a young person who is unable to obtain counsel through legal aid. When such an order is issued, the Attorney General must arrange for counsel to represent the young person (see sections 25(4) and (5) of the Youth Criminal Justice Act). In addition, the Criminal Code of Canada, R.S.C., 1985, allows for the appointment of counsel on appeal. Section 684 of the Criminal Code allows a court of appeal to “assign counsel to act on behalf of an accused who is a party to an appeal” if it “appears desirable in the interests of justice” to do so.

These types of provisions include statutory limitations on when a Canadian judge can appoint counsel. A much broader scope for the appointment of counsel has been found in the Canadian Constitution.
THE CANADIAN CONSTITUTION:

The common law does not “recognize the right of a person charged with a felony to be defended by counsel” (see R. v. Rowbotham (1988) 41 C.C.C. (3d) 1 (Ont. C.A.), at paragraph 147). In addition, the Alberta Court of Appeal has noted that “[w]hile an accused person has a constitutional right to a fair trial, there is no constitutional right to funded legal counsel in every case, nor is representation by a lawyer a prerequisite to a fair trial” (see R. v. Phillips, 2003 ABCA 4, at paragraph 10).

The Canadian Constitution does not contain a provision that specifically provides a guarantee to be represented by counsel. Section 10(b) of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, for instance, only protects the right of an arrested or detained person to be informed of their right to contact counsel.

Sections 7 and 11(d) of the Charter protect the right of an accused person not to be denied their liberty “except in accordance with the principles of fundamental justice” and to trial “by an independent and impartial tribunal.” It is these two latter provisions that formed the basis for the Ontario Court of Appeals conclusion that “in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the Charter…require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial” (Rowbotham, at paragraph 156).

Applications for the appointment of counsel have become known in Canada as “Rowbotham applications.” The Ontario Court of Appeal held in Rowbotham, that “a trial judge confronted with an exceptional case where legal aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided” (at paragraph 167).

Recently, in R. v. Imona-Russel, 2019 ONCA 252, the Ontario Court of Appeal indicated that the “three prerequisites for a Rowbotham order are that: the accused must have been refused Legal Aid; the accused must lack the means to employ counsel; and representation for the accused must be ‘essential to a fair trial’” (at paragraph 38).

The Court of Appeal also held in Imona-Russel that “[t]rial and motion judges must evaluate whether appointing counsel under a Rowbotham order is necessary for a fair trial on a case-specific basis, having regard to relevant factors, including the seriousness of the charges, the likelihood of imprisonment, the length and complexity of the proceedings in terms of the factual evidence, and the procedural, evidentiary and substantive law that would apply. The judge must also attend to the possibility of specialized procedures such as voir dires, and the accused’s personal ability to participate effectively in defending the case” (at paragraph 40).

As can be seen, the power to appoint counsel has been given a broad scope. It is not limited to any specific types of cases or involve any characterization of the accused.

The power to appoint counsel alleviates, in a specific case, the difficulties that arise when an accused person is unrepresented. But, what if that accused person does not want counsel appointed and wishes to represent him or herself?

WHAT IF THE ACCUSED DOES NOT WANT TO BE REPRESENTED BY COUNSEL?

In R. v. Cunningham, 2010 SCC 10, the Supreme Court of Canada indicated that a court “cannot force counsel upon an unwilling accused” (at paragraph 9):

An accused has an unfettered right to discharge his or her legal counsel at any time and for any reason. A court may not interfere with this decision and cannot force counsel upon an unwilling accused (see Vescio v. The King, [1949] S.C.R. 139, at p. 144; though exceptionally the court may appoint an amicus curiae to assist the court). Counsel, on the other hand, does not have an unfettered right to withdraw. The fiduciary nature of the solicitor-client relationship means that counsel is constrained in his or her ability to withdraw from a case once he or she has chosen to represent an accused...

When an accused person wishes to represent him or herself, there are avenues open to a Canadian judge to alleviate the problems that can arise. These are based in statute and at common law.

STATUTE:

One of the available options for a trial judge is the appointment of counsel for limited purposes, even when the accused does not wish to be represented by counsel. For instance, section 486.3(1) of the Criminal Code indicates that a Canadian judge “shall” appoint counsel to cross-examine a witness who is under eighteen years of age, unless the judge concludes that the “proper administration of justice” requires personal cross-examination by the accused. Either the Crown or the witness can apply to the court for counsel to be appointed under this provision. Similarly, section 486.3(2) of the Criminal Code indicates that the judge “shall” appoint counsel for the purpose of the cross-examining of a witness in relation to a list of specified offences (criminal harassment and a number of sexual offences). There is no age limitation in this provision.

Interestingly, in both provisions the order is mandatory, unless that judge concludes that the proper administration of justice requires personal cross-examination, an outcome that would appear unlikely in most cases. Once counsel is appointed, he or she conducts the cross-examination, not the accused.

Finally, section 486.3(3) of the Criminal Code allows a Canadian judge to appoint counsel to cross-examine a witness to which subsection (1) and (2) do not apply. The appointment, however, is not mandatory. The judge must be satisfied that the

3. However, the Supreme Court also concluded that a court can refuse to allow counsel to withdraw if “withdrawal is sought because of non-payment of legal fees” (at paragraph 50).
appointment of counsel is necessary for “a full and candid account” to be obtained from the witness. The unrepresented accused can argue that counsel should not be appointed, but if counsel is appointed, the unrepresented accused is prohibited from conducting the cross-examination.

In R. v. Atzenberger, 2018 BCCA 296, and R. v. Wapass, 2014 SKCA 76, it was held that the accused cannot discharge counsel appointed pursuant to these provisions without approval of the court.

These provisions limit the right of the unrepresented accused to conduct certain cross-examinations. Is there a broader scope for a Canadian trial judge to impose counsel upon an accused person who does not want to be represented by counsel?

THE APPOINTMENT OF AMICUS CURIAE:

In some cases, an appointment of counsel beyond a limited role will be necessary. What can a Canadian trial judge do if such a case arises, but the accused does not wish to be represented by counsel. One solution is the appointment of an amicus curiae.

In Ontario v. Criminal Lawyers Association of Ontario, the Supreme Court of Canada indicated that it “is not disputed that a court may appoint a lawyer as ‘amicus curiae’, a ‘friend of the court’, to assist the court in exceptional circumstances; or that the Attorney General is obligated to pay amici curiae when appointed” (at paragraph 2).

The Supreme Court of Canada indicated that the “capacity of a superior court to appoint an amicus stems from the court’s inherent jurisdiction to act where necessary to ensure that justice can be done. For a statutory court, the capacity stems from the court’s power to manage its own process and operate as a court of law, and arises in situations where the court must be able to appoint an amicus in order to exercise its statutory jurisdiction” (at paragraph 12).

Recently, in R. v. Verma, 2019 BCCA 14, the British Columbia Court of Appeal held that two principles “guide the courts in determining whether to appoint amicus curiae: (a) the appointment must be essential to the discharge of the judicial function; and (b) the court must be wary of making an appointment that blurs the line between the role of friend of the court and the role of defence counsel” (at paragraph 33).

In Ontario v. Criminal Lawyers Association the Supreme Court cautioned, however, against the overuse of such appointments, pointing out that the appointment of amicus should “be used sparingly and with caution, in response to specific and exceptional circumstances” (at paragraph 47).

THE ROLE OF AMICUS CURIAE:

In Imona-Russel, the Ontario Court of Appeal considered the differences between appointed counsel and amici curiae. It pointed out that “since amicus does not represent the accused person, the accused person may not discharge amicus” (at paragraph 67). In addition, the Court of Appeal indicated that “while amicus may assist in the presentation of evidence, amicus cannot control the litigation strategy. While there may be an issue about whether a trial judge may impose a privilege on communications between amicus and the accused person, the necessary confiden-
tiality can flow from an express Crown undertaking in consenting to the appointment of amicus” (at paragraph 68).

The Court of Appeal also held that while “it remains open to trial judges to appoint amicus where no Rowbotham appointment should be made…or to appoint amicus to function alongside a Rowbotham appointee, where there is a real risk that the accused will discharge counsel as a way of disrupting the trial. …It remains open to trial judges to make similar amicus appointments where the conditions warrant such an order, but exceptionally, bearing in mind the principles laid out by the Supreme Court in [Criminal Lawyers Association]” (at paragraph 94).

**FIXING THE RATES FOR AMICUS COUNSEL:**

The Supreme Court asked itself in *Ontario v. Criminal Lawyers Association* “whether a court’s inherent or implied jurisdiction extends to fixing the rates of compensation for *amicus curiae*” (at paragraph 2). The Supreme Court of Canada held “the power to appoint *amicus curiae*” does not “provide the power to determine what the Attorney General must pay them. ... As the Chief Law Officers of the Crown, responsible for the administration of justice on behalf of the provinces, the Attorneys General of the provinces, and not the courts, determine the appropriate rate of compensation for *amicus curiae*” (at paragraph 5).

The Supreme Court of Canada concluded that “if the assistance of an amicus is truly essential and the matter cannot be amicably resolved between the amicus and the Attorney General, the judge’s only recourse may be to exercise her inherent jurisdiction to impose a stay until the amicus can be found. If the trial cannot proceed, the court can give reasons for the stay, so that the responsibility for the delay is clear” (paragraph 76).

**CONCLUSION:**

An unrepresented accused can create significant problems for trial judges. It has been pointed out that a “judge must exercise great care not to descend from the bench and become a spectre at the accused’s counsel table, placing himself in the impossible position of being both advocate and impartial arbiter” (see *Phillips*, at paragraph 24). However, it is clear that a Canadian judge has a responsibility to provide assistance to an unrepresented accused.

As a result, the scope of the decision in *Breton* is troubling. It suggests that the duty of a trial judge to intervene to assist the unrepresented accused is an expansive one, including providing assistance to the accused in raising *Charter*-based arguments. It puts trial judges in a difficult if not untenable position. Presenting a *Charter*-based argument can be complex and often requires a thorough appreciation of evidence of which the trial judge will be unaware. It invites excessive intervention on behalf of the accused by the trial judge and the potential of the judge’s appearance of neutrality being brought into question by having provided “strategic advice” to the accused.

Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up Is Hard to Do: A Trial Judge’s Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges’ Journal. Judge Gorman’s work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.
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BECOME A SCOFLAW? by Judge Victor Fleming

Across
1 ___ up (arises)
6 Burden, as in court
10 Old late-night name
14 Jawaharlal of India
15 Underwriter’s concern
16 Therefore, in legalspeak
17 Scalia and Kagan, e.g.
18 Herb garden sprouter
20 Morse Code units
22 Key part of a settlement agreement
23 Honolulu palace
26 ___ on the bench (presided in court)
27 One reuniting in Providence, R.I., say
31 Spanish hands
33 Be worthy of
36 Western state capital
38 Game with “Draw Two” cards
39 Numbered rd.
40 Doesn’t act out
41 Ft. Collins campus (abbr.)
42 “Am ___ the green?” (query to a cad-
die)
43 Galileo’s muse
44 Caramel-topped dessert
45 Syrians and Egyptians, e.g.
47 Where to find pitchers and catchers
49 Utterance after an epiphany
51 Buds of Stan and Fran
52 Discount stores
56 Carbon compound
57 SOS alternative
59 Where JAG Corps officers may be
stationed
63 Utterance after an epiphany
64 “Stay in your ___!” [driver’s shout]
65 Knee-ankle connector
66 Sour-tasting
67 “___ Eyes” (1975 hit by the
Eagles)
68 Bergen alter ego

Down
1 Sanjay Gupta’s channel
2 “In Dreams” actor Stephen
3 Electrician’s unit
4 Like 4:00 a.m., say
5 “Once Is Not Enough” author
Jacqueline
6 Peepers, poetically
7 Peeples of “Fame”
8 Cold War participant, initially
9 Hits too high, as a golf shot
10 Old Spanish monetary
11 Vicinity
12 Gets mellower
13 ___ the bench (didn’t play in a
game)
19 Andean ruminants
21 More lofty
23 Two-nation peninsula south of
the Pyrenees
24 Closing argument deliverer
25 Women’s golf great Ochoa
28 Betty Ford Clinic forte
29 Former TV host Stewart
30 “The ___ made me do it!”
33 Centers of cells
33 Reduced, in a way
34 Auditory sensations
37 “SNL” alumnus Kevin
40 Grain measure
44 Works as a substitute
46 Performance for Anna Pavlova

Answers are found on page 52.
THE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL

The NCCRC, organized and funded in part by the Public Justice Center, is an association of individuals and organizations committed to ensuring meaningful access to the courts for all. Founded in 2003, its mission is to encourage, support, and coordinate advocacy to expand recognition and implementation of a right to counsel for low-income people in civil cases that involve basic human needs such as shelter, safety, sustenance, health, and child custody. At present, the NCCRC has over 300 participants and 200 partners in 40 states, all of whom are committed to exploring how the right to counsel in civil cases can best be advanced in their particular jurisdiction. It works to advance legislation in various jurisdictions, assist litigation, advise public officials, and has developed an extensive body of research and writing available at http://civilrighttocounsel.org/highlighted_work/publications#reflection

Want to know all about the statutes and cases in your state related to access to justice and civil right to counsel? Check http://civilrighttocounsel.org/map NCCRC is a great resource for important information.

SELF-REPRESENTED LITIGANTS NETWORK

The SRLN is a leading voice in the national movement for access to civil justice. It supports justice system professionals focused on the question of how best to reform all legal systems (courts, legal aid, the bar, and non-legal partners) so that self-represented litigants experience the courts (and indeed the legal system) as a consumer-oriented environment guided by the principles of equal protection and due process. SRLN is a resource center that provides toolkits, evaluation, implementation guidance and thought leadership. It connects and supports leaders throughout the country, and offers data and analysis for civil justice issues. Started in 2005, it is focused on building and maintaining a network of judges and others to work on the needs of the self-represented in civil courts. SRLN identifies, supports and evaluates innovative services and strategies to create a user-friendly legal system. It has marshalled scores of papers and publications including best practices for courts. https://www.srln.org/node/29/%E2%80%A2-best-practices-court-based-programs-self-represented-concepts-attributes-issues

BOOKS BY JUSTICE JOHN PAUL STEVENS—TREATMENT FOR TOUGH TIMES

When he resigned in 2011, Justice Stevens was the third longest serving Justice in American history—a period of 35 years. Currently, most commentators forecast the 2020 Term as one of high historical—and political—significance. Consequently, a growing number of judges look upon the nation’s legal landscape as mercenary, and lacking the balanced perspective of the formative past. Here are are two books by Justice Stevens, including one published shortly before his 2019 passing, that are guaranteed to reassure any jurist who is weary of sound-bite justice and worried about where we are headed.

Five Chiefs: A Supreme Court Memoir

This volume, published right after Stevens’ retirement in 2011, still resonates with relevancy today. Justice Stevens describes the inner workings of the Supreme Court and his personal experiences with the five Chief Justices with whom he served—Frederick Vinson, Earl Warren, Warren Burger, William Rehnquist, and John Roberts. He reminisces of being a law clerk during Vinson’s tenure; a practicing lawyer for Warren; a circuit judge and junior justice for Burger; a contemporary colleague of Rehnquist; and a colleague of current Chief Justice John Roberts. Along the way, he discusses his own views of some of the most significant cases that have been decided by the Court from Vinson, who became Chief Justice in 1946 when Truman was President, to Roberts, who became Chief Justice in 2005. The volume full of interesting anecdotes and stories about the Court, and is a unique and historically significant look at the highest court in the United States.

The Making of a Justice: Reflections on My First 94 Years

When Justice John Paul Stevens retired from the Supreme Court of the United States in 2010, he had authored more than 1,000 opinions. Such a prolific legacy was practically unequaled in the history of the Court. In The Making of a Justice, he remembers his extraordinary life, and recounts highlights, both professional and personal, about his long service. Appointed by President Gerald Ford and eventually retiring during President Obama’s first term, Justice Stevens has been witness to, and an integral part of, landmark changes in American society during some of the most important Supreme Court decisions over four decades. With stories of growing up in Chicago, his work as a naval traffic analyst at Pearl Harbor during World War II, and his early days in private practice, The Making of a Justice is a warm and fascinating account of Justice Stevens’s unique and transformative American life.

COVID-19 AND STATE COURTS

The National Center for State Courts is collecting information on a variety of ways that COVID-19 has impacted the courts. Just go to https://www.ncsc.org/ and you will see among other things, links to State Court COVID-19 websites and information on how states are dealing with jury trials and in-person proceedings.

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