

# **ACCESS TO JUSTICE**

*Assessing Implementation of  
Civil Gideon In Minnesota*



Minnesota State Bar Association  
Civil Gideon Task Force

December 2, 2011

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Report of the Minnesota State Bar Association Civil Gideon Task Force

I. FOREWORD

The Minnesota State Bar Association, in creating the Civil Gideon Task Force, added another chapter to Minnesota's long history of working to expand access to justice. Equal justice is integral to the state's history and embodied in its Constitution:

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws. (Minnesota Constitution, Art. I, Sec. 8)

The first Chief Justice of the Minnesota Supreme Court wrote: "The chief end of government is the protection of the rights of all – the bad no less than the good – and, even without a constitutional provision, every member of society may rightfully claim protection of his person and property. To deny it to any one member of society is an injury to the community at large..." *Davis v. Pierse*, 7 Minn. 13 (1862).

Where our system of justice is adversarial in nature, access to justice may often hinge on access to counsel. Two Minnesotans, University of Minnesota Law Professor Yale Kamisar and former Vice President Walter Mondale (then Minnesota Attorney General), were involved with the landmark case *Gideon v. Wainwright* (372 U.S. 335 (1963)), which extended the right to counsel in criminal matters. Mondale, who authored the *Gideon* amicus brief signed by 22 attorneys general in support of the expansion, addressed the 2009 Task Force Symposium on October 30, 2009, discussing access to civil counsel:

In truth, the criminal /civil distinction is often of wholly theoretical interest when you're about to be deprived of your children, committed to a mental institution, foreclosed from your home, fired from your job, or a vast range of other civil proceedings, many of which are being pressed by the economic crisis that is hitting poor people, and all of us today – that could have life or death consequences, even though they're called just civil.

Even before the Task Force was created, the MSBA had already taken a stand on the right to civil counsel in co-sponsoring American Bar Association (ABA) Resolution 112A, which passed the ABA House of Delegates unanimously in 2006. The resolution urged "federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody as determined by each jurisdiction."

Despite that stance as precedent, the work of the Task Force was challenging, and made more complex by historic state budget deficits which gave rise to concerns about scarcity of resources and additional financial burdens on government entities. But the extraordinary and dedicated Task Force members were up to the challenge. They realized that economic hard times were adversely

impacting the lives of low income Minnesotans, too, and that critical funding for the state's civil legal services providers was reducing just as the demand for their services was increasing. Task Force members grasped the urgency of the growing numbers of unrepresented low income persons threatened with inappropriate and avoidable loss of housing, government benefits, custody, healthcare and protection from domestic violence.

This Report is the product of good work by the diverse Task Force members, representing a broad continuum of legal professionals. Over 60 persons served on the Task Force between 2008 and 2011, including six representatives of the judicial branch, among them a retired Supreme Court Justice and Chief Justice. There were private attorneys with excellent experiences in large and small firms and solo practice; public law practitioners from government law offices, legal services organizations, and public defense; law school representatives; and others. They contributed much time and effort researching, surveying, analyzing and exchanging ideas and information on the important subject of whether qualified individuals have or should have a legal right to counsel in certain non-criminal cases. Open and frank discussions were encouraged and common.

This Report is not intended as a criticism of persons or government agencies which currently appear opposite unrepresented parties. The question of whether and when someone with insufficient means should have a legal right to counsel turns much more on the American principle that everyone should be accorded meaningful and equal rights under the law.

A necessary and inevitable reality of this Report and any similar time-consuming project is that some of the research and factual findings are now likely to be mildly outdated. Nevertheless, based on the trends suggested by the data and other information in this Report, the need for a right to counsel in certain civil cases is probably even more compelling than it was at the time of the original research. For example, the 13.9% Congressional Conference Committee 2012 budget cuts to the Legal Services Corporation occurring in November had not been finally approved by the Report deadline, and were not included in the body of the Report.

Although "Equal Justice under Law" remains an ideal chiseled on the facade of the United States Supreme Court and is not yet a reality for Minnesota's low income citizens, the efforts of the Task Force continue Minnesota's traditional movement toward greater access to justice. We may not yet see the end of the road ahead, but the way has been illuminated by the outstanding, bright and committed members of this Task Force, with whom it was a pleasure to serve.

### **Acknowledgments**

In addition to Task Force members who contributed their considerable time, talent, insight and input, other individuals and organizations furthered Task Force work. Our sincere appreciation goes out to them all.

Breia Schleuss and Jennifer Miernicki volunteered their exceptional report writing and editing skills over many months to form this document from separate Committee reports and materials.

Among the Minnesotans who helped create or shape the Task Force were MSBA Presidents Brian Melendez, Michael Ford and Leo Brisbois; and MSBA Legal Assistance to the Disadvantaged Committee Co-Chairs, Katie Trotzky and Patrick Burns. For the Task Force Symposium developed by the Judiciary Committee, special thanks go to the University of St. Thomas School of Law and its staff for providing the setting and support, to former Vice President Walter Mondale for his historical and current observations on access to counsel, and to the panel of clients and advocates who compellingly conveyed the importance of attorneys through their personal legal experiences.



Helen M. Meyer, Associate Justice of the Minnesota Supreme Court, shared findings of the Children's Justice Initiative, Parent Legal Representative Workgroup. Daniel G. Johnson and Jessica Barnhart served as Task Force law clerks through the Minnesota Justice Foundation. The law firms of Dorsey & Whiney, Faegre & Benson, and Fredrickson & Byron made varied and valued contributions of research, resources, space and support.

Nationally recognized experts on access to justice issues who donated their time to inform, enlighten and inspire Task Force members included: Michael Greco, former American Bar Association (ABA) President and current ABA Center for Human Rights Chair; Earl Johnson, Justice, California Court of Appeal (Ret.), and renowned Civil Gideon scholar, teacher and author; Laura Abel, Deputy Director, Justice Program, Brennan Center for Justice, NYU School of Law; Debra Gardner, Coordinator, National Coalition for a Civil Right to Counsel; Jayne Tyrell and Mary Ryan, Co-Chairs, Boston Bar Association Task Force on Expanding the Civil Right to Counsel; and John Pollock, ABA Section of Litigation Civil Right to Counsel Fellow.

The Task Force is particularly grateful to the Minnesota State Bar Association for its commitment and leadership in expanding access to justice, and for its patient and unwavering support of Task Force work. Steve Hirsh, Access to Justice Director, was invaluable and integral to Task Force success.

Mary D. Schneider and Kent G. Harbison  
*Chairs, MSBA Civil Gideon Task Force*

## II. TABLE OF CONTENTS

I.	FOREWORD .....	ii
II.	TABLE OF CONTENTS.....	v
III.	EXECUTIVE SUMMARY.....	1
IV.	REPORT: ASSESSING IMPLEMENTATION OF CIVIL GIDEON IN MINNESOTA.....	3
A.	Assessing the Justice Gap and the Unmet Legal Needs of Minnesotans .....	3
1.	Sources of Data .....	3
2.	Findings .....	5
B.	Assessing the Potential Scope of Civil Gideon in Minnesota .....	8
1.	Defining Civil Gideon and the Scope of Civil Legal Needs to be Addressed.....	8
2.	Financial Eligibility for Beneficiaries.....	9
3.	Claims Eligibility Requirements .....	10
C.	Implementing Civil Gideon in Minnesota: Considerations for Structuring a Civil Gideon Legal Services Provider .....	10
1.	Existing Models of Legal Services Providers .....	10
2.	Additional Considerations for Structuring a Civil Gideon Legal Services Provider .....	14
D.	Implementing Civil Gideon: Expansion of a Civil Right to Counsel Through Litigation and Legislation.....	15
1.	Examples from Other States.....	16
2.	Potential Areas of Expansion in Minnesota .....	19
E.	Alternative and Interim Means of Addressing the Justice Gap .....	22
V.	RECOMMENDATIONS .....	24
1.	Raise Awareness and Promote Dialogue about Establishing a Right to Civil Counsel in Minnesota.....	24
2.	Determine and Monitor the Specific Civil Legal Needs to be Addressed by Civil Gideon in Minnesota by Measuring the Justice Gap at Regular Intervals. ....	24
3.	Establish Financial and Other Eligibility Requirements.....	24
4.	Design Civil Gideon Service Delivery to Integrate Within the Existing Framework of Legal Services Providers.....	25
5.	Establish a Method for Evaluating Civil Gideon and its Services Providers. ....	25
6.	Determine Potential Costs, Cost Savings and Funding Opportunities Associated with Civil Gideon. ....	25
7.	Identify and Support Strategic Opportunities to Establish Civil Gideon Through Case-by-Case Litigation and Targeted Pilot Projects.....	26

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8. Identify and Support Strategic Opportunities to Explore Expansion of Civil Gideon Through Statewide Legislation.....	26
9. Improve Upon Current Alternatives. ....	26
VI. APPENDICES.....	28
APPENDIX A.....	29
Task Force Mission, Members and Contributors .....	29
APPENDIX B .....	32
The Right to Civil Counsel Under Minnesota Law.....	32
APPENDIX C .....	46
Civil Gideon Legislation and Rulemaking Initiatives in Other Jurisdictions .....	46
APPENDIX D.....	53
Surveys, Statistics and Additional Data Obtained by the Task Force .....	53
APPENDIX E .....	70
Resolutions, Remarks and Other Materials .....	70

### III. EXECUTIVE SUMMARY

In December 2007, the Minnesota State Bar Association (“MSBA”) resolved to form a fact-finding task force to undertake two initiatives: first, to analyze whether there exists a basis for establishing a civil right to counsel in the State of Minnesota and, second, to explore how such a right could affect the delivery of legal services and the public defense, county attorney and judicial systems in Minnesota.

The MSBA Civil Gideon Task Force convened in 2008 and undertook a multi-pronged study of a civil right to counsel (often referred to as “Civil Gideon”) in Minnesota. This Report presents a summary of information collected by the Task Force regarding:

- the existing unmet civil (*i.e.*, non-criminal) legal needs of low-income Minnesotans;
- the potential scope of Civil Gideon, including analysis of (a) whether a right to civil legal counsel should attach in all civil cases or only cases involving basic rights and (b) the financial and other eligibility requirements that may be needed for implementation of a sustainable and targeted expanded right to civil legal counsel;
- the strengths and drawbacks of existing legal services provider models, identifying that one of these models (or a combination thereof) is likely to be the most efficient means to support Civil Gideon;
- recent legislation, case law developments, pilot projects and initiatives in other states concerning Civil Gideon, which have largely focused on the rights of children and parents and, in certain states, have repealed previously mandated (albeit limited) rights to counsel; and
- potential alternative or interim means of addressing the unmet legal needs of low-income Minnesotans, which a broadened right to counsel in civil cases would attempt to assuage.

In light of the information gleaned from the studies and research conducted, the Task Force makes the following findings and recommendations for consideration by the Minnesota State Bar Association:



## FINDINGS

1. The unmet legal needs of low-income Minnesotans are significant and increasing; simultaneously, the already-limited resources available to meet those needs are being steadily eroded.
2. Minnesota is ready to take the next step to address this important issue by exploring a right to publicly-funded civil counsel in matters affecting basic needs or rights.
3. A civil right to counsel is most critical in selected legal areas where basic human needs are at stake, including shelter, safety, child custody, health and sustenance.
4. Development, implementation and evaluation of a sustainable civil right to counsel in Minnesota require thoughtful long-range planning, which should be commenced in spite of current economic conditions.

## RECOMMENDATIONS

1. Raise awareness and promote dialogue about establishing a right to publicly-funded civil counsel in Minnesota.
2. Determine and monitor the specific civil legal needs to be addressed by Civil Gideon in Minnesota by measuring at regular intervals the gap between the unmet civil legal needs of low-income individuals and the services which they receive.
3. Establish financial and other eligibility requirements for receipt of publicly-funded Civil Gideon legal services.
4. Design delivery of Civil Gideon legal services to integrate within the existing framework of Minnesota's legal services providers (including contract attorney panels, pro bono and volunteer lawyer programs and court-appointed public defender systems).
5. Establish a method for evaluating Civil Gideon and its legal services providers.
6. Identify potential costs, cost savings and funding opportunities associated with Civil Gideon.
7. Identify and support strategic opportunities to establish Civil Gideon through case-by-case litigation and targeted pilot projects.
8. Identify and support strategic opportunities to explore expansion of Civil Gideon through statewide legislation.
9. Improve upon current alternatives available to Minnesotans through simplified court procedures, revised regulations, expanded legal forms and informational resources, promotion of alternative dispute resolution mechanisms and maximization of existing pro bono and volunteer opportunities.

## IV. REPORT: ASSESSING IMPLEMENTATION OF CIVIL GIDEON IN MINNESOTA

### A. Assessing the Justice Gap and the Unmet Legal Needs of Minnesotans

In Minnesota, as in other jurisdictions<sup>1</sup>, there exists a growing gap (commonly referred to as the “Justice Gap”) between the civil legal needs of low-income<sup>2</sup> people and the legal assistance they receive. These unmet needs involve civil issues relating to health, housing, safety, sustenance and family rights that are determined without the advice or assistance of legal counsel.

To assess the scope of the Justice Gap in Minnesota, the Task Force obtained quantitative and qualitative data through studies, surveys, interviews and court observation. While the data includes some approximations and suppositions as to how best to measure Minnesota’s unmet civil legal needs, the Task Force found evidence of the existence of the Justice Gap and its effect on those seeking protection of critical civil rights.<sup>3</sup>

#### 1. Sources of Data

Data was obtained from the following sources:<sup>4</sup>

- § Legal Services Corporation (LSC) and Mid-Minnesota Legal Assistance: For two months beginning March 16, 2009, all legal aid programs federally-funded by the LSC were required to document “client turn-down” information (*i.e.*, the number of people seeking assistance who could not be served due to insufficient program resources).<sup>5</sup> In addition, Mid-Minnesota Legal Assistance, a large non-LSC provider, voluntarily participated in the two-month tracking effort and provided the Task Force with statistics covering every Minnesota county.
- § Minnesota Judicial Branch: The Task Force requested data from the Research and Evaluation Task Force Unit of the State Court Administrator’s Office about the number of cases in which one or both parties did not have attorney representation listed in the court case management system (MNCIS). Data was provided for all 2008 case filings. The Judiciary Committee of

<sup>1</sup> Studies conducted in Virginia, Utah, Wisconsin, Nevada, Alabama, Georgia and New Jersey indicated that less than one in five legal needs of low-income persons is assisted by counsel of a private or legal aid lawyer, even when those legal needs were considered “very important”, “most serious” or “caus[ing] trouble” by the household experiencing it. Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, 17 (2005, updated September 2009) (hereinafter *LSC Justice Gap Report*).

<sup>2</sup> For this Report, the MSBA defined “low-income” as ranging from 125 percent to 200 percent of the federal poverty guidelines, which matches the range eligibility ceilings of many legal aid programs. According to the 2010 U.S. Census poverty estimates, 806,575 Minnesotans live at less than 125 percent of poverty and an additional 618,430 “working poor” are between 125 percent and 200 percent. This Report uses statistics from both groups. U.S. Census, American Community Survey 1-Year Estimates, C17002 Ratio of Income to Poverty Level in the Past 12 Months: <http://www.census.gov/acs/www/> (last visited September 21, 2011).

<sup>3</sup> In a housing court study, 22 percent of represented tenants had final judgments against them as compared with 51 percent of tenants without legal representation. Carroll Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results from a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 423-26 (2001). A study of represented and unrepresented women in domestic violence protective order proceedings found that 83 percent of complainants with attorneys experienced success in obtaining a protective order as compared to only 32 percent of complainants without an attorney. Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. Gender Soc. Pol’y & L. 499, 511-12 (2003) (“2003 Murphy Study”). In Minnesota, domestic violence advocates work with women seeking orders for protection, who are then able to properly represent themselves, thereby resulting in a higher grant rate for orders for protection than reported in the 2003 Murphy Study.

<sup>4</sup> Copies of certain of the statistics, surveys and other information collected from these sources are included in Appendix D to this Report; see also charts of summarized data included at Part A.2 *infra*.

<sup>5</sup> [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

the Task Force also coordinated an online survey of 125 state trial judges representing each of the ten judicial districts in 2009. The judges ranked the types of court proceedings in which they believed legal representation was most important, and they provided feedback about potential methods for narrowing the Justice Gap.

- § Justices, Experts and Legal Aid Professionals: On October 30, 2009, former Vice President Walter Mondale, retired Chief Justice of the California Court of Appeals Earl Johnson, and other experts and legal aid attorneys participated in a symposium co-hosted by the University of St. Thomas School of Law and the Judiciary Committee of the Task Force entitled “Civil Gideon: Should the Trumpet Blare Again.” The symposium assessed the historical development of a civil right to counsel in other countries, expansion of access to counsel and the implications of Civil Gideon in the United States, and the current status of access to counsel in Minnesota.<sup>6</sup>
- § Minnesota Attorneys: Ten thousand Minnesota attorneys were contacted and asked to participate in a survey regarding the need for expanded legal services for low-income Minnesotans and the strengths and weaknesses of the four existing legal services providers. Of the attorneys who were contacted, 547 (5.5 percent) responded.<sup>7</sup>
- § Domestic Violence Professionals: The Task Force conducted interviews with advocates and other domestic violence professionals in all regions of Minnesota. Thirty-one people participated in the interviews and provided their perspective on the impact of not having attorney representation in order for protection cases.
- § Unrepresented Litigants: In an effort to obtain qualitative information from litigants themselves, the Task Force designed and administered an informal online survey posted on [www.lawhelpmn.org](http://www.lawhelpmn.org), a website visited by many unrepresented litigants trying to find basic legal information. Thirty-six responses were received in the two months the survey was posted. In addition, a panel of low-income, unrepresented litigants shared their insights during the “Civil Gideon: Should the Trumpet Blare Again” symposium discussed above.
- § WATCH: The Task Force partnered with WATCH, a Minnesota court-monitoring organization, to have volunteers observe Order for Protection hearings in Hennepin County. Sixty cases were monitored; both parties appeared *pro se* in 49 of those cases.

In addition, the Task Force analyzed studies that assessed the Justice Gap in other states. In Wisconsin, for example, a formal study indicated that 45 percent of low-income households reported a need for legal assistance in at least one area of law.<sup>8</sup> Of the households that needed assistance, 27 percent received help from a lawyer for at least one identified legal need and 12 percent received help for all of their legal needs.<sup>9</sup> By applying the same data to the census figures for Minnesota, the Task Force estimates that more than 450,000 low-income households do not receive the assistance of counsel to address some or all of their legal needs.<sup>10</sup>

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<sup>6</sup> See Agenda, “Civil Gideon – Should the Trumpet Blare Again?” attached at Appendix D-4. For a video of the symposium sessions, please contact Steve Hirsh of the Minnesota State Bar Association, 600 Nicollet Mall, Minneapolis, Minnesota 55402 ((612) 333-1183 and (800) 882-6722).

<sup>7</sup> See Attorney Survey at Appendix D-3; see also Part IV.C, *infra*.

<sup>8</sup> Access to Justice Study Committee, State Bar of Wisconsin, *Bridging the Gap: Wisconsin’s Unmet Legal Needs* 1 (2007) (defining low-income as being at or below 200 percent of the federal poverty guidelines).

<sup>9</sup> *Id.* at 7.

<sup>10</sup> These calculations are based on the 2010 poverty estimates of the number of Minnesotans living at or below 200 percent of the federal poverty guidelines. The census estimates 1,425,005 Minnesotans lived at or below 200 percent of poverty in 2010. See U.S. Census, American Community Survey 1-Year Estimates, *supra* note 3.

## 2. Findings

In Minnesota, and nationally, legal aid services do not have enough resources to serve all who seek and qualify for counsel. For approximately every eligible person served, one eligible person is denied assistance. While the statistics below identify only income-eligible persons with meritorious claims, other persons may have had legal needs but did not contact a participating program.

National LSC “Client Turn-Down” Data<sup>11</sup>

Case Type	Unable to Serve Twelve-Month Projections (2009)	Number of Cases Closed Over 12 Months (2008)
Consumer	98,214	108,404
Education	8,874	6,839
Employment	42,264	26,896
Family	391,038	312,046
Government Benefits	71,466	29,059
Juvenile	18,780	15,143
Housing	135,462	229,512
Miscellaneous	178,278	61,256
<b>TOTAL</b>	<b>944,376</b>	<b>889,155</b>
Unable to Serve 1.06 Eligible Clients for Every 1 Served		

Minnesota “Client Turn-Down” Data<sup>12</sup>

Case Type	Unable to Serve Twelve-Month Projections (2009)	Number of Cases Closed Over 12 Months (2008)
Consumer	2,922	4,002
Education	264	452
Employment	2,046	904
Family	7,158	7,987
Government Benefits	2,130	5,265
Juvenile	168	497
Housing	4,488	9,570
Miscellaneous	8,952	5,294
<b>TOTAL</b>	<b>28,128</b>	<b>33,971</b>
Unable to Serve 0.83 Eligible Clients for Every 1 Served		

Minnesota’s legal aid service providers are able to counsel more persons than are served nationally. Due to lack of resources, however, they still turn away almost as many eligible clients as they served.

<sup>11</sup> Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 11 (2005, updated September 2009) (reporting statistics for 2009).

<sup>12</sup> Minnesota programs participating in the 2009 data collection included Anishinabe Legal Services, Central Minnesota Legal Services, Legal Aid Service of Northeastern Minnesota, Legal Services of Northwest Minnesota, Mid-Minnesota Legal Assistance (voluntarily participant) and Southern Minnesota Regional Legal Services.



While the above data was collected in 2009, more recent information suggests that fewer resources are now available to assist low-income persons with their legal needs. From 2008 to 2010, the number of Minnesotans eligible for these legal services increased by 20.6 percent.<sup>13</sup> During that time, the number of civil legal services attorneys in the state declined by 12.4 percent as a result of funding cuts which prevented both the hiring of attorneys to fill open positions and the creation of new job openings to address existing needs.<sup>14</sup>

Many individuals have no alternative but to represent themselves in court. In Minnesota, the online Self-Help Center offered by the Minnesota Judicial Branch has approximately 300,000 “hits” per year, and 10,000 people in 2009 were served by its statewide hotline.<sup>15</sup> Despite this assistance, many litigants reported frustration with their ability to proceed without counsel. One online survey respondent stated, “The whole process is impossible and confusing. I don’t have a clue how to navigate the court system.”<sup>16</sup> Judges also reported that unrepresented parties often do not present necessary or sufficient evidence for the judges to make fully informed decisions, and most *pro se* parties are unfamiliar with the law.<sup>17</sup> Judges commented on the difficulty in seeking justice and assuring fairness when one or more parties appeared without legal representation.<sup>18</sup>

For example, in family law matters, at least one party is unrepresented by counsel in over half of all cases.<sup>19</sup> A detailed breakdown of the *pro se* percentages in Minnesota family courts is included below.

*Pro se* Frequency for Minnesota  
Family Case Filings in 2008<sup>20</sup>

Case Type (Number of Filings)	Both Parties <i>Pro se</i>	One Party Represented/Other Party <i>Pro se</i>	Both Parties Represented
Dissolution with Children (8,491)	21 percent	36 percent	43 percent
Dissolution without Children (8,031)	45 percent	31 percent	24 percent
Domestic Violence (10,832)	83 percent	10 percent	7 percent
Child Support (15,815)	21 percent	70 percent	9 percent
Other Family (3,018)	38 percent	31 percent	31 percent

<sup>13</sup> Census estimates show 668,567 Minnesotans at or below 125 percent of poverty in 2008 and 806,575 in 2010. See U.S. Census, American Community Survey 1-Year Estimates, *supra* note 3.

<sup>14</sup> The number of civil legal services attorneys is taken from the Legal Services Advisory Committee (LSAC) grant applications, which report 206.775 full-time employees in 2008 and 181.13 full-time employees in 2010. Applications are on file with the Minnesota State Court Administrators Office.

<sup>15</sup> Minnesota Judicial Council, *Priorities and Strategies for Minnesota’s Judicial Branch: Focus on the Future* 10 (FY2010 - FY2011). Additional statistics were provided by the Statewide Self Help Center Staff. Information on file with the Minnesota State Court Administrators Office.

<sup>16</sup> Anonymous respondent, Court Party Survey, initiated online September 2009 by the Unmet Legal Needs Committee of the Task Force.

<sup>17</sup> Results of Judges’ Survey; see Judges’ Survey at Appendix D-1.

<sup>18</sup> Results of Judges’ Survey; see Judges’ Survey at Appendix D-1; see also “Self Representation Hurting Individual Cases Say Judges,” American Bar Association, *Around the Bar*, July 12, 2010 (noting that, in a national survey of trial judges, 60 percent said that fewer parties are being represented by lawyers and 62 percent reported that parties are negatively impacted by not being represented, which impact is exemplified by a failure to present necessary evidence (94 percent), procedural errors (89 percent), ineffective witness examination (85 percent), failure to properly object to evidence (81 percent) and ineffective argument (77 percent)).

<sup>19</sup> MNCIS Case Management System.

<sup>20</sup> *Id.*

As shown above, domestic violence cases have the highest percentage of those without counsel. This is due, in part, to the fact that orders for protection sought in these cases may be issued without a hearing,<sup>21</sup> and forms for seeking orders for protection are readily available from the courts and advocacy services.<sup>22</sup> Although there are order for protection cases in which an attorney may not be necessary for either the petitioner or the respondent to get a fair result, these cases may also involve custody matters and parenting time decisions. When those issues arise, the lack of an attorney may negatively affect the parties and their children.

Judges are particularly concerned about lack of representation in contested family law cases where children are affected,<sup>23</sup> as well as other cases in which there exists a strong power differential between the parties. When asked to rank the types of cases in which legal representation is “usually” or “always” necessary, judges noted the following:

Case Types with Greater Need  
for Legal Representation<sup>24</sup>

Type of Case	Percentage of Judges Responding that Legal Counsel is Necessary
Dissolution of Marriages with Children	91.1 percent
Employment Discrimination	90.5 percent
Contested Child Custody	89.3 percent
Wrongful Employment Termination	82.4 percent

Case Types with Lesser Need  
for Legal Representation<sup>25</sup>

Type of Case	Percentage of Judges Responding that Legal Counsel is Necessary
Debt Collection	23.0 percent
Harassment Restraining Orders (General)	20.2 percent
Landlord/Tenant Matters	21.5 percent

These results are consistent with the general view of the Task Force that civil legal matters involving basic needs, children, discrimination, a person’s livelihood or a complex area of the law are those in which people may most be benefited by legal counsel.<sup>26</sup>

Nonetheless, the feedback and other data collected by the Task Force indicated concern about the lack of funding and other resources available to provide additional civil legal counsel, particularly when resources available to fund counsel in constitutionally mandated criminal cases are scarce.<sup>27</sup>

<sup>21</sup> Minn. Stat. Ann. § 518B.01(5) (West 2010).

<sup>22</sup> The development of accessible forms and the offering of advocates and support services may help those with other unmet legal needs (whether or not within the scope of domestic violence cases).

<sup>23</sup> Results of Judges’ Survey; see Judges’ Survey at Appendix D-1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See also Minnesota State Bar Association, *Overcoming Barriers that Prevent Low-Income Persons from Resolving Civil Legal Problems: A Study Prepared for the Legal Assistance to the Disadvantaged Committee of the Minnesota State Bar Association*, 13 (Hannah Lieberman Consulting, LLC/John A. Tull & Associates eds., 2011) (noting that low-income interview respondents identified civil legal needs in the areas of housing, healthcare, employment, discrimination, domestic violence and family issues, among others) [hereinafter *Overcoming Barriers*].

<sup>27</sup> Results of Judges’ Survey; see Judges’ Survey at Appendix D-1.

Given the current economic environment and budgetary difficulties at the state and county levels, provision of publicly-funded civil legal counsel may require additional consideration before implementation in Minnesota, although pilot projects and studies undertaken in other states – such as California, Massachusetts and Texas – indicate that “providing counsel in all or any of the ‘five basic human needs’ categories...significantly reduces expenses for a state, and produces substantial economic and social benefits for the community, while simultaneously freeing up resources for court budgets already stretched too thin by chronic underfunding and the recession.”<sup>28</sup>

## **B. Assessing the Potential Scope of Civil Gideon in Minnesota**

Several options exist for determining the extent to which additional publicly-funded legal services may be offered to low-income individuals in Minnesota.

### *1. Defining Civil Gideon and the Scope of Civil Legal Needs to be Addressed*

The term “Civil Gideon,” while frequently used in legal discussions of a civil right to counsel, has its genesis in the 1963 United States Supreme Court’s decision in *Gideon v. Wainwright*,<sup>29</sup> where the Supreme Court noted:

In our adversary system of criminal justice, any person hauled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided to him. This seems to us an obvious truth.<sup>30</sup>

In *Gideon*, the Supreme Court held that indigent defendants have a constitutional right to representation in criminal cases, at no cost to the defendant. The term “Civil Gideon” was later created to refer to a potential right of low-income individuals to publicly-funded counsel in civil cases. “Civil Gideon” has also been used to describe the national movement – comprised of attorneys, professionals, non-profit organizations and others – to expand awareness of the issues faced by vulnerable individuals forced to proceed without access to legal counsel in civil cases.

As an initial premise, clarity in articulating and describing a “civil right to counsel” is essential to the promotion of an informed public debate. Civil Gideon is sometimes posed and understood as whether counsel should represent civil litigants in important matters affecting basic rights, a question that a majority of respondents would probably answer in the affirmative. The clearer framework for considering Civil Gideon is whether low-income civil litigants should have the right to be represented by counsel at public expense, a question that typically generates more mixed or ambivalent responses. This distinction is crucial, and will be especially important in generating informed support from those who may not fully understand the implications of the phrase “Civil Gideon”.

In framing the debate, a decision must be made about the nature and scope of the right to counsel that may be created. Two main alternatives are most often proposed: creation of a broad, sweeping right to counsel in civil matters, or creation of a right to counsel limited to specific, defined civil matters that affect basic rights. The matters most often defined as “basic rights”

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<sup>28</sup> Letter of Michael S. Greco, Past President of the American Bar Association, to Clerk of the Supreme Court of Wisconsin, September 9, 2011, regarding Wisconsin Supreme Court Rule Petition 10-08 [hereinafter *Greco Letter*] (specifically identifying various examples of cost savings which have been identified in Florida, Virginia, Wisconsin and Massachusetts), a copy of which is attached to this Report at Appendix E-3.

<sup>29</sup> 372 U.S. 335.

<sup>30</sup> *Id.* at 344.

include shelter, health, child custody, sustenance and safety.<sup>31</sup> Critical to an identification of the kinds of matters that should entitle low-income clients to representation at public expense must be a thoughtful analysis of the interests at stake. The Boston Bar Association Report, for instance, included in its analysis matters in which there exists a “dramatic power imbalance” between the low-income client and the adverse party, and proceedings in which a civil matter relates to a criminal matter in which deprivation of liberty may occur.<sup>32</sup> The Maryland Access to Justice Commission recommended a right to counsel at public expense in adversarial proceedings where basic human needs are at issue, such as those involving shelter, sustenance, safety, health or child custody.<sup>33</sup> Minnesota trial judges, as noted above, also emphasized matters involving child custody, sustenance and other matters in which there existed a power differential between the parties.<sup>34</sup>

## 2. *Financial Eligibility for Beneficiaries*

Debate on the availability of civil legal counsel at public expense will necessarily involve considerations of financial eligibility of individual clients. While existing delivery models already screen for financial eligibility, there are multiple levels at which clients are deemed eligible or ineligible for services.<sup>35</sup> Any proposal to create additional rights must clearly address what the financial eligibility standards will be and how they will be administered. The standards must also be perceived as fair.

Other practical considerations in establishing a civil right to counsel include clear definition of any eligibility standards related to client demographics, such as age or disability, and clear descriptions of limitations on the types of legal services encompassed in the right to civil counsel. These might include a right to counsel at trial, but not on appeal, or a right to counsel in administrative proceedings but not on appeal to the district court.<sup>36</sup>

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<sup>31</sup> See American Bar Association, House of Delegates Resolution 112A (Aug. 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (identifying these matters as those in which a right to counsel should be afforded to low-income clients); American Bar Association, Basic Principles of a Right to Counsel in Civil Legal Matters (Aug. 2010), available at [www.abanow.org/](http://www.abanow.org/) (defining the categories as follows: “shelter” includes a person’s or family’s access to or ability to remain in a dwelling, and the habitability of that dwelling; “sustenance” includes a person’s or family’s ability to preserve and maintain assets, income, or financial support, whether derived from employment, court ordered payments based on support obligations, government assistance including monetary payments or “in-kind” benefits (e.g., food stamps), or from other sources; “safety” includes a person’s ability to obtain legal remedies affording protection from the threat of serious bodily injury or harm, including proceedings to obtain or enforce protection orders because of alleged actual or threatened violence, and other proceedings to address threats to physical well-being; “health” includes access to health care for treatment of significant health problems, whether the health care at issue would be financed by government programs (e.g., Medicare, Medicaid, VA, etc.), financed through private insurance, provided as an employee benefit, or otherwise; and “child custody” embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.).

<sup>32</sup> See Boston Bar Association, *Gideon’s New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*, September 2008 (identifying asylum, immigration detention, civil contempt, elder guardianship, and certain juvenile delinquency matters as areas in which the right to counsel should exist.).

<sup>33</sup> See Maryland Access to Justice Commission, *Implementing a Civil Right to Counsel in Maryland*, 2011, available at [http://www.courts.state.md.us/mdatjc/pdfs/implementing\\_acivilrighttocounselinmd2011.pdf](http://www.courts.state.md.us/mdatjc/pdfs/implementing_acivilrighttocounselinmd2011.pdf) (noting that “Limiting the right to counsel to basic human needs cases strikes a balance between resource constraints and the goal of improved well-being for all Marylanders.”).

<sup>34</sup> See Part A, *supra*, and *Overcoming Barriers*, *supra* note 27.

<sup>35</sup> See *supra* note 3.

<sup>36</sup> See Maryland Access to Justice Commission, *supra* note 34 (recommending that the right to publicly funded civil counsel would be tempered by the screening decision of the provider or administering agency. An otherwise eligible person would consult with the provider to determine what, if any, legal services they needed and to which they would thus be entitled. The individual could appeal that decision to the administrative agency.).



### 3. *Claims Eligibility Requirements*

Minnesota may also consider screening the legal matters of clients to be assisted by publicly-funded counsel. Existing legal services providers differ in their approaches. Some legal services providers decline to represent otherwise financially eligible clients on the basis that their cases lack merit (such as legal aid offices and pro bono attorneys), while other providers do not or cannot (such as public defenders). The public debate over Civil Gideon may include discussion of whether to screen matters that are without merit or that can objectively be seen as abusive of the delivery system.

These and other practical, political, legal, economic and social factors should be considered in the continuing discussion of whether to implement Civil Gideon in Minnesota and the scope of the civil legal services to be provided.

## C. **Implementing Civil Gideon in Minnesota: Considerations for Structuring a Civil Gideon Legal Services Provider**

### 1. *Existing Models of Legal Services Providers*

Minnesota currently provides legal services to low-income clients through four delivery models: legal services programs, contract attorney panels, law firm pro bono and other volunteer lawyer programs, and court-appointed public defender systems. Each of these models provides an example of how Civil Gideon may be similarly structured and implemented.

Although the following recommendation does not foreclose the adoption of new delivery models, the Task Force recommends that use of one of the existing models, or a combination of these models, is the most efficient means of delivering legal services mandated under a civil right to counsel. Proponents of Civil Gideon will need to identify which characteristics of these models are most important when developing a service delivery model, and which system weaknesses will most hamper successful implementation of a civil right to counsel. Below is a summary of strengths and weaknesses of the four existing delivery models, as perceived by the Task Force and other Minnesotans who participated in a survey and a series of interviews.<sup>37</sup>

#### A. *Legal Services Programs*

Low-income clients in Minnesota are served by numerous legal services programs. Most prominent are the member programs of the Minnesota Legal Services Coalition, including Legal Services of Northwest MN, Legal Aid Service of Northeastern MN, Southern MN Regional Legal Services, Mid-Minnesota Legal Assistance, Central MN Legal Services, Anishinabe Legal Services and Judicare of Anoka County. Other legal services agencies also provide a wide spectrum of legal services across the state, often targeted at specific client groups or legal issues, such as the Children's Law Center of Minnesota, Immigrant Law Center of Minnesota, Tubman

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<sup>37</sup> The Task Force developed and circulated a survey to obtain feedback as to the strengths and weaknesses of the four delivery models. A copy of the survey is included in Appendix D-3 hereto, together with tabulated results. Of the 10,000 recipients of the survey, 547 (or approximately 5.5 percent) responded. Committee members then conducted individual follow-up interviews to supplement the survey responses.

(formerly known as the Harriet Tubman Center), Minnesota Aids Project and Indian Child Welfare Law Center.<sup>38</sup>

All of these programs are funded through a combination of public and private support. The Legal Services Advisory Committee (LSAC) makes grants to legal services and alternative dispute resolution programs serving low-income clients from the following funds: funds appropriated by the Minnesota Legislature, a portion of attorney registration fees, IOLTA revenue<sup>39</sup> and a *cy pres* endowment dedicated to civil legal services.<sup>40</sup> The programs funded by LSAC serve every county in Minnesota and over 50,000 low-income clients statewide as of 2010.<sup>41</sup> Most of the state's legal services programs also solicit support from area foundations, law firms, the business community and individual donors.

Minnesota is also served by agencies that have adopted missions relating to increased access to justice. These include the Legal Services Coalition, the Minnesota State Bar Association Access to Justice Director and the Committee on Legal Assistance to the Disadvantaged (LAD), the Legal Services Statewide Planning Committee and the Minnesota Loan Repayment Assistance Program.

The perceived strengths of legal services programs include expertise in poverty law issues and high staff dedication to the mission of providing legal representation to low-income clients. As the staff attorneys are engaged full-time in the representation of eligible low-income clients, there are few conflicts with billable clients or matters. The legal service programs coordinate well with the private bar, and they have a strong, established presence in Minnesota.

The primary weakness of legal services programs relates to instability of funding. Funders typically impose restrictions on the types of services that can be provided, including the types of cases and the clients that can be served. An overall lack of resources limits the programs offered by these legal services providers.

### *B. Contract Attorney Panels*

Attorney panels are typically comprised of private lawyers who have acquired training and expertise in the relevant subject matter and provide legal representation to eligible clients for an hourly, monthly or flat fee specified in the contract. The lawyers are not public employees and typically maintain a private practice independent of their work on the contract panel. The protocol for appointment of panel attorneys is often determined by a local district court.<sup>42</sup>

Minnesota has some experience with the use of contract attorney panels, primarily in matters in which the provision of counsel is statutorily mandated. These include paternity matters,<sup>43</sup>

<sup>38</sup> LSAC grant recipients for the period July 1, 2011 through June 30, 2013 include the Battered Women's Legal Advocacy Project, Minnesota Disability Law Center, Minnesota Justice Foundation, Neighborhood Justice Center and the Volunteer Lawyers Network. See complete list of LSAC grant recipients available online at <http://www.mncourts.gov/lisac>.

<sup>39</sup> IOLTA is a reference to the Interest on Lawyer Trust Accounts (IOLTA) Program, which was created to enhance the availability of civil legal services to low-income people. For more information about the IOLTA Program and related revenue, see <http://www.mncourts.gov/iolta>.

<sup>40</sup> <http://www.mncourts.gov/lisac>.

<sup>41</sup> Bridget Gernander, Legal Services Program Grant Manager, Minnesota Supreme Court, "Minnesota Poverty Statistics and Legal Services Funding and Case Data," presentation delivered October 26, 2011 at the MSBA Access to Justice Summit.

<sup>42</sup> The Ramsey County Probate Court Panel is an example of contract lawyer panels, in that lawyers must qualify by meeting specific training and experience criteria, are compensated at the hourly rate of \$50.00, and are appointed on a rotational basis to represent clients. Similar procedures are used by the Civil Commitment Defense Panel in the county. Probate Court, MINNESOTA JUDICIAL BRANCH: SECOND DISTRICT, available at <http://www.mncourts.gov/district/2/?page=524>.

<sup>43</sup> Minn. Stat. Ann. §257.69 (2010).

guardianship and conservatorship matters,<sup>44</sup> and cases involving civil commitment.<sup>45</sup> Contract attorney panels may also be utilized in matters in which appointment of counsel is discretionary. For example, the Fourth Judicial District Guardian *Ad Litem* Program maintains a panel of attorneys contracted to represent guardians *ad litem* in juvenile court abuse and neglect proceedings, and the Ramsey County Family Court maintains a panel of attorneys contracted to represent chemically dependent parents in child custody disputes.

The most significant strengths of contract attorney panels include the ability to draw on the local expertise of lawyers in targeted practice areas and their wide range of professional expertise. Contract attorney panels enhance the ability of the private bar to serve low-income clients and provide greater oversight than the traditional pro bono model of representation. They also enjoy economies of scale, in which resources can be spread over a wider geographical area by drawing participating lawyers from multiple offices, particularly in rural areas.

Several weaknesses were also identified, including narrow restrictions on financial eligibility for clients and limited resources from which to pay contract attorneys. According to survey respondents, contract attorney panels may also suffer from disparities in service quality and lesser oversight and supervision of contract attorneys. Some survey respondents noted a lack of expertise in poverty law, although it should be noted that most existing panels in Minnesota provide representation in matters in which the subject matter of the representation is not poverty law. Other respondents raised concern that contract attorney panels may reduce or eliminate the incentive for lawyers to provide pro bono services.

### *C. Law Firm Pro Bono and Other Volunteer Lawyer Programs*

Under Rule 6.1 of the Minnesota Rules of Professional Conduct, every lawyer has a professional responsibility to provide legal services to those unable to pay. Further, a lawyer should aspire to provide at least 50 hours of pro bono public services annually,<sup>46</sup> a majority of which should be provided without fee or expectation of a fee to persons of limited means or nonprofit organizations which address the needs of persons of limited means.

Minnesota lawyers have a strong tradition of pro bono service in their communities. Individual lawyers provide pro bono representation to clients in a wide variety of contexts, including volunteer lawyer programs organized by legal services offices or local bar associations, law firm-based pro bono programs, court-based clinical programs, and individual selection of pro bono matters by lawyers from their contacts and interests in the community. Many legal services programs rely on a corps of trained pro bono volunteers to serve a majority of their clients, while other programs use volunteer lawyers to supplement the work of staff attorneys. Pro bono lawyers provide legal representation to clients in a very wide range of civil matters in the state, limited only by their own willingness and capacity to undertake the representation. Accurate statistics are not currently available statewide with respect to the number of pro bono hours provided by Minnesota lawyers.

The strengths of the pro bono model of delivery of legal services to low-income clients reflect the unique characteristics of volunteer service: ability to control caseload (particularly with respect to client financial eligibility, case merit and timing of service), access to private law firm resources that are not available in other delivery models, and a potential volunteer base of more

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<sup>44</sup> Minn. Stat. Ann. Chapter 524, Art. 5 (2010).

<sup>45</sup> Minn. Stat. Ann. Chapter 2538 (2010).

<sup>46</sup> ABA Model Rules of Professional Conduct, Rule 6.1.

than 20,000 licensed attorneys. Pro bono lawyers also have experience and training in many areas of law that may affect low-income clients and in which other lawyers, particularly those specializing in poverty law, may not have.

The weaknesses of pro bono services are a reflection of the nature of a volunteer program. Pro bono attorneys may encounter the primacy of billable work, ethical conflicts with billable matters, personal financial considerations, and commitments to other forms of community service. Attorneys may not have the professional or personal desire to accept pro bono matters. If they do, they may lack poverty law or related experience. Pro bono services are in some instances perceived as lacking appropriate infrastructure, supervision and oversight, and the administrative support needed to screen cases for financial and merit eligibility. One group of interviewees noted that responsibility for providing civil legal counsel, particularly if due to a constitutionally-established right, should not rest on the volunteer efforts of an uncertain number of attorneys.

#### *D. Public Defender Model*

Minnesota's court-appointed public defender system is a state-managed program that provides representation in criminal cases to all eligible clients. The Board of Public Defense administers the program, which is managed at the judicial district level by chief public defenders. The Board is funded by legislative appropriations.<sup>47</sup> Minnesota law entitles anyone who is financially unable to obtain counsel to be represented by a public defender if he or she is charged with a felony, gross misdemeanor or misdemeanor, or is appealing from a conviction of a felony or gross misdemeanor and has not already had a direct appeal of the conviction; in addition, a recent Minnesota case has found a right to court-appointed private counsel on appeals in cases involving financially eligible misdemeanor defendants.<sup>48</sup> Children over 10 years of age who are the subjects of child protection proceedings and certain children in delinquency proceedings are also entitled to representation by public defenders. Public defenders are typically full-time or part-time employees of the Board; several districts also utilize contract attorney panels.

The primary strength of the public defender system is tied to the constitutional mandate that underlies its mission: it benefits from the clarity of client eligibility and the assurance that eligible clients will be represented. Four other strengths were noted: strong attorney commitment to the defender mission; high levels of attorney expertise in representing clients; familiarity with local court practices; and expertise in, and understanding of, how indigent clients experience the criminal justice system.

Weaknesses associated with the public defender model were strongly tied to the lack of stable or adequate funding for the Board. In addition, public defenders experience high case loads with little administrative support, and the Board has difficulty retaining experienced lawyers due to the low pay, high stress and heavy workload. Some respondents also noted client dissatisfaction with public defenders.

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<sup>47</sup> The state of Minnesota pays the costs of all defender services in the ten judicial districts, except for Hennepin County, which shares the costs with the state. *Criminal Justice: Minnesota Public Defender System*, MINNESOTA HOUSE OF REPRESENTATIVES: HOUSE OF RESEARCH, <http://www.house.leg.state.mn.us/hrd/pubs/ss/ssmpds.htm>.

<sup>48</sup> *State v. Randolph*, 800 N.W.2d 150 (Minn. 2011).

## 2. *Additional Considerations for Structuring a Civil Gideon Legal Services Provider*

In addition to determining the model for delivering civil legal services to low-income clients, Minnesota may need to consider additional structural components to ensure consistent practice standards, regular oversight and transparency.

### A. *Practice Standards*

Clear practice standards are encouraged. Standards may be set for attorney competence, attorney qualifications and the level of supervision and training needed for inexperienced lawyers. Practice standards may protect clients by preventing incompetent legal counsel and reducing the possibility of overworked lawyers who are unable to provide timely and efficient legal representation. Standards for attorney workloads and administrative support are utilized in most existing Minnesota delivery models.

### B. *Oversight and Evaluation*

As Minnesota expands the provision of civil legal services to low-income clients, it should also develop a mechanism for evaluating the impact of expanded services. Measurements may evaluate the quality, timeliness, efficiency and effectiveness of the legal services provided and whether such legal services resulted in a positive outcome for the clients. Access to legal services may also be measured, including whether barriers to service based on geography, language or culture have been addressed, reduced and /or eliminated. For reference, Minnesota may look to the California civil right to counsel “pilot project”, which includes a comprehensive evaluation component, as well as the other pilot projects and quantitative studies recently undertaken by various advocacy organizations.<sup>49</sup>

The Justice Gap should also be measured both before and after any implementation of Civil Gideon to determine changes in the ratio of available legal services to unmet legal needs. Analysis of the Justice Gap may include a discussion of the economic and practical ramifications of serving (and failing to serve) low-income clients in civil legal matters. For example, the provision of additional legal services may benefit the community by increasing the number of people able to stay in their homes and reducing state or local health care expenditures by securing federal or private medical or other benefits to which disabled people are entitled.<sup>50</sup> Failure to provide legal services may result in costs and other collateral effects when, for example, a family is evicted from its home, places its children in foster care or moves to a community’s homeless shelter.

Each of these potential consequences may affect the greater community, principally in the form of additional costs in the social and educational programs accessed to support such families.<sup>51</sup> Any evaluation tool should include a method for measuring the overall impact of Civil Gideon in Minnesota.

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<sup>49</sup> See Appendix C for a summary overview of Massachusetts and Texas pilot programs in process and the California program implemented by the Sargent Shriver Act. See also NPC Research, *Civil Right to Counsel, Phase II Pilot Study: Needs Assessment and Cost Elements*, submitted to the Northwest Justice Project and the Civil Right to Counsel Leadership and Support Initiative, June 2010.

<sup>50</sup> See The Perryman Group, *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential*, February 2009.

<sup>51</sup> *Id.*

### C. Funding and Transparency

Funding remains one of the most critical challenges to creating (and sustaining) a civil right to counsel.<sup>52</sup> Any expansion of services to provide legal representation (whether constitutional or statutory) does not guarantee adequate sustained funding, as the state's public defender program can attest. Proponents of Civil Gideon may also be challenged to demonstrate a commitment to maintaining funding for existing legal service providers, rather than diverting existing funds to new programs.

Cost projections associated with establishing a civil right to counsel must also be realistic and transparent. Projections should include (i) expenses related to employment of lawyers and administrative support staff, (ii) expenses incurred in any increased litigation that may result from more clients having an opportunity to take matters to trial or appeal, (iii) additional costs to the judicial branch associated with increased demands on judicial resources and court personnel, and (iv) since most clients will be eligible for *in forma pauperis* filing status, anticipated expenditures for discovery, transcripts, printing, expert witness fees, service fees, mediation costs and court services costs.

### D. Integration with Existing Systems

Minnesota has a mature, well-developed system for the delivery of legal services to low-income clients. While many programs have limitations on the services they provide, many also deliver an array of civil legal services. Designation of a Civil Gideon legal services provider should not materially limit the existing scope of services or change the mission of existing programs to meet only the needs of clients with matters entitling them to counsel. Any expansion should complement and strengthen existing civil legal services initiatives—not replace them. Proponents of Civil Gideon may need to assure program funders, and the public, that implementation of a new right to counsel would integrate smoothly within existing efforts to provide legal services to low-income clients, and would not replace existing state efforts. For a complete discussion of the scope of the existing right to counsel in Minnesota, refer to Appendix B.

The Maryland Access to Justice Commission recommended a similar, integrative approach to build on and supplement, but not replace, its existing discretionary civil legal services system.<sup>53</sup> Rather than recommending a new legal services delivery provider, Maryland suggested an independent administering entity that would provide grants to a range of providers selected through a competitive grant application process. The administrator could be an existing entity, such as the Maryland Legal Services Corporation which administers the existing discretionary civil legal services system in Maryland, or a new entity. In establishing a right to civil counsel, this is one model that could be considered in Minnesota.

## D. Implementing Civil Gideon: Expansion of a Civil Right to Counsel Through Litigation and Legislation

State courts have considered a number of civil cases in which parties claim a right to counsel.<sup>54</sup> Some courts have been willing to recognize that the right to counsel should be expanded to include civil cases in certain areas: most frequently, those involving termination of parental rights,<sup>55</sup> child custody or the rights of minors.<sup>56</sup> In addition to litigation as a means of

<sup>52</sup> See Greco Letter, *supra* note 29.

<sup>53</sup> See Maryland Access to Justice Commission, *supra* note 34.

<sup>54</sup> A more extensive review of active and recent cases involving Civil Gideon may be found at Appendix C.

<sup>55</sup> See Appendix C for a discussion of cases in Indiana, Michigan, Illinois and Alaska.

implementing Civil Gideon, some states have considered legislation which would create or expand a right to publicly-funded counsel in limited circumstances, while others have crafted pilot programs and other initiatives aimed at testing the viability of such new or expanded right. These methods of implementation – litigation, legislation, pilot programs and other initiatives – are outlined in this section.

### 1. *Examples from Other States*

Review of the activities undertaken by courts, legislatures and advocacy groups in other states provides a useful starting point for analyzing avenues by which Civil Gideon may be implemented in Minnesota and understanding national trends in this arena.

#### A. *Expansion of Civil Gideon Through Litigation*

In a recent case before the Supreme Court of the United States, *Turner v. Rogers*, an indigent, unrepresented parent was incarcerated for 12 months following a civil contempt hearing before a South Carolina family court following the parent's fifth failure to make child support payments.<sup>57</sup> As the Court found that procedural safeguards informing the unrepresented parent of critical issues (which could have mitigated the outcome and perhaps enabled him to avoid incarceration) were lacking, it therefore held that the incarceration was a violation of the Due Process Clause.<sup>58</sup> However, the Court also noted that:

... the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).<sup>59</sup>

The *Turner* decision follows the Court's 1981 holding in *Lassiter v. Department of Social Services*, in which the Court found 5-4 that an indigent litigant in a civil case brought by the state in a termination of parental rights proceeding was not entitled, as an absolute matter under the Due Process Clause, to counsel.<sup>60</sup> Although these cases do not support a broad-based right to counsel in all civil cases, they clearly hold that circumstances exist under which such a right may be found.

In a prime example of the reasoning of those state courts which have embraced a civil right to counsel (in limited circumstances), the Illinois Supreme Court held that if the state appointed counsel for termination of parental rights proceedings in the Juvenile Court in order to satisfy the requirements of the Equal Protection Clause, it must also provide counsel for termination proceedings privately initiated under the Adoption Act. However, the Task Force notes that various state courts have refused to recognize a right to counsel outright or have declined to address the issue.

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<sup>56</sup> See Appendix C for a discussion of cases in Ohio, Georgia and Washington.

<sup>57</sup> *Turner v. Rogers*, 564 U.S. \_\_\_\_ (2011).

<sup>58</sup> See Appendix C for further discussion of the case.

<sup>59</sup> *Turner v. Rogers*, 564 U.S. \_\_\_\_ (2011), at 16.

<sup>60</sup> 425 U.S. 18 (1981).

### *B. Expansion of Civil Gideon Through Legislation*

No state has yet mandated a right to counsel in all civil cases. Numerous states have used legislation to protect or expand the right to counsel of vulnerable individuals in limited circumstances, most frequently those involving children's rights or the rights of parents in custodial and dependency proceedings.<sup>61</sup> These areas of expansion echo those seen in state court settings. Notably, California was (and remains) the first state to pass legislation which implements a pilot program aimed at assisting low-income individuals with civil legal needs in the areas of eviction, child custody, domestic abuse and neglect of vulnerable populations (such as the elderly or disabled). A further discussion of this pilot project is included below in Part D.1.C.

Discretionary systems aimed at cases involving basic human needs appear to be growing in popularity among state legislatures willing to consider Civil Gideon bills. Louisiana recently enacted a law which repealed a previously established right to counsel for parents in cases involving contested intra-family adoptions, replacing the right with a discretionary appointment system.<sup>62</sup> Hawaii has also established a discretionary appointment system for parents in child protective proceedings,<sup>63</sup> and Washington has taken a similar approach in dependency and termination of parental rights proceedings.<sup>64</sup> A modified discretionary system is in place in Texas with respect cases involving eviction appeals of indigent tenants: the court may only appoint attorneys willing to handle the case pro bono.<sup>65</sup> The Texas system is structured to avoid funding issues, but it is unclear whether the system is effectively employed or if there has been an increase in representation in eligible cases.

Other state legislatures, including those of Florida, Georgia and New York, have recently considered bills which would expand the right to counsel to cases involving custody and dependency proceedings, as well as eviction and foreclosure cases. Each of the proposed bills died in committee and were not presented to the legislature for a vote.<sup>66</sup> A bill introduced in North Carolina would have given trial courts the discretionary authority to appoint counsel in any civil case where a person could not afford counsel and the facts of the case made such appointment appropriate, as a supplement to existing legal service resources and programs.<sup>67</sup> If passed, North Carolina courts would have been directed to consider:

1. The complexity of the factual and legal issues in the case.
2. The nature of the interests at stake, and particularly whether the case impacts basic human needs, including shelter, sustenance, safety, health and family integrity.
3. The severity of potential consequences that the outcome may have for the unrepresented party.

<sup>61</sup> See Appendix C and Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 Loy. L. A. L. Rev. 1087 (2009).

<sup>62</sup> HB 1146, signed into law in June 2010, amending and reenacting Children's Code Articles 1244(A), 1245(A), 1247(B) and 1253(A), enacting Children's Code 1244.1, repealing Children's Code Articles 1245.1 and 1258. See Appendix C for complete discussion.

<sup>63</sup> Hi. Legis. 135 § 17. See Appendix C for complete discussion.

<sup>64</sup> HB 2735, signed into law in March 2010, amending RCW 13.34.100, 13.34.105 and 13.34.215 and enacting new sections thereof. See Appendix C for complete discussion.

<sup>65</sup> Tex. Gov't Code §§ 25.0020 and 26.010. See Appendix C for complete discussion.

<sup>66</sup> SB 1860 (Florida), SB 292 (Georgia), Int-648 and Int-0090 (New York). See Appendix C for complete discussion.

<sup>67</sup> NC HB 1915, House DRH70551-LL-286 (5/9), sponsored by Rep. Glazier in the 2009 session, amending G.S. 7A-451.



4. The extent to which appointment of counsel in the case will assist in the administration of justice.<sup>68</sup>

The bill was submitted to the North Carolina House of Representatives in 2010 and passed first reading; however, as with proposed bills on similar issues in other states, it has since stalled and has not been passed or reintroduced. The North Carolina framework echoes the concerns raised by the Supreme Court in *Lassiter* and *Turner*, and perhaps reflects a growing recognition by legislators that even if a right to counsel in all civil cases is not a viable option, certain circumstances should give rise to protections that are not currently afforded.

A more extensive review of recent legislation and rulemakings (proposed and enacted) implicating Civil Gideon issues may be found at Appendix C.

### C. Pilot Programs and Other Initiatives

In addition to litigation and statutory actions, a few states and organizations have established pilot programs to test the costs and impact of expanding access to counsel in civil matters. In New York, the state chief judge created a pilot program to provide counsel for homeowners in danger of foreclosure. Programs that provide counsel to individuals in danger of losing housing are also ongoing in Massachusetts and Texas.<sup>69</sup> These programs seek to expand access and determine the economic effects of improved right to counsel.

The California legislature recently created court fee-funded pilot programs to provide counsel to individuals living at or below 200 percent of the federal poverty guidelines in four types of civil cases: domestic violence, child custody, housing and elder abuse.<sup>70</sup> These pilot programs, established by the Sargent Shriver Civil Counsel Act, provide a right to counsel in test cases where there has been an independent determination that the client may benefit by representation.<sup>71</sup> California courts are also required to develop best practices to facilitate case administration and management.<sup>72</sup> The pilot projects, slated to begin in July 2011,<sup>73</sup> are operated by legal services nonprofit corporations working in collaboration with local superior courts, and are to be paid for from a previously approved increase in court services fees.<sup>74</sup>

Various state bar associations and the American Bar Association submit amicus briefs in cases involving Civil Gideon and have formed task forces which study the underlying bases, scope and potential avenues for implementation of a civil right to counsel.<sup>75</sup> These task forces have

<sup>68</sup> *Id.*

<sup>69</sup> See Appendix C for a summary of Massachusetts and Texas pilot programs in process.

<sup>70</sup> Sargent Shriver Civil Counsel Act, California AB 590, signed into law in October 2009. Funding through use of \$10 fee already in place with respect to certain court services (*e.g.*, issuance of orders of sale, recordation of licenses or certificates).

<sup>71</sup> Text of the bill is available at <http://lawprofessors.typepad.com/files/ab590.pdf>. See also Kevin G. Baker and Julia R. Wilson, *Stepping Across the Threshold*, 43 Clearinghouse Review 550 (2010), available at <http://www.civilrighttocounsel.org/pdfs/2010%20March-April%20Baker%20&%20Wilson.pdf> (describing the events leading up to the passage of the Act and the main features of the bill).

<sup>72</sup> For example, these best practices could include the possibility of increased mediation using pro bono assistance from volunteer lawyers and other mediators. *Id.*

<sup>73</sup> Report to the Judicial Counsel: Sargent Shriver Civil Counsel Act: Selection of Pilot Projects (April 7, 2011), <http://www.courts.ca.gov/xbcr/cc/20110429itemp-revt.pdf>.

<sup>74</sup> Kevin G. Baker and Julia R. Wilson, *Stepping Across the Threshold*, 43 Clearinghouse Review 554-555 (2010), available at <http://www.civilrighttocounsel.org/pdfs/2010%20March-April%20Baker%20&%20Wilson.pdf> (“Pilot programs will be funded by a \$10 increase in certain court fees, beginning in 2011.”).

<sup>75</sup> The ABA conducted the only national legal needs study to date, finding approximately 1.1 legal needs per low-income household per year and of those, only 20 percent were met through the assistance of a private attorney or legal aid lawyer. Albert H. Cantril, *Agenda for Access: The American People and Civil Justice* at 3 (American Bar Association 1994).

proposed model legislation, circulated petitions, organized educational and advocacy efforts and have published extensive findings of the costs and economic benefits which can result an expansion of the right.<sup>76</sup>

## 2. *Potential Areas of Expansion in Minnesota*

While this Task Force has not undertaken an independent analysis of the costs and economic benefits which could result from an expansion of the right to counsel in civil cases, the following section sets forth a short overview of areas in which such an expansion may be implemented.<sup>77</sup> Specific areas considered by the Task Force include those in which an eligible person faces eviction from public housing or foreclosure proceedings, termination or loss of government benefits and matters regarding children and parental rights. There may be other areas in which a potential expansion of the right to counsel should be considered, such as employment and safety, that the Task Force was unable to fully explore due to time and resource constraints.

Consensus about how to create a right to civil counsel in Minnesota will have to be developed in conjunction with the consensus that a right should be created. As described in this Report, the two primary vehicles are (a) adoption of a litigation strategy to create an opportunity for the Minnesota Supreme Court to articulate a constitutional right to civil counsel under the Minnesota State Constitution<sup>78</sup> and (b) legislative enactment of a statutory right to counsel.<sup>79</sup> The strategies are not mutually exclusive, but each presents unique challenges and opportunities depending on the areas in which expansion is targeted.

### A. *Housing: Eviction and Foreclosure Proceedings*

Minnesota does not extend the right to counsel to civil housing matters. Thus, such a right could include (1) proceedings where tenants face eviction from housing (particularly viable in the case of public housing) and (2) case involving equity stripping.

In the case of public housing, where tenants have obtained a vested right to a government benefit, a loss of this right can lead to severe consequences. Families evicted “for cause” from public housing may be barred from public housing for up to three years after eviction<sup>80</sup> or be denied qualification for an extended period of time following criminal activity.<sup>81</sup> Further, many aspects of the leasing practices of public housing authorities (“PHAs”) are governed by federal law, although eviction matters are governed by state law. While tenants facing eviction by a PHA have a right to challenge the eviction, these tenants face a government-funded, federally regulated agency that is represented by attorneys paid with public funds and are not bound to require any level of proof to support an eviction based on criminal activities.<sup>82</sup>

<sup>76</sup> See Appendix C for an overview of bar association and other organizational activities.

<sup>77</sup> This section consists of excerpted portions of “The Right to Civil Counsel Under Minnesota Law,” a white paper drafted by Dorsey & Whitney LLP, spearheaded by Mr. Bricker Lavik and Mr. Perry Wilson, a complete version of which is attached at Appendix B.

<sup>78</sup> See Memorandum, Dorsey & Whitney, *Potential Bases for a Right to Civil Counsel in Civil Cases Under Minnesota Law*, December 20, 2006.

<sup>79</sup> Minnesota has already enacted statutory provisions which provide a right to counsel in specific civil matters, including termination of parental rights, paternity, civil commitment, civil contempt, certain delinquency matters and child protection proceedings.

<sup>80</sup> Minneapolis Public Housing Authority, *MPHA Statement of Policies*, 21, available at [www.mphaonline.org/docs/SOP-Final%206-20-06.pdf](http://www.mphaonline.org/docs/SOP-Final%206-20-06.pdf).

<sup>81</sup> *Id.* at 20.

<sup>82</sup> *Id.*

Victims of equity stripping (a practice where a homeowner facing foreclosure is given the option to stay in his home in exchange for transferring title to an equity stripping business, who then sells the home back to the homeowner under a contract for deed, charging extortionate fees in the process) tend to be low-income, uninformed, and elderly.<sup>83</sup> The transactions involved in equity stripping are often exceedingly complex, and many victims do not understand that they are transferring ownership of their home to a third party.<sup>84</sup> The Minnesota Consumer Fraud Act (the “MCFA”) gives a private right of action<sup>85</sup> to victims of the practice and may be able to rescind<sup>86</sup> arrangements which violate of state law.<sup>87</sup> The complex nature of the procedures<sup>88</sup> necessary to take advantage of the remedies afforded by the MCFA make representation by counsel not only useful but also necessary where the homeowner is unsophisticated or unaware of his rights, as is most frequently the case.<sup>89</sup>

### B. Government Benefits

Minnesota law does not currently afford the right to counsel in cases involving government payments or unemployment benefits or Section 8 benefits or vouchers.<sup>90</sup> It is estimated that less than 10 percent of applicants are represented by counsel in these hearings.<sup>91</sup> Right to counsel may be most beneficial if expanded to include cases in which an applicant faces temporary or permanent loss of benefits or to assist in establishing the factual basis of the need or disability of an applicant.

In the case of Section 8 benefits, prior to termination of assistance, PHAs are required to offer an “informal hearing” for participants in the voucher program and must notify the participants of the right to such hearing.<sup>92</sup> The informal hearing provides an opportunity for certain discovery by their parties.<sup>93</sup> Participants are also permitted to be represented by counsel (at their own expense) and participants and the PHAs may present witnesses and evidence.<sup>94</sup> However, the traditional rules of evidence do not apply and presumptively every piece of evidence is admissible.<sup>95</sup> This proceeding is often a *de facto* eviction proceeding that never goes in front of a judge, but is instead heard by a panel of PHA employees, with the ultimate PHA determination subject to substantial deference.<sup>96</sup> Unrepresented individuals are usually unfamiliar with the process and

<sup>83</sup> *Id.*; Telephone interview with Mark Ireland, Staff Attorney, Foreclosure Relief Law Project (July 29, 2008) (hereinafter *Ireland Interview*).

<sup>84</sup> Michelle Lore, *Lawyers Need to Assist Victims of Mortgage Fraud and Foreclosure*, MINNESOTA LAWYER, Dec. 31, 2007; Ireland Interview.

<sup>85</sup> Minn. Stat. Ann. § 325N.18 (2007), Minn. Stat. Ann. § 8.31 (1996).

<sup>86</sup> Minn. Stat. Ann. § 325N.02 (2004).

<sup>87</sup> See Minn. Stat. Ann. § 325N.03 (2007).

<sup>88</sup> See Lore, *supra* note 85.

<sup>89</sup> See Lore, *supra* note 85.

<sup>90</sup> See Minn. Stat. Ann. § 268.105(6)(b) (2010) (Unemployment insurance appeals hearings).

<sup>91</sup> See Interview with Craig Gustafson, Unemployment Insurance statistician (August 15, 2008) (estimating that, in unemployment benefit appeals hearings, approximately 10 percent of employers and 5 percent of applicants are represented by counsel); Interview with Kenneth Mentz, Chief Appeals Judge, Appeals and Regulations Division, Dep’t Hum. Serv., in Minn. (July 22, 2008) (estimating that in health and cash assistance program hearings 90 percent of applicants are not represented by counsel).

<sup>92</sup> 24 C.F.R. § 982.555(a)(1)(v) (2011 through Jan. 6); 24 C.F.R. § 982.555(c) (2011 through Jan. 6).

<sup>93</sup> 24 C.F.R. § 982.555(e)(2) (2011 through Jan. 6).

<sup>94</sup> *Id.* § 982.555(e)(3) and § 982.555(e)(5).

<sup>95</sup> *Id.* § 982.555(e)(5).

<sup>96</sup> *Hinneberg v. Big Stone County Housing and Redevelopment Authority*, 2004 WL 2986536, at 2 (Minn. Ct. App. Dec. 28, 2004), *affd on other grounds*, 706 N.W.2d 220 (Minn. 2005). See also *Carter v. Olmsted County Housing and Redevelopment Authority*, 574 N.W.2d 725 (Minn. Ct. App. 1998) (Housing authority terminating Section 8 benefits acted in a quasi judicial capacity and the housing authority’s decision is subject to deference).

fail to take advantage of the opportunities afforded by the hearing to present evidence in support of their claims.

### C. Parental Rights and Matters Involving Minors

A limited right to counsel exists in Minnesota in certain cases with custody implications; this right could be expanded to include representation of children in cases that impact the person who may have or obtain custodial rights. In addition, the Minnesota Supreme Court has at least twice left open the issue of whether children should have their own counsel in paternity suits.<sup>97</sup> The Parentage Act provides that a child may be made a party to a proceeding under the Act and provides for the appointment of a guardian *ad litem* in such cases.<sup>98</sup> Minnesota law further provides that a court should consider the child's wishes in custody disputes and adoptive placements so long as the child is of "sufficient age to express preference."<sup>99</sup> Counsel could be appointed in place of, or in addition to, the guardian *ad litem* to pursue the child's wishes, rather than the guardian's conception of the child's best interests.<sup>100</sup> The appointment of counsel for children in cases affecting custody could help ensure their preferences are made known and taken into consideration by the courts.

The right could be expanded to provide counsel for indigent parents in custody disputes, although Minnesota courts have so far rejected claims for a right to counsel for parents in custody determinations.<sup>101</sup> A right to counsel may be most important in third party custody cases in which custody may be transferred to someone other than a parent.<sup>102</sup>

Public defenders must represent children age 10 or older in CHIP proceedings but there is no requirement that they represent parents.<sup>103</sup> Private attorneys are now representing many of these people but there are disputes between the state and counties as to who should be responsible for paying for such counsel.<sup>104</sup> A statutory requirement that public defenders also represent parents in CHIPs proceedings would be helpful in solving this problem, but state budget cuts ensure that funding will continue to be a problem and implementation of such a requirement unlikely.<sup>105</sup>

<sup>97</sup> *Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn. 1979) (using supervisory power to find a right to counsel for indigent defendants in paternity suits but leaving issue of child's representation undecided); *Ramsey County Public Defender's Office v. Fleming*, 294 N.W.2d 275 (Minn. 1980) (reserving issue as to whether child's interests might be best protected if it had its own legal counsel).

<sup>98</sup> Minn. Stat. Ann. § 257.60 (2010).

<sup>99</sup> Minn. Stat. Ann. § 257.025 (2010) (custody dispute factors); Minn. Stat. Ann. § 259.29 (2010) (adoptive placement factors).

<sup>100</sup> Minn. Stat. Ann. § 518.165(2) (2010) ("The guardian *ad litem* shall represent the interests of the child and advise the court with respect to custody and parenting time.").

<sup>101</sup> See, e.g., *Robinson v. Stegara*, 2003 Minn. App. LEXIS 523 (Minn. App. May 6, 2003) (no due process violation where sole legal and physical custody of children was transferred to their grandparents because the children's parents had no right to counsel in the custody case).

<sup>102</sup> *Id.*

<sup>103</sup> Minn. Stat. Ann. § 611.14(4); Barbara L. Jones, *Ugly Confrontation Brewing Over CHIPS Representation*, MINNESOTA LAWYER, June 30, 2008, at 14.

<sup>104</sup> Jones, *supra* note 104, at 14.

<sup>105</sup> Chief Judge Jon Maturi of the 9th Judicial District recently issued an order to all public defenders in the district to continue representing their clients, parents in CHIPS proceedings, until the cases are concluded. Judge Maturi said that under Minn. Stat. § 611.16 the court could appoint a public defender in any case where a statute requires that a person be represented by counsel and where no rule or statute excludes the client from those whom public defenders may be appointed to represent. He also stated that although his order may increase the burden on public defenders, "that concern pales when contrasted with the possible unjustified loss of a parent's relationship with their child." The Judge's order, however, does not apply to public defenders in new juvenile protection hearings so this dilemma will likely persist.

Finally, the right to counsel could also be extended to cover all expedited child support proceedings<sup>106</sup> and to assist custodial parents or guardians seeking child support regardless of whether the county is involved in the collection of support payments. Establishment, collection or modification of child support requires extensive fact gathering with which an attorney could assist the petitioners.

#### *D. Other Areas*

In addition to the areas described above, the right to counsel could be expanded in civil cases related to prisoners' rights, the environment and healthcare benefits, each as more fully set forth in Appendix B. Expansion in many of these areas would provide individuals facing deprivation or potential deprivation of basic rights with counsel to assist in navigating complex regulatory schemes, although these areas have not yet been the focus of other state legislative actions or pilot projects and may be less likely to gain popular support in the short term.

#### **E. Alternative and Interim Means of Addressing the Justice Gap**

While discussions and awareness of Civil Gideon matters continue in Minnesota, consideration should be given to potential avenues for addressing – at least in the short term – the unmet needs for civil legal services in Minnesota.<sup>107</sup> Further, it will require consideration of alternative means of addressing access to justice issues.

Within the legal system, simplification of court procedures and substantive law, so that individual litigants may successfully proceed *pro se*, is one way in which Civil Gideon goals could be partially satisfied within the existing legal framework.<sup>108</sup> By reducing the complexity of the process and creating mechanisms which would educate *pro se* litigants and simplify the process (e.g., by use of online court forms with express, simple instructions for completion and compilation of brochures, videos or pamphlets which detail the process and the requirements related to certain types of proceedings which could be viewed online or at the courthouse), perhaps the range of legal needs which can only effectively be served by counsel could be reduced.

In addition, development and promotion of non-adversarial alternative dispute resolution mechanisms dedicated to issues most frequently faced by Minnesotans, in a format which would not require representation by counsel to protect individual rights, may also be effective to reduce the needs and costs relative to civil litigation. A close review of public housing and social services regulations with an eye to eliminating or revising those which result in unnecessary litigation could also be undertaken.

Outside the legal system, alternatives include identification of practices that are effective in avoiding or preventing adversarial litigation and therefore reduce the need for legal representation. Social services practices that limit or minimize court involvement in child protection matters or diversion programs for specific types of disputes, such as mortgage foreclosures, that divert these matters to forums other than the courts for resolution, are potential

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<sup>106</sup> See *Hepfel*, *supra* note 98, at 346 (noting that welfare department may become “the aggressive and predominant party in interest” in paternity actions as one factor warranting a right to counsel for indigent respondents in such actions).

<sup>107</sup> LSC Justice Gap Report, *supra* note 2, at 21, in which the LSC noted that the general population of the United States includes one private attorney for every 439 persons, but there is only one private attorney for every 6,415 low-income individuals. *See also id.* at 17, finding that only about 20 percent of those who qualify for civil legal services are able to receive assistance due to limited resources.

<sup>108</sup> Many states have developed sophisticated court-based programs to assist *pro se* litigants.

ways in which these alternatives could be implemented, provided that due consideration of such alternatives do not promote or result in dual systems of justice at the expense of low-income individuals.

Other opportunities may exist with respect to the existing volunteer attorney pool. Existing volunteer lawyer organizations and coordinators could organize free legal aid hotlines staffed by volunteer attorneys who could provide brief legal advice on discrete issues, in addition to expanding existing legal aid clinics and other legal service offerings already available to low-income individuals.

Funding will be a challenge with respect to putting any of these alternative means of addressing the Justice Gap into practice, although certain states have been able to document cost savings which have resulted from expanded counsel in civil matters.<sup>109</sup> Separate funding would have to be secured in order to set up alternative dispute resolution forums that would provide a viable means of settling claims in an efficient manner, and a critical mass of participants would be required in order to ensure effective implementation. However, if a more detailed study of specific practices and laws can be undertaken to identify opportunities to make relatively simple changes to facilitate implementation of these alternatives, this would provide a viable basis for generating broad support for finding alternatives or interim solutions that can begin to address the Justice Gap while consideration of Civil Gideon continues.

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<sup>109</sup> See Greco Letter, *supra* note 29, in which Mr. Greco identifies that Florida economists found savings of \$9,368 and \$7,362, respectively, in two locales where representation in civil matters was provided to juveniles, together with a decrease of re-arrests by 45% and 31%, respectively; Mr. Greco also indicates that services related to eviction and homelessness provided in 2009 by various Massachusetts legal aid service providers “saved the state more than \$8.4 million in homeless shelter costs...”

## V. RECOMMENDATIONS

The Task Force is confident that this Report provides a framework for considering how Minnesota could adopt a publicly-funded right to civil counsel. To that end, the Task Force recommends the following:

1. *Raise Awareness and Promote Dialogue about Establishing a Right to Civil Counsel in Minnesota.*

The Task Force recommends that the MSBA continue to monitor existing pilot projects in other states, ongoing litigation and proposed and enacted Civil Gideon legislation. The Task Force also recommends that the MSBA take a leadership role in creating educational programming to enhance awareness of the unmet legal needs of low-income Minnesotans, establish a forum for discussion of Civil Gideon and engage stakeholders in an effort to develop or expand available funding sources for legal services providers.

2. *Determine and Monitor the Specific Civil Legal Needs to be Addressed by Civil Gideon in Minnesota by Measuring the Justice Gap at Regular Intervals.*

The Task Force recommends carefully defining the nature and scope of civil legal needs to which a right to counsel may attach. Two main alternatives are often proposed: creation of a broad, sweeping right to counsel in civil matters, or creation of a right to counsel limited to specific, defined civil matters that affect basic rights. Similar to the ABA and various state bar associations, the Task Force recommends that a right to counsel attach only to civil matters affecting shelter, health, child custody, sustenance, safety and other areas in which there exists a significant power differential between a low-income client and the adverse party.

The Task Force also recommends regular monitoring of the “gap” between the civil legal needs of low-income Minnesotans (particularly those legal needs to be addressed by Civil Gideon) and the legal assistance they receive. If Civil Gideon is implemented in Minnesota, consistent measurement of such Justice Gap over time will also provide valuable information about the effect and impact of Civil Gideon in Minnesota.

3. *Establish Financial and Other Eligibility Requirements.*

The Task Force recommends that Minnesota adopt clear financial criteria and other eligibility standards which would provide parameters for identifying individuals eligible for Civil Gideon assistance. For example, Minnesota should demarcate whether the right to publicly-funded civil counsel should attach only when an individual commences suit or whether the right should attach when the individual first recognizes she may have a legal problem. As other state bar associations have recognized, the closer the right to counsel attaches at the time of “consultation,” the greater the amount of legal services may be provided (and funded) by the state. On the other hand, “providing access to counsel early on may help individuals with legal problems avert unnecessary litigation, avoid noncompliance with the law, and reduce the overall social costs of civil conflict.”<sup>110</sup>

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<sup>110</sup> See Maryland Access to Justice Commission, *supra* note 34.

4. *Design Civil Gideon Service Delivery to Integrate Within the Existing Framework of Legal Services Providers.*

The Task Force recommends that one of the four existing legal services provider models (or a combination thereof) be utilized to provide publicly-funded civil counsel to low-income individuals. The four existing models include: legal services programs, contract attorney panels, law firm pro bono and other volunteer lawyer programs, and court-appointed public defender systems. Each has strengths and weaknesses that should be considered when structuring and implementing a Civil Gideon services provider.

The Task Force emphasizes and cautions that any Civil Gideon services provider should supplement and complement, rather than replace, existing providers. For example, Civil Gideon may be implemented by expanding the services offered by one or more of the current providers. Alternatively, Minnesota may simply expand the authority of the Legal Services Advisory Committee (LSAC), which in turn can provide grants to a range of providers selected through a competitive grant application process.

5. *Establish a Method for Evaluating Civil Gideon and its Services Providers.*

As Minnesota expands the provision of publicly-funded legal services to low-income clients, it should develop a mechanism for evaluating the impact of such expanded services. In addition to the quantitative study referenced above, Minnesota should evaluate the quality, timeliness, efficiency and effectiveness of the legal services provided and whether such legal services resulted in a positive outcome for the clients.

Any administrator of Civil Gideon, whether LSAC or another provider, should also establish standards for attorney compensation, attorney qualifications and the level of supervision and training needed for less experienced lawyers.

6. *Determine Potential Costs, Cost Savings and Funding Opportunities Associated with Civil Gideon.*

Minnesota should develop detailed cost and savings projections before implementing Civil Gideon. Projections may include, but should not be limited to, (i) expenses related to employment of lawyers and administrative support staff, (ii) expenses incurred in any increased litigation that may result from more clients having an opportunity to take matters to trial or appeal,<sup>111</sup> (iii) savings that may result to individuals and state and local governments if Minnesotans are permitted to stay with their children, in their homes or at their places of employment, etc., (iv) costs to the judicial branch associated with increased demands on judicial resources and court personnel, and (v) since most clients will be eligible for *in forma pauperis* filing status, anticipated expenditures for discovery, transcripts, printing, expert witness fees, service fees, mediation costs and court services costs.

The Task Force recognizes the limited number of resources available to implement Civil Gideon in Minnesota in difficult economic times, and encourages legal services providers to take part in an assessment of existing services frameworks to identify where administrative efficiencies may

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<sup>111</sup> The Task Force notes that this potential increase in litigation may be offset by the increased efficiency that results from representation by counsel. See Greco Letter, *supra* note 29 at 7, discussing surveys of judges indicating that an increase in *pro se* litigants causes inefficiencies within the court system.



be achieved and cost savings identified.<sup>112</sup> To the extent feasible, the Task Force also encourages further study to identify new sources of funding to sustain Civil Gideon without diverting resources from existing providers.

7. *Identify and Support Strategic Opportunities to Establish Civil Gideon Through Case-by-Case Litigation and Targeted Pilot Projects.*

Although the United States Supreme Court held that the Due Process Clause does not automatically require the provision of counsel in civil matters, the Court left open the possibility that such a right may be found to exist in certain (although narrow) circumstances. Applied on a case-by-case basis, litigants and appellants may analyze multiple factors (such as those cited by *Turner*) and cite to persuasive authority from other states when arguing for a right to publicly-funded civil counsel in Minnesota. The MSBA may also consider submitting amicus briefs in cases involving Civil Gideon.

The Task Force also recommends that the MSBA consider sponsorship of pilot projects in targeted Minnesota communities in order to collect information about, and raise awareness of, the legal needs of low-income Minnesotans that could be addressed (at least in part) by Civil Gideon.

8. *Identify and Support Strategic Opportunities to Explore Expansion of Civil Gideon Through Statewide Legislation.*

The Task Force recommends that Minnesota utilize the model legislation developed by the ABA and other state bar associations<sup>113</sup> when implementing Civil Gideon in Minnesota.

Although Minnesota may not yet be able to adopt a comprehensive statute establishing a broad right to civil right to counsel, existing statutes may be revised over time to expand the right to vulnerable individuals in certain circumstances. An overview of these specific areas is provided in the report above, and a detailed analysis of how existing statutes and rights may be expanded is included in Appendix C.

9. *Improve Upon Current Alternatives.*

In the interim, or in conjunction with advocacy efforts by Civil Gideon proponents, Minnesota can continue its efforts to (1) simplify court procedures so individual litigants may successfully proceed *pro se*,<sup>114</sup> (2) make forms (similar to those for seeking orders for protection) and information regarding legal rights readily available from courts and advocacy services, (3) develop effective, non-adversarial alternative dispute resolution mechanisms, and (4) think creatively with its existing legal services providers, about offering and publicizing free legal aid “hotlines” for brief legal advice and similar low-cost mechanisms for low- and middle-income residents.<sup>115</sup>

<sup>112</sup> The Task Force also recognizes that Civil Gideon may generate savings for government programs. An in-depth fiscal analysis could be undertaken to ascertain potential savings.

<sup>113</sup> See Appendix IV.D. for an overview of bar association and other organizational activities.

<sup>114</sup> Many states have developed sophisticated court-based programs to assist *pro se* litigants.

<sup>115</sup> See Chicago Bar Association and Chicago Bar Foundation, *Position on The ABA’s “Civil Gideon” Proposal* (June 15, 2006), available at [http://www.chicagobarfoundation.org/images/stories/civil\\_gideon\\_aba\\_memo\\_june\\_2006.pdf?phpMyAdmin=a8e49e74e0dd1e34849a2cb5f31d6231](http://www.chicagobarfoundation.org/images/stories/civil_gideon_aba_memo_june_2006.pdf?phpMyAdmin=a8e49e74e0dd1e34849a2cb5f31d6231).

***A Final Note from the Task Force***

Despite the realities of Minnesota's current economic conditions and ongoing funding challenges, as a civil society Minnesota cannot turn a blind eye on its less fortunate citizens. As a pioneering state, Minnesota has the opportunity to make a significant contribution by addressing head-on the inadequate access to civil legal counsel which challenges those with limited means. The recommendations of this Task Force are designed to produce thoughtful discussion and debate that will ultimately inform and inspire creative and realistic problem-solving approaches to address this issue.

## VI. APPENDICES

- A. Task Force Mission, Members and Contributors
- B. “The Right to Civil Counsel Under Minnesota Law,” a white paper drafted by Dorsey & Whitney LLP, spearheaded by Mr. Bricker Lavik and Mr. Perry Wilson
- C. Civil Gideon Legislation and Rulemaking Initiatives in Other Jurisdictions
- D. Surveys, Statistics and Additional Data Obtained by Task Force
  - 1. Judge’s Survey
  - 2. Court Party Survey
  - 3. Attorney Survey
  - 4. Agenda: “Civil Gideon – Should the Trumpet Blare Again?”
- E. Resolutions, Remarks and Other Materials
  - 1. 2006 Resolution of American Bar Association
  - 2. 2008 Address by American Bar Association Past President Michael Greco to MSBA Civil Gideon Task Force
  - 3. 2011 Letter of American Bar Association Past President Michael Greco to Clerk of Supreme Court of Wisconsin

## APPENDIX A

## Task Force Mission, Members and Contributors

**MSBA Civil Gideon Task Force Mission**

RESOLVED, that the Minnesota State Bar Association (MSBA) create a task force to explore the feasibility of a civil right to counsel in Minnesota. The mission of the task force should be fact-finding in nature, with the goal of providing a thorough analysis of whether there exists a basis to establish a civil right to counsel, and how such a right would affect the legal services delivery, public defense, county attorney and judicial systems in Minnesota.<sup>116</sup>

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<sup>116</sup> MSBA Legal Assistance to the Disadvantaged Committee, REPORT AND RECOMMENDATION TO THE MINNESOTA STATE BAR ASSOCIATION Regarding a Proposal to Create a Task Force to Explore the Feasibility of a Civil Right to Counsel in Minnesota, Aug. 1, 2007.

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### **MSBA Civil Gideon Task Force Committees**

#### **Academic Inquiry Committee**

*Mary Jane Morrison and Janine Laird (Chairs)*

Max Heerman

Peter Knapp

Explored possible contributions which law schools, universities, faculty, students and researchers could make to Civil Gideon issues, such as: a law review volume devoted to access to justice issues; a symposium, training and other educational events; focused student projects; legal research and writing; and development of training and educational materials.

#### **Unmet Needs and Resources Committee**

*Bridget Gernander (Chair)*

Rana Fuller

Lew Linde

Worked with other entities and organizations to document the unmet legal needs of low-income Minnesotans and the resources available (and lacking) in Minnesota to meet such needs.

### **Judiciary Committee**

*Hon. John Van De North (Chair)*

Hon. Russell A. Anderson

Sam Hanson

Hon. Jay M. Quam

Hon. Jon Stafsholt

Steven H. Hirsh

Obtained information from the judiciary regarding practicalities and the potential impact Civil Gideon issues. Organized symposium co-hosted by the University of St. Thomas School of Law entitled “Civil Gideon: Should the Trumpet Blare Again” on October 30, 2009.

### **Practical Issues Committee**

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Identified and summarized issues to be addressed and resolved in order to implement Civil Gideon in Minnesota, including scope of Civil Gideon right to counsel, service delivery model, costs and expenses associated with expansion of legal services, evaluation of services delivered and alternative means of meeting legal needs of low-income clients. Obtained information from attorneys statewide regarding the practicalities and implications of Civil Gideon.

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The Right to Civil Counsel Under Minnesota Law

**A White Paper Presented to the Minnesota State Bar Association's  
Civil Gideon Task Force**

**September 11, 2008**

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**INTRODUCTION**

In *Gideon v. Wainwright*, the U.S. Supreme Court found that:

[R]eason and reflection require us to recognize that in our adversary system...any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.<sup>117</sup>

In 2006, the American Bar Association House of Delegates recommended that United States jurisdictions expand *Gideon's* imperative to civil litigants in cases involving important individual rights:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.<sup>118</sup>

The Minnesota State Bar Association (“MSBA”) recognizes along with the ABA that indigent civil litigants in Minnesota are often forced to litigate over their health, safety, children, and sustenance without the benefit of counsel. To that end, Minnesota has a strong and relatively well-funded legal services delivery system.

But even Minnesota’s legal services system can only meet about 20 percent of the client need. Thus, expanding the availability of court-appointed counsel presents a potential opportunity to expand access to legal services to those who stand to risk the most by unjust outcomes in civil proceedings.

It is not clear whether civil-*Gideon* is the best solution to the problem of insufficient legal services, however. Minnesota’s budget for court-appointed legal services and legal aid is finite, and recent well-publicized budget cuts have pared back the available resources even further.<sup>119</sup>

In light of the promise and the potential pitfalls of civil-*Gideon*, the MSBA Assembly passed the following resolution in December 2007 creating a civil-*Gideon* task force:

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<sup>117</sup> 372 U.S. 335, 344 (1963).

<sup>118</sup> American Bar Association, House of Delegates Resolution 112A (Aug. 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

<sup>119</sup> See, e.g. Elizabeth Stawicki, *Public Defenders to Stop Representing Poor Parents in Child Protection Cases*, MINNESOTA PUBLIC RADIO, July 3, 2008, available at [http://minnesota.publicradio.org/display/web/2008/07/03/who\\_will\\_pay/](http://minnesota.publicradio.org/display/web/2008/07/03/who_will_pay/).

While it is not likely that a Minnesota Civil Gideon will be created in the near future, given national trends this issue will continue to develop in the coming years and it is important that the Minnesota State Bar Association (MSBA) lead the discussion in this state. Minnesota has a strong and relatively well-funded legal services delivery system but it can only meet, at best, about 20 percent of the client need. Creating a right to counsel in civil cases is one way to expand access to justice, but it is not clear whether this is the best, or even a desirable, solution. A fact-finding task force convened by the MSBA would bring together representatives from the legal services, public defender, county attorney, law school, and judicial communities to examine the pros and cons of a civil right to counsel. The task force would encourage collaboration amongst the interested parties and identify the needs and concerns of the many stakeholders. The task force would research whether there is a basis for a civil right to counsel in Minnesota, perhaps conduct public hearings, and explore the cost of having such a right and how it might impact funding for legal services, public defenders, county attorneys and the judiciary. The task force report and findings will be important for shaping any future action on the issue in Minnesota.

The aim of this white paper is to help guide the MSBA's civil-*Gideon* task force's analysis of merits of civil-*Gideon* by providing a legal backdrop. This white paper explores the current state of Minnesota law in several areas where court-appointed counsel may ensure that indigent litigants are not unjustly deprived of basic rights. For each such area, this paper then discusses the potential for expansion of the right to court-appointed counsel.

## **DISCUSSION**

### **I. THE RIGHT TO COUNSEL IN CASES INVOLVING SHELTER**

#### **A. Current Scope of the Right**

Minnesota does not extend the right to counsel to civil housing matters. For example, there is currently no right to counsel in Minnesota for indigent persons challenging their eviction actions or the determinations of a Public Housing Authority in court.<sup>120</sup> There is also no right to counsel in Minnesota related to mortgage foreclosure or in civil cases involving predatory lending, mortgage fraud, or equity stripping.

#### **B. Potential for Expansion**

Although a multitude of proceedings exist which in some way touch upon the basic right to shelter, this section will cover proceedings that present the most viable option for extending the right to counsel to civil proceedings.

##### *1. Eviction from public housing*

A promising opportunity exists for establishing the right to counsel in eviction proceedings where tenants are evicted from Public Housing.

First, the right at stake is a vested right to a government benefit, a benefit provided in the form of shelter. This right is not easily acquired. For example, the Minneapolis Public Housing Authority ("MPHA") is the largest public housing authority in the State of Minnesota, yet there are 5,190 individuals

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<sup>120</sup> See *Maeberry v. Housing and Redevelopment Auth. of Duluth, Minn.*, 341 F. Supp. 643, 647 (D. Minn. 1971) ("[T]he court does not believe that it has the legislative authority to order [the welfare department or public housing authority] to expend money for the purpose of employing counsel, nor to void the Housing and Redevelopment proceedings because thereof").



on its high-rise public housing waiting list and 6,400 families on its family public housing waiting list.<sup>121</sup> At the moment, MPHA is not even accepting new applications for the Family Wait List.<sup>122</sup> Moreover, the loss of this right can lead to severe consequences, as families evicted “for cause” from Public Housing may be barred from Public Housing for up to three years after eviction.<sup>123</sup> The MPHA can also deny qualification for up to five years if the applicant has been evicted for drug-related criminal activity, and may permanently disqualify applicants for any past criminal activity if MPHA believes that the applicant “may adversely affect the health, safety, or welfare of other tenants, neighbors, or MPHA staff, contractors, or subcontractors.”<sup>124</sup>

Second, Public Housing Authorities (“PHAs”) are the “landlord” in such proceedings. Although Federal law governs several aspects of PHAs’ leasing practices, state law continues to govern evictions. Federal regulations require that all tenants evicted by local PHAs have the right to challenge their evictions in court under State law.<sup>125</sup> However, these proceedings differ from other evictions because the tenant’s adversary is not a regular landlord, but a government-funded, federally regulated agency. The PHA will be represented during the eviction proceeding by attorneys paid with public funds, often at an advantage to the tenant because they routinely practice before the Court seeking similar evictions against public housing tenants.

With regard to Public Housing evictions, the most compelling area for applying Civil *Gideon* would be for eviction proceedings where the PHA evicts a tenant for alleged criminal activity. The Federal Assisted Housing Code requires state and local PHAs to incorporate the following language in their leases with their Public Housing tenants, which empowers PHAs to evict for:

... any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control ...<sup>126</sup>

While PHAs typically must hold some form of hearing before evicting a public housing tenant for lease violations, Congress expressly eliminated the administrative hearing requirement for “criminal activity” evictions.<sup>127</sup>

PHAs may evict for suspected criminal activity even where there is no criminal conviction, charge, arrest, or investigation.<sup>128</sup> Further, PHAs need not determine that the alleged conduct would meet the criminal standard of proof for constituting a crime — i.e., “beyond a reasonable doubt” — indeed, PHAs are not bound to require any level of proof to support an eviction.<sup>129</sup>

Without counsel, eviction defendants are hard pressed to even identify the myriad of defenses that may be available to them and are plainly ill-equipped to raise such defenses in court. Because of the quasi-criminal nature of “criminal activity” and “drug-related activity” eviction cases, a successful eviction defense may depend on, among other things, an understanding of both civil and criminal procedure, Fourth

<sup>121</sup> Minneapolis Public Housing Authority, *Agency Fact Sheets: MPHA Overview*, <http://www.mphaonline.org/agencyfa.html>.

<sup>122</sup> Minneapolis Public Housing Authority, *MPHA Family Waiting List Information*, <http://www.mphaonline.org/iting.html>.

<sup>123</sup> Minneapolis Public Housing Authority, *MPHA Statement of Policies*, 21, available at [www.mphaonline.org/docs/SOP-Final%206-20-06.pdf](http://www.mphaonline.org/docs/SOP-Final%206-20-06.pdf).

<sup>124</sup> *Id.* at 20.

<sup>125</sup> 24 C.F.R. §§ 966.51-966.53, 966.57 (2010); see e.g. Minn. Stat. Ann. § 504B.171 (2010) (preventing the eviction of any tenant unless tenant knew or had reason to know of alleged criminal activity).

<sup>126</sup> 42 U.S.C. § 1437d(I)(6) (2006); see also 24 C.F.R. § 966.4(f)(12) (2010) (also requiring every public housing lease to contain terms set forth in § 1437d[I][6]).

<sup>127</sup> See 24 C.F.R. § 966.51(a)(2)(i)(A) (2011 through Jan. 6).

<sup>128</sup> 24 C.F.R. 966.4(I)(5)(iii)(A) (2010).

<sup>129</sup> *Id.*

Amendment search and seizure law, evidence, and substantive criminal law. These complexities suggest a strong need for counsel, a luxury that Public Housing tenants cannot be expected to afford.

Due to the importance of the right at stake, the severe consequences of eviction, and the likely complexities of the proceedings, eviction from Public Housing should be further investigated as a possible area to expand the right to counsel.

## 2. *Section 8 benefits*

The termination of assistance with respect to Section 8 benefits or vouchers presents another opportunity to establish a right to counsel.

The Section 8 program “offers financial assistance for rental housing to low income families” by providing subsidies for use in renting units from private landlords.<sup>130</sup> “The intent of the program is to lessen the burden on the family’s budget for housing costs, helping them to better afford their rental payment.”<sup>131</sup>

Prior to termination of assistance, PHAs are required to offer an “informal hearing” for participants in the Section 8 voucher program and to notify the participants of the right to such hearing.<sup>132</sup> The notice will contain a deadline to request an informal hearing, for example, MPHA’s deadline is ten days from when notice was given.<sup>133</sup>

The informal hearing permits certain discovery rights to both the program participants and to the PHA.<sup>134</sup> Participants are also permitted to be represented by counsel (at their own expense) and participants and the PHAs may present witnesses and evidence.<sup>135</sup> However, the traditional rules of evidence do not apply and presumptively every piece of evidence is admissible.<sup>136</sup>

Section 8 assistance, similar to admittance to Public Housing, is a benefit not easily obtained. The MPHA has 6,970 families on its Section 8 waiting list.<sup>137</sup> Also, like eviction from Public Housing, the consequences of termination of assistance can be severe. A PHA will most likely deny a new application for assistance if any PHA has ever terminated assistance under the program for any member of the family.<sup>138</sup>

Participants face an additional risk in such proceedings, because the termination of Section 8 assistance results in an automatic termination of the lease.<sup>139</sup> Although the owner may offer the participant a separate unassisted lease, the cost of the unit would be greater than the participant could afford. In sum this proceeding is often a de-facto eviction proceeding that never goes in front of a judge, but is instead heard by a panel of PHA employees.

Further, the PHA’s decision to terminate Section 8 benefits is subject to deference. An appeal would be a complicated process, only by writ of certiorari, and the participant must show that the decision was

<sup>130</sup> Minneapolis Public Housing Authority, Section 8 Program Benefits, <http://www.mphaonline.org/grambene.html>.

<sup>131</sup> *Id.*

<sup>132</sup> 24 C.F.R. § 982.555(a)(1)(v) (2011 through Jan. 6); 24 C.F.R. § 982.555(c) (2011 through Jan. 6).

<sup>133</sup> Minneapolis Public Housing Authority, *Section 8 Administrative Plan*, ch. 16-11, available at <http://www.mphaonline.org/s8polic.html>.

<sup>134</sup> 24 C.F.R. § 982.555(e)(2) (2011 through Jan. 6).

<sup>135</sup> *Id.* § 982.555(e)(3) and § 982.555(e)(5).

<sup>136</sup> *Id.* § 982.555(e)(5).

<sup>137</sup> Minneapolis Public Housing Authority, *Agency Fact Sheets: MPHA Overview*, <http://www.mphaonline.org/agencyfa.html>.

<sup>138</sup> Minneapolis Public Housing Authority, *Section 8 Administrative Plan*, ch. 3, available at <http://www.mphaonline.org/s8polic.html>.

<sup>139</sup> Minneapolis Public Housing Authority, *Section 8 Administrative Plan*, ch. 12,10, available at <http://www.mphaonline.org/s8polic.cfm> (when the family’s assistance is terminated, the lease and contract terminate automatically).

“arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.”<sup>140</sup>

For the foregoing reasons, termination of assistance with respect to Section 8 benefits or vouchers is another potential area for establishing a right to counsel under Civil *Gideon*.

### 3. Foreclosure/equity stripping

Although mortgage foreclosure was examined as a possible area to extend the right to counsel, Minnesota law allows mortgage foreclosure by “power of sale,” also known as foreclosure by advertisement.<sup>141</sup> Hence, Minnesota statutes provide that as long as lenders follow certain procedures and timelines, they do not need to go before a court in order to foreclose on a mortgagor in default.<sup>142</sup>

A Minnesota Civil *Gideon* right to counsel makes much more sense in the context of equity stripping. Equity stripping is a practice in which businesses allow homeowners facing foreclosure to stay in their homes in exchange for transferring title to the property to the business.<sup>143</sup> The equity stripping business then sells the homes back to the original homeowner under a contract for deed.<sup>144</sup> The equity stripper charges the original homeowner excessive fees, and when they cannot pay, and therefore breach the contract for deed, the equity stripper evicts them.<sup>145</sup> Homeowners who are victims of equity stripping lose not only their homes but all of the equity they had built up over years of paying a mortgage.

Victims of equity stripping tend to be low-income, uninformed, and elderly.<sup>146</sup> The transactions involved in equity stripping tend to be exceedingly complex and many victims do not even know that they are transferring ownership of their home to the equity stripping business.<sup>147</sup>

Minnesotans who have been the victims of equity stripping do have recourse, however. Under a provision of the Minnesota Consumer Fraud Act (“MCFA”), the state has regulated equity stripping practices and has given a private right of action to victims.<sup>148</sup> Among other things, the anti-equity-stripping provisions of the MCFA mandate that equity-stripping businesses verify a homeowner’s ability to pay fees associated with any contract-for-deed arrangement and make a number of disclosures to the homeowner before entering into any such arrangement.<sup>149</sup> Further, the anti-equity-stripping provisions ban a number of deceptive practices by equity-strippers.<sup>150</sup>

Most important for past victims of equity stripping, however, are two aspects of the MCFA. First, the Minnesota legislature passed the equity-stripping portion of the MCFA in 2004, just before the peak of such practices in Minnesota. This means that the vast majority of victims have a plausible recourse available

<sup>140</sup> *Hinneberg v. Big Stone County Housing and Redevelopment Authority*, 2004 WL 2986536, at \*2 (Minn. Ct. App. Dec. 28, 2004), *affd on other grounds*, 706 N.W.2d 220 (Minn. 2005). See also *Carter v. Olmsted County Housing and Redevelopment Authority*, 574 N.W.2d 725 (Minn. Ct. App. 1998) (Housing authority terminating Section 8 benefits acted in a quasi judicial capacity and the housing authority’s decision is subject to deference).

<sup>141</sup> See Minn. Stat. Ann. §§ 580.001-30 (2010).

<sup>142</sup> *Id.*

<sup>143</sup> Michelle Lore, *Lawyers Need to Assist Victims of Mortgage Fraud and Foreclosure*, MINNESOTA LAWYER, Dec. 31, 2007.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*; Telephone interview with Mark Ireland, Staff Attorney, Foreclosure Relief Law Project (July 29, 2008) (hereinafter *Ireland Interview*).

<sup>147</sup> Michelle Lore, *Lawyers Need to Assist Victims of Mortgage Fraud and Foreclosure*, MINNESOTA LAWYER, Dec. 31, 2007; Ireland Interview.

<sup>148</sup> Minn. Stat. Ann. § 325N.18 (2007), Minn. Stat. Ann. § 8.31 (1996).

<sup>149</sup> See Minn. Stat. Ann. § 325N.17 (2007).

<sup>150</sup> See *id.*

to them.<sup>151</sup> Second, the equity-stripping provisions of the MCFA include a right of rescission.<sup>152</sup> Under the MCFA, a homeowner can rescind any agreement with an equity-stripping business that does not comply with broad disclosure requirements.<sup>153</sup> The requirements mandate full, written disclosure of the exact nature of the arrangement between the homeowner and the equity-stripper.<sup>154</sup> The written disclosure must be the same as what the equity-stripper orally told the homeowner.<sup>155</sup> Because a hallmark of equity stripping is an oral misrepresentation of the agreement between homeowner and equity-stripper, many victims will have a right of rescission under the MCFA.

The MCFA gives Minnesota equity-stripping victims viable and useful claims. Such claims are generally quite complicated.<sup>156</sup> Whether an equity-stripping victim successfully brings such a claim can be the difference between keeping his or her home on the one hand or losing the home and all home equity on the other.

Further, the Minnesota legislature has demonstrated its desire to see victims of equity stripping have attorney representation by allowing for recovery of attorney costs and fees.<sup>157</sup> Despite the attorney's fees provision in the MCFA, however, a great need exists for more lawyers to represent victims of equity stripping in Minnesota.<sup>158</sup>

For the foregoing reasons, potential exists for a Civil Gideon right for plaintiffs bringing MCFA claims based on equity stripping.

## **II. The Right to Counsel in Cases Involving Child Custody, Safety, and Support**

### **A. Cases Involving Child Custody and Parental Rights**

#### *1. Current scope of the right*

There is no general right to appointed counsel in custody cases in Minnesota.<sup>159</sup> However, a right to counsel exists for individuals in the following types of cases with custody implications:

- 1) A putative father who has registered with the father's adoption registry and is seeking to exercise his paternal rights over a child being put up for adoption.<sup>160</sup>
- 2) The birth parents in a direct adoption proceeding.<sup>161</sup>

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<sup>151</sup> *Ireland Interview*.

<sup>152</sup> Minn. Stat. Ann. § 325N.02 (2004)

<sup>153</sup> See Minn. Stat. Ann. § 325N.03 (2007).

<sup>154</sup> Minn. Stat. Ann. § 325N.03(c) (2007).

<sup>155</sup> *Id.*

<sup>156</sup> Michelle Lore, *Lawyers Need to Assist Victims of Mortgage Fraud and Foreclosure*, MINNESOTA LAWYER, Dec. 31, 2007; *Ireland Interview*.

<sup>157</sup> Minn. Stat. Ann. § 325N.18 (2010); Minn. Stat. Ann. § 8.31 (2010).

<sup>158</sup> Michelle Lore, *Lawyers Need to Assist Victims of Mortgage Fraud and Foreclosure*, MINNESOTA LAWYER, Dec. 31, 2007; *Ireland Interview*.

<sup>159</sup> *Robinson v. Stegora*, 2003 Minn. App. LEXIS 523 (Minn. App. May 6, 2003) (rejecting parents' claim that trial court erred by not advising them of "right" to appointed counsel before a custody trial in which the court transferred legal and physical custody of their children to the grandparents; "a decision to extend the right to court-appointed counsel to include custody proceedings is not the province of this court"); *Bjerke v. Bacon*, 1993 Minn. App. LEXIS 951 (Minn. App. Sept. 28, 1993) (rejecting mother's claim that she was entitled to court-appointed counsel when appealing custody determination which awarded sole legal and physical custody of her son to his father).

<sup>160</sup> Minn. Stat. Ann. § 259.52(12) (2007) (upon proof of indigency); Minn. R. Adoption P. 23.02(2) (2010 through Nov. 1) (same).

- 3) The minor parent of a child being given up for adoption prior to consenting to the adoption.<sup>162</sup>
- 4) A child, parent, guardian, or custodian in cases where the remedy sought is out-of-home placement, foster care, or inpatient treatment.<sup>163</sup>
- 5) A child and their parent or guardian for the preparation of an out-of-home placement plan for the child.<sup>164</sup>
- 6) All parties in proceedings under the Parentage Act, which primarily involves paternity establishment.<sup>165</sup>
- 7) Parents and children in termination of parental rights proceedings.<sup>166</sup>
- 8) A party has a right to court-appointed counsel on custody and parenting time issues if they are necessary for the initial establishment of parentage.<sup>167</sup>

## 2. Potential for expansion

One area in which the right to counsel may be expanded is the representation of children in cases that influence who has custody of them, such as paternity and custody proceedings. The Minnesota Supreme Court has at least twice left open the issue of whether children should have their own counsel in paternity suits.<sup>168</sup> The Parentage Act provides that a child may be made a party to a proceeding under the Act and provides for the appointment of a guardian *ad litem* in such cases.<sup>169</sup> However, counsel could be appointed in place of, or in addition to, the guardian *ad litem* to pursue the child's wishes, rather than the guardian's conception of the child's best interests.<sup>170</sup> Furthermore, Minnesota law provides that a court should consider the child's wishes in custody disputes and adoptive placements so long as the child is of "sufficient age to express preference."<sup>171</sup> The appointment of counsel for children in cases affecting their custody could help ensure their preferences are made known and taken into consideration by the courts.

Another area for expansion is a right to counsel for indigent parents in custody disputes. Counsel is important in these cases because they have dramatic results that potentially remove a child from the custody of their mother or father, but Minnesota courts have so far rejected claims for a right to counsel for parents in

<sup>161</sup> Minn. Stat. Ann. § 259.47(5) (2007) (requiring adoptive parents to pay for birth parents' counsel upon request); Minn. R. Adoption P. 23.04(1)-(2) (2010 through Nov. 1) (same).

<sup>162</sup> Minn. Stat. Ann. § 259.24(2) (2007) (guaranteeing right to consult with an attorney, physician, or member of clergy and requiring county to pay for counsel if minor cannot afford it).

<sup>163</sup> Minn. Stat. Ann. § 260C.163(3)(b)-(c) (2007).

<sup>164</sup> Minn. Stat. Ann. § 260C.212(1)(d) (2007).

<sup>165</sup> Minn. Stat. Ann. § 257.69(1) (2007) ("the court shall appoint counsel for a party who is unable to pay timely for counsel in proceedings under sections 257.51 to 257.74," otherwise known as the Parentage Act).

<sup>166</sup> Minn. Stat. Ann. § 260C.163(3)(a) (2010).

<sup>167</sup> Minn. Gen. R. Prac. 357.03 (2010 through Nov. 1).

<sup>168</sup> *Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn. 1979) (using supervisory power to find a right to counsel for indigent defendants in paternity suits but leaving issue of child's representation undecided); *Ramsey County Public Defender's Office v. Fleming*, 294 N.W.2d 275 (Minn. 1980) (reserving issue as to whether child's interests might be best protected if it had its own legal counsel).

<sup>169</sup> Minn. Stat. Ann. § 257.60 (2010).

<sup>170</sup> Minn. Stat. Ann. § 518.165(2) (2010) ("The guardian *ad litem* shall represent the interests of the child and advise the court with respect to custody and parenting time.")

<sup>171</sup> Minn. Stat. Ann. § 257.025 (2010) (custody dispute factors); Minn. Stat. Ann. § 259.29 (2010) (adoptive placement factors).

custody determinations.<sup>172</sup> A right to counsel may be most important in third party custody cases in which custody may be transferred to someone other than a parent.<sup>173</sup>

## B. Cases Involving Child Safety

### 1. Current scope of the right

A child taken into custody for placement in a secure detention or child care facility and his or her parent, guardian, or custodian have the right to counsel at the detention hearing if the child is in need of protection or services, neglected and in foster care, or if parental rights may be terminated.<sup>174</sup> The right also extends to a child, parent, guardian, or custodian in child protection proceedings before a juvenile court such as children in need of protection or services (“CHIPS”) and termination-of-parental-rights (“TPR”) proceedings.<sup>175</sup>

### 2. Potential for expansion

As noted above, both the child and their parent(s) generally have a right to appointed counsel in such proceedings. One problem, however, is that public defenders have stopped representing parents and children in these cases, which they had been doing since the 1970s.<sup>176</sup> Public defenders must represent children 10 or older in CHIPS proceedings but there is no requirement that they represent the parents.<sup>177</sup> Private attorneys are now representing many of these people but there are disputes between the state and counties as to who should be responsible for paying these private attorneys.<sup>178</sup> A statutory requirement that public defenders also represent parents in CHIPS proceedings would be helpful in solving this problem, but with recent state budget cuts funding would obviously be a problem.<sup>179</sup>

## C. Cases Involving Child Support

### 1. Current scope of the right

Each party in the expedited child support process has the right to counsel, but not necessarily the right to appointed counsel.<sup>180</sup> Any party in expedited child support cases has the right to an attorney if they cannot afford one, but only if the case involves either the establishment of parentage or contempt proceedings in which incarceration of the indigent party is a possible outcome.<sup>181</sup> A party has a right to

<sup>172</sup> See, e.g., *Robinson v. Stegara*, 2003 Minn. App. LEXIS 523 (Minn. App. May 6, 2003) (no due process violation where sole legal and physical custody of children was transferred to their grandparents because the children’s parents had no right to counsel in the custody case).

<sup>173</sup> *Id.*

<sup>174</sup> Minn. Stat. Ann. § 260C.176(3)(7) (2007).

<sup>175</sup> Minn. Stat. Ann. § 260C.163(3)(a) (2007).

<sup>176</sup> Barbara L. Jones, *Ugly Confrontation Brewing Over CHIPS Representation*, MINNESOTA LAWYER, June 30, 2008, at 1.

<sup>177</sup> Minn. Stat. Ann. § 611.14(4); Jones, *supra* note 177, at 14.

<sup>178</sup> Jones, *supra* note 177, at 14.

<sup>179</sup> Chief Judge Jon Maturi of the 9th Judicial District recently issued an order to all public defenders in the district to continue representing their clients, parents in CHIPS proceedings, until the cases are concluded. Judge Maturi said that under Minn. Stat. §. 611.16 the court could appoint a public defender in any case where a statute requires that a person be represented by counsel and where no rule or statute excludes the client from those whom public defenders may be appointed to represent. He also stated that although his order may increase the burden on public defenders, “that concern pales when contrasted with the possible unjustified loss of a parent’s relationship with their child.” The Judge’s order, however, does not apply to public defenders in new juvenile protection hearings so this dilemma will likely persist.

<sup>180</sup> 112 Minn. Gen. R. Prac. 357.01 (2005).

<sup>181</sup> Minn. Gen. R. Prac. 357.03 (2005); *Cox v. Slama*, 355 N.W.2d 401, 403 (Minn. 1984) (Minnesota Supreme Court used its supervisory power to find a right to appointed counsel for indigent persons facing civil contempt charges for failing to pay child support).

court-appointed counsel on child support issues if they are necessary for the initial establishment of parentage.<sup>182</sup>

## 2. *Potential for expansion*

The right to counsel in child support proceedings applies only in the expedited process in which the county is involved in the collection of child support. However, the right to *appointed* counsel exists only in expedited child support proceedings in which contempt proceedings or paternity are in issue.<sup>183</sup> The right could be extended to cover all expedited child support proceedings due to the fact that the county is assisting with the collection of support.<sup>184</sup>

The right to appointed counsel could also be expanded to cover custodial parents or guardians seeking child support regardless of whether the county is involved in the collection. Establishment, collection, or modification of child support requires extensive fact gathering (e.g., all sources of the respondent's income) with which an attorney could assist the petitioners. However, Minnesota courts provide rather simple forms that parties can use in the child support process. Assistance by some type of social services agency would probably be adequate in this regard and counsel may be unnecessary.

### III. The Right to Counsel in Cases Involving Government Benefits

#### A. Current Scope of the Right

Through cash assistance,<sup>185</sup> health care,<sup>186</sup> 117 and unemployment assistance programs,<sup>187</sup> Minnesota provides government benefits to Minnesotans whose basic needs are not being met. The process for receiving these government benefits includes (1) the applicant's initial application; (2) the government's request for supporting documentation; and (3) an interview during which an initial determination is made regarding eligibility. If benefits are denied or if the applicant wishes to contest the amount of the award, the applicant has a right to appeal to an administrative agency and, in some instances, state courts.<sup>188</sup>

Minnesota law does not currently afford the right to counsel in cases involving government monetary payments or unemployment benefits.<sup>189</sup> It is estimated that less than 10 percent of applicants are represented by counsel in these hearings.<sup>190</sup>

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<sup>182</sup> Minn. Gen. R. Prac. 357.03 (2005).

<sup>183</sup> *Id.*

<sup>184</sup> See *Hepfel v. Bashaw*, 279 N.W.2d 342, 346 (Minn. 1979) (noting that welfare department may become "the aggressive and predominant party in interest" in paternity actions as one factor warranting a right to counsel for indigent respondents in such actions).

<sup>185</sup> Cash assistance programs include (1) Food Support (formerly Food Stamps), (2) Minnesota Family Investment Program, which provides financial support to families with dependent children while encouraging the parents to find work, (3) General Assistance, which provides financial support to individuals without children, and (4) Minnesota Supplemental Aid, which bolsters the financial situation of Minnesotan dependent on federal Supplemental Security Income. MN. DEP'T HUM. SERV., HUMAN SERVICES APPEALS PROCESS 2 (2006).

<sup>186</sup> Health care programs include Medical Assistance and General Assistance Medical Care, which provide medical care for low-income and disable people, and MinnesotaCare, which provides subsidized medical insurance for low-income people without health coverage. *Id.* at 2-3.

<sup>187</sup> The unemployment assistance provides cash benefits for some individuals upon separation from employment. See Minn. Stat. Ch. 268 (2007).

<sup>188</sup> Minn. Stat. § Ann. 256.045(7) (2006).

<sup>189</sup> See Minn. Stat. Ann. § 268.105(6)(b) (2010) (Unemployment insurance appeals hearings).

<sup>190</sup> See Interview with Craig Gustafson, Unemployment Insurance statistician (August 15, 2008) (estimating that, in unemployment benefit appeals hearings, approximately 10 percent of employers and 5 percent of applicants are represented by counsel); Interview with Kenneth Mentz, Chief Appeals Judge, Appeals and Regulations Division, Dep't Hum. Serv., in Minn. (July 22, 2008) (estimating that in health and cash assistance program hearings 90 percent of applicants are not represented by counsel).

## B. Potential for Expansion

Stakeholders involved in government benefit hearings have identified several areas in which the deprivation of these basic needs is most at risk and, accordingly, a right to counsel would be most beneficial. Broadly speaking, these areas include those in which (1) an applicant risks temporary or permanent loss of benefits or (2) the law provides the judges presiding over the hearings with discretion to determine the appropriate amount of support based on the factual evidence presented by the applicant.

First, the need for sustenance is implicated in administrative hearings involving the government's decision to sanction the applicant by reducing, terminating, or denying support. In areas involving food stamps, unemployment benefits, and other cash benefits, if an applicant makes a false representation or conceals facts regarding his or her eligibility, the applicant's benefits may be denied or revoked.<sup>191</sup> The period of lost support can range from 13 weeks to two years.<sup>192</sup> In addition, the applicant may be subject to criminal<sup>193</sup> or civil penalties<sup>194</sup> for unemployment fraud.<sup>195</sup> To balance these harsh penalties, the government's burden of proof is heightened to clear and convincing evidence,<sup>196</sup> which means that an applicant may easily prevail simply by showing up and providing a logical explanation for the applicant's statements. Nevertheless, many applicants do not even show up for these hearings, and those that do regularly fail to present basic facts that could assist their defense. Were experienced counsel to be provided in these hearings, counsel could assist the applicant to understand the implications of phrases such as "clear and convincing evidence" and *mens rea* standards,<sup>197</sup> which, in turn, would enable the applicant to mount a more successful defense. Situations in which an applicant who has provided only truthful statements nevertheless ends up being deprived of his or her basic needs could be prevented.

Second, the need for sustenance is implicated in areas in which judges must determine the appropriate amount of support based upon factual evidence presented by the applicant. This is often the case, for example, in cases involving specialized medical knowledge. Unlike those cases in which the judge simply applies clear-cut guidelines,<sup>198</sup> the law provides judges with discretion in determining the proper amount of support.<sup>199</sup> For example, in unemployment benefit hearings, the issue is often whether the applicant was forced to leave his or her jobs due to the employer's refusal to make reasonable accommodations for the applicant's serious medical condition.<sup>200</sup> In areas of specialized medicine, such as mental illnesses, judges may lack knowledge and may not know how to elicit all the relevant evidence concerning a condition.<sup>201</sup> By the time the applicant has an opportunity to request reconsideration or appeal

<sup>191</sup> Minn. Stat. Ann. § 268.182 (2007) (unemployment benefits).

<sup>192</sup> Minn. Stat. Ann. § 268.182(2) (2007) (disqualification from receiving unemployment benefits ranging from 13 to 104 weeks).

<sup>193</sup> Minn. Stat. Ann. § 609.52(3) (2010) (the criminal penalty is imprisonment or fine, with the maximum fine for a first time offender is two to five times the amount of benefits received).

<sup>194</sup> Minn. Stat. Ann. § 268.18(2)-(2b) (2009) (the civil penalty for fraud can be up to 140 percent of the benefits received plus 1.5 percent monthly interest plus collection fees).

<sup>195</sup> Minn. Stat. Ann. § 268.182 (2007) (unemployment benefits).

<sup>196</sup> Interview with Louis Thayer, Appeals Judge, Appeals and Regulations Division, Dep't Hum. Serv., in Minn. (July 30, 2008).

<sup>197</sup> The standard is "intentionally" for criminal penalties in the unemployment context and in cash assistance program termination hearings. Minn. Stat. Ann. § 268.182(1) (2007) (an applicant is subject to criminal penalties if he or she intentionally makes a false representation); Interview with Louis Thayer, Appeals Judge, Appeals and Regulations Division, Dep't Hum. Serv., in MN (July 30, 2008) (explaining that the standard in cash assistance program termination hearings is intent). The standard is "knowingly" for civil penalties in the unemployment context. Minn. Stat. Ann. § 268.182 (2007) (an applicant can be subject to civil penalties if he or she knowingly makes a false representation).

<sup>198</sup> See Minnesota Department of Human Services, *Combined Manual*, available at [http://www.dhs.state.mn.us/main/idcplg?IdcService=GET\\_DYNAMIC\\_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id\\_016956](http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id_016956) (setting forth the guidelines for determining program eligibility); see also Interview with Margaret Manderfeld, Appeals Judge, Appeals and Regulations Division, Dep't Hum. Serv., in Minn. (July 30, 2008) (noting that the majority of cases involve the application of guidelines).

<sup>199</sup> Interview with Rita McDermott, Appeals Representative for Hennepin County, Dep't Hum. Serv., in Minn. (July 29, 2008).

<sup>200</sup> Minn. Stat. Ann. § 268.085(13a) (2010); Minn. Stat. Ann. § 268.095(1)(7).

<sup>201</sup> Interview with Judge Frank Bloom, Unemployment Law Judge, August 11, 2008.



the decision, the record is sealed.<sup>202</sup>133 Similarly, some health and cash benefit programs vary in the amount of support the applicant receives based on the applicant's need (e.g., financial support for foster parents<sup>203</sup>) or degree of disability. Because this determination largely turns on the applicant's ability to document and establish the degree of need or disability,<sup>204</sup> it is critical that the applicant present relevant factual information at the initial hearing. Were counsel to be provided in these cases, counsel could assist the applicant to establish the full extent of the need or disability by presenting relevant factual evidence in a manner that is tailored to the law. In contrast, without counsel, applicants may fail to address relevant factual issues that could dramatically increase the amount of support they are entitled to under the highly subjective standards.

#### IV. The Right to Counsel in Cases Involving Health

##### A. Current Scope of the Right

According to the Minnesota Department of Health, one in twelve Minnesotans lack health insurance.<sup>205</sup> Currently, Minnesota does offer a statutory right to counsel for certain limited health-related issues.<sup>206</sup> These statutes provide rights to counsel only where certain liberties and freedoms are at stake. However, no right to counsel exists in Minnesota for people seeking access to healthcare or healthcare insurance.

According to the ABA, "health" includes access to appropriate healthcare for treatment of significant health problems, whether that healthcare is financed by government agencies (e.g. Medicare, Medicaid, VA, etc.) or as an employee benefit through private insurance or otherwise.<sup>207</sup> The ABA focused its civil-Gideon resolution on the rights of individuals to obtain healthcare and medical treatment.

Presently, Minnesota law does not provide a right to counsel for proceedings related to state healthcare benefits. Minnesota has three main programs for those that meet the stringent eligibility requirements and are unable to participate in Medicare or Medicaid: MinnesotaCare, General Assistance Medical Care (GAMC), and Medical Assistance (MA). Roughly 707,000 Minnesotans receive health care through these three publicly-funded basic health care programs.<sup>208</sup> The Minnesota Department of Human Services (DHS) administers MinnesotaCare and oversees MA and GAMC, which are administered by counties.<sup>209</sup> About one-half of the combined enrollees are under the age of twenty-one.<sup>210</sup>

Participants may pursue two avenues to remedy their complaints or grievances with the programs. Participants may file a verbal or written grievance or appeal with the health plan regarding a particular action taken by the healthcare plan. They also have the right to seek a "fair hearing" with the Minnesota

<sup>202</sup> See Minn. Stat. Ann. § 268.105(2)(c) (2010).

<sup>203</sup> Interview with Louis Thayer, Appeals Judge, Appeals and Regulations Division, Dep't Hum. Serv., in Minn. (July 30, 2008).

<sup>204</sup> *Id.*

<sup>205</sup> Minn. Dept. of Health, *Immigrant Health: A Call to Action*, January 2005, at 4, available at <http://www.health.state.mn.us/divs/idepc/refugee/topics/immhealthrpt.pdf>.

<sup>206</sup> See Minn. Stat. Ann. § 144.4195(1)(b) (2009) (requiring that an ex parte order for the quarantine of a person or group of persons notify those quarantined of their right to a court hearing and their right to counsel or appointed counsel if indigent, at any proceeding related to the court order); see also Minn. Stat. § 144.4890(3) (describing the petition and hearing process for enforcement or relief of an order designating someone a tuberculosis health threat and requiring that, in cases where the petitioning party is the government seeking enforcement of such order, notice of the hearing notifying the respondent of his or her right to appointed counsel); see also Minn. Stat. Ann. § 144.7407(2)(e) (2010) (guaranteeing the respondent's right to counsel in proceedings related to the non-consensual taking of a blood sample for pathogen-testing purposes).

<sup>207</sup> ABA, *Resolution of Civil Right to Counsel*, 15 Temp. Pol. & Civ. Rts. L. Rev. 508, 522 (2006).

<sup>208</sup> Minn. Dept. of Human Services, *Human Services Department Helps Meet Basic Needs*, April 2010, available at <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-6146-ENG>.

<sup>209</sup> Minn. Dept. of Human Services, *Health Care*, available at [http://www.dhs.state.mn.us/main/idcplg?IdcService=GET\\_DYNAMIC\\_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id\\_006254](http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id_006254).

<sup>210</sup> *Id.*

Department of Human Services. However, strict time limits apply. Participants only have ninety days to file a grievance or appeal, and only thirty days to request a State fair hearing from the time the action complained of was taken.<sup>211</sup> The grievance/appeals and “fair hearing” avenues may be pursued concurrently.<sup>212</sup>

Currently, the State of Minnesota provides limited help and information to those navigating the grievance/appeals process in the State healthcare system. Minnesotans that participate in one of these plans can seek help from the Office of the Ombudsman for State Managed Health Care Programs. The Ombudsman office reviews and investigates complaints and recommends actions to remedy complaints related to access, service, and billing problems. The Ombudsman office also provides information to participants regarding the grievance and appeals process and the State fair hearing process.

## **B. Potential for Expansion**

While participants in Minnesota health care programs have a number of avenues to pursue their complaints, they may be unaware of these avenues, and are forced to represent themselves in connection with these important benefits. Counsel would certainly be beneficial in assisting beneficiaries in hearing procedures that adjudicate the potential reduction or termination of their health care benefits. State-appointed counsel could also reduce the number and refine the type of complaints that are made regarding state health-care benefits because counsel could help beneficiaries assess the merits of their claim before it is raised with the plan or the Department of Human Services. The task force should consider whether the cost of appointing counsel in these cases would save money in the long run, and whether the cost is justified by the important benefits counsel could provide to beneficiaries.

## **V. The Right to Counsel in Cases Involving the Environment**

### **A. Current Scope of the Right**

Minnesota provides citizens with several private rights of action to enforce Minnesota’s environmental safety laws, but does not provide a right to court-appointed counsel in such actions.

The Minnesota Pollution Control Agency (MPCA) was organized “to achieve a reasonable degree of purity of water, air and land resources of the state consistent with the maximum enjoyment and use thereof in furtherance of the welfare of the people of the state ...”<sup>213</sup> In pursuit of its goal, the MPCA is authorized to devise and adopt standards governing air quality and emissions (including livestock odor), solid waste disposal, noise levels, and hazardous waste management.<sup>214</sup> Although the MPCA may itself issue administrative penalties and field citations to non-compliers, both the Minnesota Environmental Rights Act (MERA) and the Minnesota nuisance statute contemplate private rights of action for noncompliance with certain MPCA standards.<sup>215</sup>

Through MERA, the Minnesota legislature declared that “it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction.”<sup>216</sup> When bringing an action under MERA, a plaintiff may establish a prima facie case by identifying a protectable natural resource and showing that the conduct of the defendant

<sup>211</sup> Minn. Dept. of Human Services, *Health Care: Grievances and Appeals Process through the Health Plan State Fair Hearing Process*, available at: [http://www.dhs.state.mn.us/main/ideplg?IdcService=GET\\_DYNAMIC\\_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id\\_052228#P566819](http://www.dhs.state.mn.us/main/ideplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id_052228#P566819).

<sup>212</sup> *Id.*

<sup>213</sup> Minn. Stat. Ann. § 116.01 (1969).

<sup>214</sup> Minn. Stat. Ann. § 116.07 (2010); Minn. Stat. Ann. § 116.0713 (2000).

<sup>215</sup> Minn. Stat. Ann. § 116B.03 (1986); Minn. Stat. Ann. § 561.19 (2004).

<sup>216</sup> Minn. Stat. Ann. § 116B.01 (1986); Minn. Stat. Ann. § 116B.03 (1986).

violates or is likely to violate “an environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit ... .”<sup>217</sup>

For example, in *State by Schaller v. County of Blue Earth*, the plaintiff brought a MERA claim alleging that construction of a new highway would violate MPCA noise standards.<sup>218</sup> Additionally, in *Overgaard v. Rock County Board of Commissioners*, the plaintiffs brought a MERA claim alleging that a local pig feedlot was violating MPCA odor and emissions standards.<sup>219</sup> Finally, in *Safe Grant*, the plaintiffs alleged a successful prima facie MERA claim when the defendant’s gun club degraded quietude and materially adversely affected the environment (although MPCA does not have a specific noise standard for gun clubs).<sup>220</sup>

Similar to a MERA claim, the Minnesota nuisance statute provides for private rights of action based on MPCA or other state mandated standards.<sup>221</sup> Specifically, that statute explains that “an action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance ... .”<sup>222</sup>

For example, in *Wendinger v. Forst Farms Inc. & Wakefield Pork Inc.*, the court held that invasive odors from a confined-animal feeding operation qualified as a nuisance.<sup>223</sup> In particular, the court explained that “a plaintiff who presents evidence that the defendant intentionally maintains a condition that is injurious to health, or indecent or offensive to the senses, or which obstructs free use of property, states an actionable claim in nuisance.”<sup>224</sup> Although the plaintiffs in *Wendinger* did not rely on a MPCA or other state sponsored standard, it is likely that they could have as Minn. Stat. § 561.19 Subd. 2(c)(1) contemplates a private right of action for violations of “state or local laws, ordinances, rules or permits ... .”

## B. Potential for Expansion

The Minnesota legislature has already evinced an intent that private individuals should help enforce Minnesota’s environmental safety standards, particularly when the violation of those standards may lead to personal injury or health concerns. Minnesota’s environmental standards are best preserved by private litigants, who are uniquely able to deter violations of environmental standards and quantify environmental damages. Private plaintiffs bringing MERA claims and claims under Minnesota’s nuisance statute should be provided counsel to ensure their ability to comprehensively vindicate environmental rights. Providing counsel in such cases will further the stated environmental goals of the Minnesota legislature. The legislature should seriously explore whether the costs of providing counsel to private litigants in such cases could protect environmental standards for less money than the cost of funding a state agency charged with aggressively prosecuting violations of environmental standards.

## VI. The Right to Counsel in Prisoners’ Rights Cases

### A. Current Scope of the Right

<sup>217</sup> *Citizens for a Safe Grant v. Lone Oak Sportsmen’s Club, Inc.*, 624 N.W.2d 796, 805 (Minn. Ct. App. 2001); Minn. Stat. Ann. § 116B.04 (1985).

<sup>218</sup> No. C2-96-1004, 1996 WL 438845 (Minn. Ct. App. Aug. 6, 1996), *affd.*, 563 N.W.2d 260 (Minn. 1997).

<sup>219</sup> No. Civ. 02-601(DWF/AJB), 2002 WL 31924522 (D. Minn. Dec. 30, 2002).

<sup>220</sup> 624 N.W.2d at 806.

<sup>221</sup> Minn. Stat. Ann. § 561.01 (20010).

<sup>222</sup> *Id.*

<sup>223</sup> 662 N.W.2d 546, 552 (Minn. Ct. App. 2003).

<sup>224</sup> *Id.*

It is well documented that individuals confined in U.S. prisons are subject to civil rights violations as well as physical injury and/or death.<sup>225</sup> Although prisoners may have some legal recourse, including the ability to file federal 42 U.S.C. 1983 claims in state court, many obstacles can impede a prisoner's ability to secure such a remedy.<sup>226</sup> One commonly seen obstruction is a lack of legal representation.

Unlike criminal defendants facing incarceration, prisoners who file civil actions have no constitutional or statutory right to counsel. On the contrary, such prisoners typically have less access to legal assistance than the average civil litigant. In addition to the obvious barriers created by incarceration (e.g. inability to conduct factual investigation or discovery, lack of fixed income and inability to make court appearances), prisoners do not have access to legal aid programs that receive funding from the Legal Services Corporation.<sup>227</sup> Furthermore, the Prison Litigation Reform Act of 1995 (PLRA) significantly reduces the attorneys fees available to successful prisoner plaintiffs and, thereby, further decreases the incentive for attorneys to represent incarcerated individuals.<sup>228</sup> Finally, the PLRA works generally to make civil litigation more difficult for prisoners by mandating that all administrative remedies be exhausted before civil rights claims may be alleged under 42 U.S.C. § 1983.<sup>229</sup>

## **B. Potential for Expansion**

Prisoners depend on agents of the State (namely guards and other prison staff) for all of their basic human needs, yet Minnesota does not provide them with an effective method to redress violations of their basic human rights. Minnesota should consider whether a tailored policy can be implemented to provide prisoners with non-frivolous abuse claims with court-appointed counsel to ensure that the state's prisons are complying with basic standards for the proper treatment of prisoners. In light of the high potential for prisoner abuse and the difficulty involved in achieving a legal remedy, a strong argument may be proffered in support of a right to counsel for prisoners.

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<sup>225</sup> See generally Jamie Fellner, *Prisoner Abuse: How Different are U.S. Prisons?*, HUMAN RIGHTS WATCH, May 13, 2004, available at <http://www.hrw.org/english/docs/2004/05/14/usdom8583.htm>; Allen J. Beck et al., *Sexual Violence Reported by Correctional Authorities*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, July 2008, available <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrjca0506.pdf>.

<sup>226</sup> *Fisher v. State, Dep't. of Corr.*, Nos. A06-76, A06-77, 2007 WL 1673642 (Minn. App. June 12, 2007).

<sup>227</sup> Omnibus Consol. Rescissions & Approps. Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996); 45 C.F.R. part 1637 (1997).

<sup>228</sup> 42 U.S.C. § 1997e(d) (1996).

<sup>229</sup> See 47 U.S.C. § 1997e(d) (1996).

## APPENDIX C

Civil Gideon Legislation and Rulemaking Initiatives  
in Other Jurisdictions

## A. NOTABLE LITIGATION

- *Turner v. Rogers*:<sup>230</sup> In June 2011 the Supreme Court of the United States considered a case involving the imprisonment of an indigent parent by a South Carolina family court following his fifth failure to pay child support and his unrepresented appearance at a civil contempt hearing. Among other things, the Supreme Court considered whether there is a broadly-based right to counsel for civil contempt cases. In an opinion by Justice Breyer,<sup>231</sup> the Supreme Court held, under the circumstances (where the parent lacked counsel and there were no procedural safeguards, and the parent failed to receive notice that his ability to pay would impact the outcome of the proceeding) and despite finding that the Due Process Clause of the Fourteenth Amendment did not automatically require that the state provide counsel under the circumstances, the incarceration was a violation of the Due Process Clause and vacated the judgment of the South Carolina Supreme Court, remanding the case for further proceedings. The opinion suggests that if the state had provided “alternative procedural safeguards equivalent to adequate notice of the importance of the ability to pay, a fair opportunity to present, and to dispute, relevant information, and express court findings as to the supporting parent’s ability to comply with the support order.”<sup>232</sup>
- *Merryfield v. State*:<sup>233</sup> The Kansas Court of Appeals held in October 2010 that the failure to provide appointed counsel for a person challenging the quality of their treatment under the Kansas Sexual Predator Treatment Program is a violation of both due process and equal protection. The court first found that the petitioner lacked a statutory right to counsel, then held that because Merryfield was detained for treatment and not as punishment, the state was required to provide appointed counsel just as it appointed counsel for non-sex offenders subjected to involuntary mental health commitment.
- *Franco-Gonzalez v. Holder*:<sup>234</sup> This federal class action lawsuit filed in August 2010 in the Central District of California argued that the United States has an obligation to provide appointed counsel for mentally disabled detainees in immigration proceedings under the Immigration and Nationality Act (INA), the Fifth Amendment, and the Rehabilitation Act. The court ruled on plaintiffs’ preliminary injunction and held that the Rehabilitation Act requires the government to provide a “qualified representative” for two individual plaintiffs who are part of the class.<sup>235</sup>
- *In re J.B.B.*:<sup>236</sup> In a case involving a right to counsel in “involuntary adoptions,” (*i.e.*, an adoption conducted without the consent of the parent and involving the termination of parental rights) the

<sup>230</sup> *Turner v. Rogers et al.*, 564 U.S. \_\_\_\_ (2011), decided June 20, 2011; slip opinion available at <http://www.supremecourt.gov/opinions/10pdf/10-10.pdf>.

<sup>231</sup> Justice Breyer was joined by Justices Kennedy, Ginsburg, Sotomayor and Kagan; Justice Thomas dissented, joined by Justice Scalia in whole and Justices Roberts and Alito as to certain portions. *See id.*

<sup>232</sup> *Id.*, Syllabus and pages 7-16.

<sup>233</sup> 241 P.3d 573, 2010 WL 4140305 (Kan. App. 2010).

<sup>234</sup> No. CV10-02211 (C.D. Cal. 2010). Complaint available at <http://www.aclu.org/files/assets/2010-8-2-GonzalezvHolder-AmendedComplaint.pdf>.

<sup>235</sup> Legal Action Center, <http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/immigrants-mental-disabilities-removal-proceedings>; ACLU, *Immigrants Win Right to Representation*, (Dec. 23, 2010) <https://www.aclu-sc.org/releases/view/103059>.

<sup>236</sup> 2011 WL 1239807, 2011-Ohio-1653 (Ohio Ct. App. Mar 30, 2011).

Ohio Court of Appeals declined to address the parent's right to counsel, holding the "the issue is not ripe for adjudication."

- *In the Matter of the Termination of the Parent-Child Relationship of I.B. v. Indiana Dep't of Child Services*:<sup>237</sup> In October 2010, the Indiana Supreme Court held that parents have a right to counsel in appeals of terminations of their parental rights. The court's holding was based on statutory construction.
- *Leone v. Owen*:<sup>238</sup> An Ohio Court of Appeals held that juvenile respondents have a due process right to counsel in civil protective order hearings.
- *In re DR/AR*:<sup>239</sup> The Washington Supreme Court initially accepted a case addressing whether children have the right to counsel for children in dependency/termination proceedings.<sup>240</sup> However, the Court found that the writ for review had been improvidently granted because the statute had been amended after the trial court's decision to require the state to notify children of their right to request counsel.<sup>241</sup>
- *Bellevue Sch. Dist. v. E.S.*:<sup>242</sup> In 2009, the Washington State Court of Appeals held that a child in a truancy proceeding has a due process right to appointed counsel, citing the child's liberty, privacy, and educational interests. However, in 2011 the Washington Supreme Court reversed, holding that the Court of Appeals had erred in its decision.
- *Rhine v. Deaton*:<sup>243</sup> This case was appealed to the United States Supreme Court but denied certiorari in early 2010. The petitioner alleged that Texas's statutory scheme violates Equal Protection by providing appointed counsel to parents in termination of parental rights proceedings only when the state initiates the petition. The petitioner also argued that the trial court, in refusing to appoint counsel, failed to undertake the case-by-case due process analysis required by *Lassiter v. Dep't of Social Services*.<sup>244</sup> However, the United States Supreme Court followed the Texas Solicitor General to recommendation to deny certiorari.
- *Office of Pub. Advocacy v. Alaska Ct. Sys.*:<sup>245</sup> In 2007, an Alaska trial court ruled that the state constitution requires appointment of counsel for indigent parents in adversarial child custody proceedings where the opposing party has private counsel. After complete briefing and argument, including the first-ever state court amicus brief from the ABA, the Alaska Supreme Court dismissed the appeal in August 2009 as moot, leaving the trial court decision intact.
- *In re McBride*:<sup>246</sup> The Michigan Court of Appeals held in 2009 that while it was clear error to deny appointed counsel to an incarcerated parent in a termination of parental rights proceeding, the error was "harmless" and therefore not reversible. The appellant urged the Michigan Supreme Court to reverse on the grounds that the complete denial of counsel in a TPR case is never harmless, but the

<sup>237</sup> 933 N.E.2d 1264 (Ind. 2010).

<sup>238</sup> *In re D.L.*, 937 N.E.2d 1042 (Ohio App. 2010).

<sup>239</sup> No. 27394-6-111 (Wash. 2010).

<sup>240</sup> <http://templeofjustice.org/2011/in-re-the-termination-of-d-r-and-a-r/>.

<sup>241</sup> CIVIL RIGHT TO COUNSEL UPDATE (Civil Right to Counsel), March 2011, at 1, <http://www.civilrighttocounsel.org/pdfs/2011-March-CRTC-update.pdf>.

<sup>242</sup> 199 P.3d 1010 (Wash. Ct. App. 2009), *reversed* No. 83024-0, 2011 WL 2278158 (Wash. June 9, 2011).

<sup>243</sup> 250 S.W.3d 486 (Tex. App. Ft. Worth 2008), *review denied*, No. 08-0351 (Tex. 2009), *cert denied*, 130 S.Ct. 1281 (2010).

<sup>244</sup> 452 U.S. 18 (1981).

<sup>245</sup> No. 3AN-06-8867 (Alaska Sup. Ct. 2007), *review denied*, No. S-12999 (Alaska 2008).

<sup>246</sup> 2008 WL 2751233 (Mich. App. 2008) (unpublished), leave to appeal denied, 766 N.W.2d 857 (Mich. 2009), reconsideration denied, 771 N.W.2d 801 (Mich. 2009).

Michigan Supreme Court denied review in June 2009, even though the state Attorney General agreed in an amicus brief that reversal was proper.

- *In re L.T.M.*:<sup>247</sup> The Illinois Supreme Court held in 2005 that the state violated equal protection by providing for appointed counsel for TPR proceedings under the Juvenile Court Act but not proceedings under the Adoption Act. In essence, this decision extended the right of appointed counsel to privately initiated TPR proceedings.
- *Kenny A. v. Perdue*:<sup>248</sup> A federal district court held in 2005 that foster children in Georgia have a due process right to appointed counsel in all deprivation proceedings, pursuant to the Georgia Constitution. The United States Supreme Court reversed and remanded this case on grounds completely unrelated to the right-to-counsel issue.

## B. RECENT LEGISLATIVE ACTIVITIES

- Alabama: In 2008, a statute extending the right to counsel in Termination of Parental Rights (TPR) proceedings to cover privately initiated TPR petitions was passed.<sup>249</sup> However, this statute merely codified a 1996 due process right to counsel ruling from the Alabama Court of Civil Appeals.<sup>250</sup>
- Connecticut: The Connecticut legislature passed a bill (HB 6422) that will require a child-directed attorney (as opposed to a guardian *ad litem* or a lawyer in a dual role) be appointed for all children in child protection proceedings.
- Florida: SB 1860 was introduced, but died in committee (Children, Families, and Elder Affairs). This bill would have required that courts appoint counsel for children in certain proceedings, such as ones affecting personal liberty, and would have provided discretion for the court to appoint counsel for children in other proceedings, such as custody proceedings.
- Georgia: SB 292 would have required an attorney (as opposed to a guardian *ad litem* (GAL)) to be appointed for children in Georgia dependency proceedings. Although the bill did not make it through the legislative session when introduced, there are plans to reintroduce it.
- Hawaii: Civil Gideon proponents attempted to modify HRS § 587-34 in order to provide a right to counsel for parents in child protective proceedings, proceedings in which right to counsel is currently discretionary. However, Hi Legis. 135 § 17 signed by the Governor May 24, 2010 retained the discretionary appointment system. The enacted bill modified the law to enable a judge to appoint counsel for indigent parents without having to also find that it such appointment is necessary to protect the parents' interests and that such interests are not represented by another represented party.
- Louisiana: HB 1146, which was signed by the Governor in June 2010, repealed the right to counsel provided to parents in contested intrafamily adoptions that was enacted unanimously in 2008, replacing it with a discretionary appointment system. The bill also removed the statutory requirement that those seeking to adopt pay the fees for any attorney appointed for the contesting parent. As originally drafted, this bill would have stripped the right to counsel provided to children, but amendments made during the enactment process restored this right. At one point, an amendment

<sup>247</sup> 824 N.E.2d 221 (Ill. 2005).

<sup>248</sup> 356 F.Supp. 1353 (N.D. Ga. 2005).

<sup>249</sup> 2008 Ala. Acts 277, codified at Ala. Code § 12-15-305. See Civil Right to Counsel Update (Oct. 2008), <http://www.civilrighttocounsel.org/pdfs/2008-10-13-newsletter.pdf>.

<sup>250</sup> *Id.*

was introduced that would have allowed the court to impose attorney's fees against the contesting appointment if the contest was found to be frivolous, but this amendment was removed prior to passage.

- Massachusetts: HB 5028, signed by the Governor in October 2010, provides a continuing right to counsel for children ages 18-22 who continue to receive voluntary services from the Massachusetts Department of Children and Families.
- Montana: In 2005, the state enacted legislation establishing a right to counsel for parents and guardians in all abuse and neglect proceedings. The legislation expanded the existing right to counsel, which had provided parents with a right to counsel in abuse and neglect cases only when (a) a request was made for a determination that preservation or reunification services need not be provided or (b) a petition for termination of parental rights was filed. The legislation also attempted to improve the quality of parents' representation in abuse and neglect cases by, among other things, requiring the newly-appointed statewide public defender to (i) handle mandated abuse and neglect cases, and (ii) establish and follow standards for the qualification and training of public defenders and policies and procedures for handling conflicts of interest, excessive caseloads, and financial eligibility determinations.
- New York: In 2009, a bill was introduced (Int-648) in the New York City Legislature that would have established a "civil justice coordinator" to implement a program to provide appointed legal services for all indigent seniors in eviction and foreclosure cases. The same bill was reintroduced in 2010 (Int-0090) and was referred in early March 2010 to the Committee on Aging. The New York State Legislature also introduced a bill during the 2009-2010 session requiring landlords seeking a default to disclose whether the defendant is a senior citizen; if the defendant is a senior citizen (or the plaintiff is unsure), the court would be prevented from entering a default judgment until providing time for the defendant to secure counsel, and upon request, the court could then appoint counsel for the defendant. The bill was referred to the housing subcommittee in January 2010, but no votes were scheduled.
- North Carolina: Civil Gideon advocates introduced HB 1915 in 2010, a bill which would have given trial courts the discretionary authority to appoint counsel in any civil case when necessary to ensure justice (mirroring 28 U.S.C. § 1915). The courts would have been instructed to weigh the typical *Mathews* factors (interests at stake, risk of error)<sup>251</sup> as well as the severity of consequences for the unrepresented party if they lose. The bill also would have awarded three \$25,000 CRTC pilot grants. Although the bill passed the first reading, it did not survive legislative session.
- Tennessee: In 2008, the state legislature expanded the right to counsel for parents to include proceedings involving abuse/neglect and termination of parental rights carried out pursuant to the Adoption Code.

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<sup>251</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332, 335, 96 S.Ct. 893, 901, 903, 47 L.Ed.2d 18 (1976).



- Texas:
  - In early 2009, Rep. Elliott Naishtat introduced HB 2824, which would have required counsel to be appointed for indigent tenants in eviction appeals from Justice Court to County Court where the indigent tenant was in possession of the property at the time of the eviction filing. The bill was modified in committee to make appointment discretionary, and then further modified by the legislature prior to codification as Tex. Gov't. Code §§ 25.0020 and 26.010. The enacted bill empowers the court to appoint an attorney willing to do the case pro bono (attorneys' fees, however, are disallowed), and requires the court to notify parties to an eviction of their right to make a request for appointment.
  - In 2005, the Texas Legislature broadly restructured the Texas child welfare system. Among other things, the state established a right to counsel in all cases in which the government is seeking conservatorship of a child (*i.e.*, care, control or custody, or the right to determine placement of the child), effectively expanding the civil right to counsel that had previously existed in dependency cases in which the government sought to terminate a parent's rights. The initiative for these changes came from parents' rights advocates and the Center for Public Policy Priorities.
- Washington: The Governor signed HB2735 in March 2010, which requires children 12 years and older to be informed of their right to request a discretionary appointment of counsel in dependency and termination proceedings. The state must also notify the court of the child's response and repeat the notification to the child each year as well as upon any motion affecting the child's placement, services, or familial relationships.

### C. MASSACHUSETTS AND TEXAS PILOT PROGRAMS

- Massachusetts: In 2008, the Boston Bar Association's Task Force on Expanding the Civil Right to Counsel issued a report entitled *Gideon's New Trumpet* that urged for the creation of pilot programs to further study the implementation of a civil right to counsel.<sup>252</sup> The BBA subsequently obtained sufficient funding to initiate two pilots related to eviction proceedings,<sup>253</sup> and the BBA has started to collect data from the implemented pilots.<sup>254</sup>
- Texas: In 2010, the Texas Access to Justice Foundation funded two civil right to counsel pilot projects that will last for approximately 20 months.<sup>255</sup> The two pilots serve litigants at 125 percent or below of the poverty level and are attempting to determine the costs, savings, and impacts of providing counsel.<sup>256</sup> The projects seek to provide counsel in foreclosure and eviction cases.<sup>257</sup> The pilots are underway.

<sup>252</sup> GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS (Boston Bar Association Task Force on Expanding the Civil Right to Counsel ed., 2008), [http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/gideons\\_new\\_trumpet\\_9\\_08.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/gideons_new_trumpet_9_08.authcheckdam.pdf) (proposing several pilot projects).

<sup>253</sup> CIVIL RIGHT TO COUNSEL UPDATE (Civil Right to Counsel), June 2009, at 2–3, <http://www.civilrighttocounsel.org/pdfs/June%202009%20CRC%20Update%20no.4.pdf>.

<sup>254</sup> Press Release, MA Civil Right to Counsel Pilot Projects Launched (July 13, 2009), [http://www.bostonbar.org/prs/nr\\_0809/PilotProject071309.htm](http://www.bostonbar.org/prs/nr_0809/PilotProject071309.htm); Press Release, MBF Supports Civil Right to Counsel Pilot Project, <http://www.massbarfoundation.org/news/2009/mbf-supports-civil-right-to-counsel-pilot-project>.

<sup>255</sup> Pilots, NATIONAL COALITION TO A CIVIL RIGHT TO COUNSEL, <http://www.civilrighttocounsel.org/advances/pilots/> (“The first pilot is being operated by Texas Rio Grande Legal Aid, which received \$347,000 to provide counsel in foreclosure cases... The project will serve six counties near the border that have traditionally been underserved. The second pilot is being operated by Lone Star Legal Aid, which was awarded \$310,000 to provide counsel in tenant defense cases.”).

<sup>256</sup> *Id.*

## D. OTHER INITIATIVES AND ACTIVITIES

- In September 2010, a group of advocacy organizations led by Legal Action of Wisconsin filed a petition with the Wisconsin Supreme Court urging it to create court rules requiring the appointment of counsel in cases involving basic human needs, once the judge determines that counsel is “needed” (which is based on a number of factors, including complexity of the case).<sup>258</sup> The petition has 1,300 signatures on it, including a number of judges and court administrators.
- New York State Chief Judge Jonathan Lippman created a program to ensure that “any homeowner in foreclosure who does not have a lawyer will be supplied one by legal aid groups or other pro bono groups.”<sup>259</sup> The programs were put into place in two counties in early 2011 and are to be implemented across the state by the end of the year.<sup>260</sup> Once the Task Force has completed its report, Chief Judge Lippman intends to use the report in his budget proposal.
- The California State Bar Association drafted two “model acts.” The first, the State Equal Justice Act, is a plan for providing legal assistance in virtually all civil cases, but the types of assistance for some cases is short of actual representation.<sup>261</sup> The second, the State Basic Access Act, provides a full right to counsel but for a more limited range of cases (those affecting basic human needs).<sup>262</sup>
- In 2009, the ABA Section of Litigation Children’s Rights Litigation Committee drafted a Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings.<sup>263</sup> The Act calls for a categorical right to counsel for children in abuse or neglect proceedings.<sup>264</sup> The Act will be brought to the ABA’s House of Delegates for adoption in August of 2011.
- A number of state Access to Justice Commissions have been active in studying or developing an approach to Civil Right to Counsel (CRTC), including California, Hawaii, Maryland, New Hampshire, New Mexico, North Carolina, South Carolina, and Texas. Colorado’s ATJC held a moot court on civil Gideon in April 2010, the Hawaii ATJC held a conference in June 2010 that addressed civil Gideon, and the Maryland ATJC is attempting to “cost out” the implementation phase of civil right to counsel.<sup>265</sup> The Access to Justice Commissions in Maryland, Massachusetts, and North Carolina have endorsed the principles expressed in the ABA’s 2006 Resolution.
- Other organizations have engaged in education efforts: the Northeast chapter of American Constitution Society in Ohio put on a civil right to counsel panel in October 2010, while the Society of American Law Teachers in San Francisco hosted a workshop in January 2011 entitled, “Civil

<sup>257</sup> Press Release, Texas Access to Justice Foundation Awards New Grants for Pilot Projects Impacting the Texas Legal Delivery System, <http://www.teajf.org/news/releases/Special-Board-Impact-Grants.aspx>.

<sup>258</sup> Debra Cassens Weiss, *Petition Asks Wisconsin High Court to Adopt Civil Gideon Rule*, ABA JOURNAL, [http://www.abajournal.com/news/article/petition\\_asks\\_wisconsin\\_high\\_court\\_to\\_adopt\\_civil\\_gideon\\_rule/](http://www.abajournal.com/news/article/petition_asks_wisconsin_high_court_to_adopt_civil_gideon_rule/); See also Civil Gideon in Wisconsin, <http://www.wisgideon.org/>.

<sup>259</sup> David Streitfeld, *New York Courts Vow Legal Aid in Housing*, N.Y. TIMES, Feb. 16, 2011, at B1, available at <http://www.nytimes.com/2011/02/16/business/16housing.html>.

<sup>260</sup> *Id.*

<sup>261</sup> California Commission on Access to Justice, *State Equal Justice Act*, BRENNAN CENTER, Nov. 3, 2006, available at [http://www.brennancenter.org/page/-/d/download\\_file\\_38656.pdf](http://www.brennancenter.org/page/-/d/download_file_38656.pdf).

<sup>262</sup> California Commission on Access to Justice, *State Basic Access Act*, CIVIL RIGHT TO COUNSEL, Feb. 8, 2008, available at <http://civilrighttocounsel.org/pdfs/State%20Basic%20Access%20Act%20Feb%2008%20final.pdf>.

<sup>263</sup> ABA MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS, <http://www.isc.idaho.gov/childprotection/PDFs/ABA%20Model%20Act%20rep%20of%20child%20in%20cp%20case.pdf>.

<sup>264</sup> *Id.*

<sup>265</sup> MARYLAND ACCESS TO JUSTICE COMMISSION, IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND, <http://xa.yimg.com/kq/groups/7366000/891992047/name/implementingacivilrighttocounselinmd2011.pdf>.

Gideon: An Idea Whose Time Is Now.” In addition, the National Coalition for a Civil Right to Counsel organized a panel at the 2010 NLADA Conference entitled, “Different Tools, Different Jobs: Exploring Civil Right to Counsel’s Place Among Various Services for the Unrepresented.”

- The Dignity in Schools Campaign has prepared a draft code called *A Model Code on Education and Dignity* that includes a recommendation for a right to counsel in school disciplinary proceedings resulting in the denial of educational rights.<sup>266</sup> In addition, the DCS co-sponsored a summit entitled *Raising Our Hands: Creating a National Strategy for Children's Right to Education and Counsel*.<sup>267</sup>
- The Children’s Advocacy Network and First Star have released the Second Edition of *A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children*, detailing each state’s provision of attorneys to abused and neglected children in dependency cases.<sup>268</sup>

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<sup>266</sup> DIGNITY IN SCHOOL CAMPAIGN, PRESENTING A HUMAN RIGHTS FRAMEWORK FOR SCHOOLS: A MODEL CODE ON EDUCATION AND DIGNITY (2110), [http://www.dignityinschools.org/files/DRAFT\\_Model\\_Code.pdf](http://www.dignityinschools.org/files/DRAFT_Model_Code.pdf).

<sup>267</sup> DIGNITY IN SCHOOLS, <http://www.dignityinschools.org/content/chicago-summit-and-roundtable-model-code-2009-3>; *see also* Conference Program, *Raising our Hands: Creating a National Strategy for Children’s Right to Education and Counsel* (Oct. 23, 2009), [http://www.dignityinschools.org/files/Childrens\\_Rights\\_Summit.pdf](http://www.dignityinschools.org/files/Childrens_Rights_Summit.pdf).

<sup>268</sup> A CHILD’S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN, *available at* [http://www.caichildlaw.org/Misc/Final\\_RTC\\_2nd\\_Edition\\_lr.pdf](http://www.caichildlaw.org/Misc/Final_RTC_2nd_Edition_lr.pdf).

## APPENDIX D-1

## Surveys, Statistics and Additional Data Obtained by the Task Force

**JUDGES' SURVEY****SURVEY TEXT**

P1

Welcome to the Civil Gideon Unrepresented Litigants Survey. The purpose of the survey is to provide judges' perspectives on unrepresented litigants to the MSBA Civil Gideon Task Force, which is currently exploring the feasibility of a civil right to counsel in Minnesota. The mission of the task force is fact-finding in nature. It has been created with the goal of conducting a thorough analysis of this question and determining whether there exists a basis to establish a civil right to counsel. It has also been asked to determine how such a right would affect legal services delivery, public defense, prosecuting attorneys and Minnesota's judicial system. Please answer the survey questions based on your experience in all counties where you have served as a judge. This survey will take less than 10 minutes to complete. At the end of the survey, you can choose whether to provide your name for possible follow up questions from MSBA Civil Gideon Task Force members. If you do not provide your name for possible follow up, your answers will remain confidential. You cannot exit the survey and continue at a later time, so please plan to take the survey when you have the time available. Thank you for taking the time to complete this survey.

P2 Necessary Counsel

[M]

Please indicate, for each case type, the extent to which counsel is necessary.

	<b>Always Unnecessary</b>	<b>Usually Unnecessary</b>	<b>Usually Necessary</b>	<b>Always Necessary</b>	<b>No Opinion/ Not Applicable</b>
Abuse of institutionalized persons	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Child support proceedings	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contested custody	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Criminal expungement	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Debt collection	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dissolution with children	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dissolution without children	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Employment discrimination	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Foreclosure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

P3 2

[M]

Please indicate, for each case type, the extent to which counsel is necessary.

	<b>Always Unnecessary</b>	<b>Usually Unnecessary</b>	<b>Usually Necessary</b>	<b>Always Necessary</b>	<b>No Opinion/ Not Applicable</b>
Garnishment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Harassment restraining order	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Landlord/tenant	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Non-criminal domestic violence	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Paternity	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Public health	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Unpaid wages	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wrongful termination	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other/Comments	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

P4 CaseTypeNecessary

In your experience, in what three civil case types is representation most necessary?

Case Type 1 \_\_\_\_\_  
 Case Type 2 \_\_\_\_\_  
 Case Type 3 \_\_\_\_\_

P4 Significant Impacts

What are the three most significant impacts of lack of counsel in the areas identified above?

Case Type 1 \_\_\_\_\_  
 Case Type 2 \_\_\_\_\_  
 Case Type 3 \_\_\_\_\_

P4 Other Problems

Please describe any other significant problems caused by lack of representation in the space provided below.

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

P5 I

In your experience, in what three civil case types is representation least necessary?

Case Type 1 \_\_\_\_\_  
 Case Type 2 \_\_\_\_\_  
 Case Type 3 \_\_\_\_\_

P6 District

[M]

Please select the judicial district in which you work.

- |                                  |                                   |
|----------------------------------|-----------------------------------|
| <input type="radio"/> District 1 | <input type="radio"/> District 6  |
| <input type="radio"/> District 2 | <input type="radio"/> District 7  |
| <input type="radio"/> District 3 | <input type="radio"/> District 8  |
| <input type="radio"/> District 4 | <input type="radio"/> District 9  |
| <input type="radio"/> District 5 | <input type="radio"/> District 10 |

P6 County

[M]

Please select the counties in which you regularly serve.

- |                                   |                                     |
|-----------------------------------|-------------------------------------|
| <input type="checkbox"/> Aitkin   | <input type="checkbox"/> Mahnommen  |
| <input type="checkbox"/> Anoka    | <input type="checkbox"/> Marshall   |
| <input type="checkbox"/> Becker   | <input type="checkbox"/> Martin     |
| <input type="checkbox"/> Beltrami | <input type="checkbox"/> Meeker     |
| <input type="checkbox"/> Benton   | <input type="checkbox"/> Mille Lacs |

- |                                            |                                          |
|--------------------------------------------|------------------------------------------|
| <input type="checkbox"/> Big Stone         | <input type="checkbox"/> Morrison        |
| <input type="checkbox"/> Blue Earth        | <input type="checkbox"/> Mower           |
| <input type="checkbox"/> Brown             | <input type="checkbox"/> Murray          |
| <input type="checkbox"/> Carlton           | <input type="checkbox"/> Nicollet        |
| <input type="checkbox"/> Carver            | <input type="checkbox"/> Nobles          |
| <input type="checkbox"/> Cass              | <input type="checkbox"/> Norman          |
| <input type="checkbox"/> Chippewa          | <input type="checkbox"/> Olmsted         |
| <input type="checkbox"/> Chisago           | <input type="checkbox"/> Otter Tail      |
| <input type="checkbox"/> Clay              | <input type="checkbox"/> Pennington      |
| <input type="checkbox"/> Clearwater        | <input type="checkbox"/> Pine            |
| <input type="checkbox"/> Cook              | <input type="checkbox"/> Pipestone       |
| <input type="checkbox"/> Cottonwood        | <input type="checkbox"/> Polk            |
| <input type="checkbox"/> Crow Wing         | <input type="checkbox"/> Pope            |
| <input type="checkbox"/> Dakota            | <input type="checkbox"/> Ramsey          |
| <input type="checkbox"/> Dodge             | <input type="checkbox"/> Red Lake        |
| <input type="checkbox"/> Douglas           | <input type="checkbox"/> Redwood         |
| <input type="checkbox"/> Faribault         | <input type="checkbox"/> Renville        |
| <input type="checkbox"/> Fillmore          | <input type="checkbox"/> Rice            |
| <input type="checkbox"/> Freeborn          | <input type="checkbox"/> Rock            |
| <input type="checkbox"/> Goodhue           | <input type="checkbox"/> Roseau          |
| <input type="checkbox"/> Grant             | <input type="checkbox"/> St. Louis       |
| <input type="checkbox"/> Hennepin          | <input type="checkbox"/> Scott           |
| <input type="checkbox"/> Houston           | <input type="checkbox"/> Sherburne       |
| <input type="checkbox"/> Hubbard           | <input type="checkbox"/> Sibley          |
| <input type="checkbox"/> Isanti            | <input type="checkbox"/> Stearns         |
| <input type="checkbox"/> Itasca            | <input type="checkbox"/> Steele          |
| <input type="checkbox"/> Jackson           | <input type="checkbox"/> Stevens         |
| <input type="checkbox"/> Kanabec           | <input type="checkbox"/> Swift           |
| <input type="checkbox"/> Kandiyohi         | <input type="checkbox"/> Todd            |
| <input type="checkbox"/> Kittson           | <input type="checkbox"/> Traverse        |
| <input type="checkbox"/> Koochiching       | <input type="checkbox"/> Wabasha         |
| <input type="checkbox"/> Lac qui Parle     | <input type="checkbox"/> Wadena          |
| <input type="checkbox"/> Lake              | <input type="checkbox"/> Waseca          |
| <input type="checkbox"/> Lake of the Woods | <input type="checkbox"/> Washington      |
| <input type="checkbox"/> Le Sueur          | <input type="checkbox"/> Watonwan        |
| <input type="checkbox"/> Lincoln           | <input type="checkbox"/> Wilkin          |
| <input type="checkbox"/> Lyon              | <input type="checkbox"/> Winona          |
| <input type="checkbox"/> McLeod            | <input type="checkbox"/> Wright          |
|                                            | <input type="checkbox"/> Yellow Medicine |

P6 Contact YN

[M]

May we contact you for follow-up information? (If you select “no”, your answers will remain confidential and answers will only be shared in the aggregate.)

- Yes  
 No [Skip to Thank You]

P7 Name

You indicated you would be willing to be contacted for follow-up information. Please give your information below.

First name

Last name

Telephone number

E-mail address

Thank You Page

Thank you for participating in our survey. Your responses have been successfully recorded.

Survey Closed Page

Thank you for your willingness to participate, however this study has been completed and is closed. We hope you will visit us in the future for other surveys.

## APPENDIX D-2

## Surveys, Statistics and Additional Data Obtained by the Task Force, Continued

**COURT PARTY SURVEY****SURVEY TEXT**

The Minnesota State Bar Association is studying whether there should be a right to a lawyer in civil cases (such as family and housing), as there is in criminal cases. We have interviewed judges and lawyers, but we want information from the people who are most impacted by the court system. We appreciate your answering the following four questions about your most recent experience with the courts.

Q1: What type of case are you involved in?

- child support       custody       divorce       domestic violence       housing

Other (please specify)

\_\_\_\_\_

Q2: Have you tried to find a lawyer for this case?

Q3: If you're not working with a lawyer, have you been able to handle your case yourself? Please describe your experience.

Q4: Is there anything else we should know about your experience?

**COURT PARTY SURVEY RESULTS****Question 1:**

<b>Response</b>	<b>Response Percent</b>	<b>Response Count</b>
Child support	14.3%	3
Custody	38.1%	8
Divorce	38.1%	8
Domestic violence	14.3%	3
Housing	19%	4
Total Answers		21
Skipped Question		15



**Question 2:**

Total Narrative Answers	33
Skipped Question	3

**Question 3:**

Total Narrative Answers	30
Skipped Question	6

**Question 4:**

Total Narrative Answers	22
Skipped Question	14

## APPENDIX D-3

## Surveys, Statistics and Additional Data Obtained by the Task Force, Continued

## ATTORNEY SURVEY

## SURVEY TEXT

**1. Responder Information**

Q1: I am a (chose [sic] all that apply)

- Private attorney  
 Pro bono attorney  
 Legal aid staff attorney  
 Public defender  
 Government attorney  
 Judge  
 Judicial branch attorney  
 Contract or panel attorney  
 Non-attorney law firm staff  
 Social service provider

Q2: I deliver legal services to the disadvantaged primarily in this county: \_\_\_\_\_

**2. Pro Bono (Please select all that apply)**

Q1: Strengths

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>
Professional expertise in many areas of law	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Large pool of potential volunteers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Access to law firm resources	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Able to control caseload	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other / Comments:

\_\_\_\_\_

Q2: Weaknesses

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>
Primacy of billable work	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Financial considerations: costs	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>
& expenses					
Lack of expertise in poverty law	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Conflicts with billable practice clients	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lack of infrastructure & administrative support to screen for financial eligibility/merit	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dedication of resources to other forms of community service	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lack of professional or personal incentive	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other / Comments:

\_\_\_\_\_

### 3. Legal Aid programs (Please select all that apply)

Q1: Strengths

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>
Expertise in poverty law	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Staff commitment to mission of legal aid	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Good coordination with private attorneys	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Strong, established programs	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
No conflicts with billable clients	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other / Comments:

\_\_\_\_\_

Q2: Weaknesses

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>
Lack of resources	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Restricted financial eligibility	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Restrictions on types of cases and clients who can be served	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Complexity of system	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Unstable funding	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other / Comments:

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#### 4. Public Defender (Please select all that apply)

##### Q1: Strengths

	Strongly disagree	Disagree	Not sure / no opinion	Agree	Strongly agree
Formal system that insures criminal defendants have counsel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Clarity about types of eligible cases (liberty deprivation at stake, includes contempt, civil commitment, etc)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Attorney expertise	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Staff commitment to mission of public defense	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Familiarity with local practices	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Expertise in how indigent defendants experience the criminal justice system	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Since services are constitutionally mandated, ongoing funding is assured	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other / Comments:

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##### Q2: Weaknesses

	Strongly disagree	Disagree	Not sure / no opinion	Agree	Strongly agree
Level of funding is inadequate and can be unstable	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
High caseloads, little administrative support, client dissatisfaction	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Public perception that clients are unsympathetic	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Difficulty retaining experienced attorneys because of low pay and high stress	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other / Comments:

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### 5. Contract/panel attorneys (Please select all that apply)

#### Q1: Strengths

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>
Can spread resources over wider area with numerous local offices	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Allows better oversight/controls than pure pro bono model	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Draws on local practitioner [sic] expertise in targeted practice areas	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Strengthens the private bar's ability to provide service to people with lower income	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Professional expertise in many areas of law	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other / Comments:

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#### Q2: Weaknesses

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>
Expenses of administration in addition to cost of lawyers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Can reduce/eliminate incentives for pro bono service	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lack of expertise in poverty law	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lack of experience and infrastructure for merit screening and managing caseloads	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Potential for disparities in service quality depending on reimbursement rates	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Uncertain funding streams [sic]	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Narrow restrictions on financial eligibility for representation by panel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>
Quality issues: oversight and supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other / Comments:

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### ATTORNEY SURVEY RESULTS

#### 1. Responder Information

##### Question 1:

Response	Response Percent	Response Count
Private attorney	66.2%	347
Pro bono attorney	15.5%	81
Legal aid staff attorney	9.7%	51
Public defender	2.3%	12
Government attorney	14.3%	75
Judge	3.6%	16
Judicial branch attorney	3.1%	16
Contract or panel attorney	3.1%	16
Non-attorney law firm staff	1.3%	7
Social service provider	0.6%	3
Total Answers		524
Skipped Question		3

##### Question 2:

Total Answers	399
Skipped Question	128

## 2. Pro Bono

### Q1: Strengths

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>	<b>Rating Average</b>	<b>Response Count</b>
Professional expertise in many areas of law	2.1% (8)	12.6% (47)	14.4% (54)	56.1% (210)	14.7%	3.69	374
Large pool of potential volunteers	7.4% (28)	18.7% (71)	19.5% (74)	42.2% (160)	12.1% (46)	3.33	379
Access to law firm resources	2.9% (11)	7.9% (30)	15.8% (60)	59.1% (224)	14.2% (54)	3.74	379
Able to control caseload	4.8% (18)	10.9% (41)	26.0% (98)	48.3% (182)	10.1% (38)	3.48	377

Other / Comments:

52

Total Answers	380
Skipped Question	147

### Q2: Weaknesses

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>	<b>Rating Average</b>	<b>Response Count</b>
Primacy of billable work	1.6% (6)	6.7% (25)	11.3% (42)	47.5% (177)	33.0% (123)	4.03	373
Financial considerations: costs & expenses	0.8% (3)	9.1% (34)	12.3% (46)	52.1% (195)	25.7% (96)	3.93	374
Lack of expertise in poverty law	4.8% (18)	14.0% (52)	16.1% (60)	43.5% (162)	21.5% (80)	3.63	372
Conflicts with billable practice clients	4.0% (15)	25.1% (94)	16.3% (61)	38.0% (142)	16.6% (62)	3.38	374
Lack of infrastructure & administrative support to screen for financial eligibility/merit	4.0% (15)	18.7% (70)	24.1% (90)	39.6% (148)	13.6% (51)	3.40	374
Dedication of resources to other forms of community service	3.5% (13)	17.5% (65)	38.3% (142)	33.4% (124)	7.3% (27)	3.23	371
Lack of professional or personal incentive	8.6% (32)	33.5% (124)	17.8% (66)	30.3% (112)	9.7% (36)	2.99	370

Other / Comments:

47

Total Answers	374
Skipped Question	153

### 3. Legal Aid programs (Please select all that apply)

#### Q1: Strengths

	Strongly disagree	Disagree	Not sure / no opinion	Agree	Strongly agree	Rating Average	Response Count
Expertise in poverty law	1.6% (6)	1.9% (7)	7.4% (27)	34.4% (126)	54.6% (200)	4.39	366
Staff commitment to mission of legal aid	1.1% (4)	2.2% (8)	5.8% (21)	35.6% (130)	55.3% (202)	4.42	365
Good coordination with private attorneys	5.5% (20)	13.2% (48)	38.1% (139)	32.6% (119)	10.7% (39)	3.30	365
Strong, established programs	1.9% (7)	7.9% (29)	11.5% (42)	49.3% (180)	29.3% (107)	3.96	365
No conflicts with billable clients	1.1% (4)	3.3% (12)	16.2% (59)	44.0% (160)	35.4% (129)	4.09	364
Other / Comments:							32

Total Answers	366
Skipped Question	161

#### Q2: Weaknesses

	Strongly disagree	Disagree	Not sure / no opinion	Agree	Strongly agree	Rating Average	Response Count
Lack of resources	0.5% (2)	6.9% (25)	11.8% (43)	45.9% (167)	34.9% (127)	4.08	364
Restricted financial eligibility	2.5% (9)	9.6% (35)	20.6% (75)	48.4% (176)	19.0% (69)	3.72	364
Restrictions on types of cases and clients who can be served	1.1% (4)	10.7% (39)	16.2% (59)	50.0% (182)	22.0% (80)	3.81	364
Complexity of system	3.0% (11)	19.6% (71)	43.8% (159)	26.2% (95)	7.4% (27)	3.15	363



	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>	<b>Rating Average</b>	<b>Response Count</b>
Unstable funding	0.8% (3)	5.3% (19)	16.9% (61)	47.1% (170)	29.9% (108)	4.00	361
Other / Comments:							38

Total Answers	364
Skipped Question	163

#### 4. Public Defender (Please select all that apply)

##### Q1: Strengths

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>	<b>Rating Average</b>	<b>Response Count</b>
Formal system that insures criminal defendants have counsel	0.6% (2)	2.5% (9)	7.9% (28)	47.9% (169)	41.1% (145)	4.26	353
Clarity about types of eligible cases (liberty deprivation at stake, includes contempt, civil commitment, etc)	2.3% (8)	5.7% (20)	16.1% (57)	49.3% (174)	26.6% (94)	3.92	353
Attorney expertise	3.1% (11)	6.5% (23)	14.2% (50)	41.6% (147)	34.6% (122)	3.98	353
Staff commitment to mission of public defense	1.1% (4)	4.0% (14)	14.8% (52)	45.5% (160)	34.7% (122)	4.09	352
Familiarity with local practices	0.9% (3)	3.1% (11)	9.4% (33)	45.7% (161)	40.9% (144)	4.23	352
Expertise in how indigent defendants experience the criminal justice system	1.1% (4)	4.0% (14)	13.1% (46)	48.9% (171)	32.9% (115)	4.08	350
Since services are constitutionally mandated, ongoing funding is assured	13.1% (46)	26.2% (92)	21.9% (77)	28.8% (101)	10.0% (35)	2.96	351
Other / Comments:							47

Total Answers	354
Skipped Question	173

## Q2: Weaknesses

	Strongly disagree	Disagree	Not sure / no opinion	Agree	Strongly agree	Rating Average	Response Count
Level of funding is inadequate and can be unstable	0.6% (2)	2.8% (10)	12.1% (43)	44.4% (157)	40.1% (142)	4.21	354
High caseloads, little administrative support, client dissatisfaction	0.8% (3)	5.9% (21)	13.6% (48)	36.7% (130)	42.9% (152)	4.15	354
Public perception that clients are unsympathetic	2.3% (8)	17.9% (63)	23.0% (81)	40.3% (142)	16.5% (58)	3.51	352
Difficulty retaining experienced attorneys because of low pay and high stress	3.1% (11)	15.9% (56)	25.8% (91)	32.6% (115)	22.7% (80)	3.56	353
Other / Comments:							32

Total Answers	354
Skipped Question	173

## 5. Contract/panel attorneys (Please select all that apply)

## Q1: Strengths

	Strongly disagree	Disagree	Not sure / no opinion	Agree	Strongly agree	Rating Average	Response Count
Can spread resources over wider area with numerous local offices	2.0% (7)	6.6% (23)	25.9% (90)	55.0% (191)	10.4% (36)	3.65	347
Allows better oversight/controls than pure pro bono model	2.3% (8)	10.7% (37)	27.8% (96)	48.7% (168)	10.4% (36)	3.54	345
Draws on local practitioner [sic] expertise in targeted practice areas	1.7% (6)	3.5% (12)	18.4% (64)	64.0% (222)	12.4% (43)	3.82	347
Strengthens the private bar's ability to provide service to people with lower income	2.3% (8)	7.5% (26)	25.4% (88)	52.0% (180)	12.7% (44)	3.65	346

	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>	<b>Rating Average</b>	<b>Response Count</b>
Professional expertise in many areas of law	1.4% (5)	5.2% (18)	18.8% (65)	58.4% (202)	16.2% (56)	3.83	346
Other / Comments:							24

Total Answers	
Skipped Question	

Q2: Weaknesses
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	<b>Strongly disagree</b>	<b>Disagree</b>	<b>Not sure / no opinion</b>	<b>Agree</b>	<b>Strongly agree</b>	<b>Rating Average</b>	<b>Response Count</b>
Expenses of administration in addition to cost of lawyers	1.2% (4)	8.7% (30)	30.6% (106)	47.4% (164)	12.1% (42)	3.61	346
Can reduce/eliminate incentives for pro bono service	2.9% (10)	26.9% (92)	34.2% (117)	28.7% (98)	7.3% (25)	3.11	342
Lack of expertise in poverty law	1.7% (6)	19.7% (68)	33.9% (117)	33.9% (117)	10.7% (37)	3.32	345
Lack of experience and infrastructure for merit screening and managing caseloads	0.9% (3)	14.8% (51)	39.2% (135)	36.0% (124)	9.0% (31)	3.38	344
Potential for disparities in service quality depending on reimbursement rates	1.7% (6)	13.7% (47)	31.5% (108)	40.5% (139)	12.5% (43)	3.48	343
Uncertain funding streams [sic]	0.3% (1)	4.3% (15)	24.6% (85)	51.0% (176)	19.7% (68)	3.86	345
Narrow restrictions on financial eligibility for representation by panel	1.7% (6)	8.7% (30)	51.3% (177)	31.3% (108)	7.0% (24)	3.33	345
Quality issues: oversight and supervision	3.2% (11)	16.2% (55)	35.3% (120)	34.7% (118)	10.6% (36)	3.33	340
Other / Comments:							35

Total Answers	346
Skipped Question	181

APPENDIX D-4

Surveys, Statistics and Additional Data Obtained by the Task Force, Continued

**AGENDA: “CIVIL GIDEON – SHOULD THE TRUMPET BLARE AGAIN?”**

***Civil Gideon – Should The Trumpet Blare Again?***

**Friday, October 30, 2009, 8:30 – noon**

**Thornton Auditorium, University of St. Thomas Business School**

10<sup>th</sup> and LaSalle Ave, Minneapolis

***AGENDA***

- 8:30: Welcome and introduction by Judge John B. Van De North
- 8:40: Gideon Revisited: Vice President Walter Mondale
- 9:00: Panel Discussion: Consequences of lack of counsel: moderated by Judge Jay Quam
- 10:15: Break (refreshments provided by UST)
- 10:30: The Right to Civil Counsel in Minnesota, the United States, and the World
  - International Perspective: Justice Earl Johnson, Jr. (retired), California Court of Appeals;
  - Minnesota and National Issues: Mary Deutsch Schneider, Executive Director, Legal Services of Northwest Minnesota; Perry Wilson, Dorsey & Whitney
- 12:00 Moving Forward: Ensuring Equal Access to Justice, Associate Justice Sam Hanson (retired)

Presented by the Minnesota State Bar Association Civil Gideon Task Force

and

the Holloran Center at the University of St. Thomas School of Law

## APPENDIX E-1

## Resolutions, Remarks and Other Materials

**2006 RESOLUTION OF AMERICAN BAR ASSOCIATION**

In 2006, the American Bar Association House of Delegates recommended that United States jurisdictions expand *Gideon's* imperative to civil litigants in cases involving important individual rights:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.<sup>269</sup>

A copy of the complete ABA Report 112A, submitted to the ABA House of Delegates in August 2006 by the Task Force on Access to Civil Justice, the Section of Business Law, the Commission on Interest on Lawyers' Trust Accounts, the Commission on Law and Aging, the Section of Litigation, the Steering Committee on the Unmet Legal Needs of Children, the Special Committee on Death Penalty Representation, the Standing Committee on Legal Aid and Indigent Defendants, the Commission on Immigration, the Association of the Bar of the City of New York, the King County Bar Association (Washington), the Maine State Bar Association, the New York County Lawyers' Association, the Philadelphia Bar Association, the National Legal Aid and Defender Association, the Section of Administrative Law and Regulatory Practice, the Washington State Bar Association, the Boston Bar Association, the Colorado Bar Association, the New York State Bar Association, the Connecticut Bar Association, the Minnesota State Bar Association, the Los Angeles County Bar Association, the Bar Association of the District of Columbia, the Section of Labor and Employment Law and the Section of Individual Rights and Responsibilities is available online at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

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<sup>269</sup> American Bar Association, House of Delegates Resolution 112A (Aug. 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

## APPENDIX E-2

## Resolutions, Remarks and Other Materials, Continued

**2008 ADDRESS TO MSBA CIVIL GIDEON TASK FORCE BY AMERICAN BAR ASSOCIATION PAST  
PRESIDENT MICHAEL GRECO**

*In his keynote address to the MSBA Civil Gideon Task Force on September 11, 2008, Michael Greco, past President of the ABA, provided an overview of the history, need for, and challenges to implementing a right to civil counsel.*<sup>270</sup>

It is a great pleasure to be addressing the members of the Civil Gideon Task Force of the Minnesota State Bar Association, an outstanding bar whose support historically for expanding access to justice has been so strong.

Your bar association and its members have consistently demonstrated great leadership on access to justice issues. As a co-sponsor of the ABA's historic 2006 resolution on a defined civil right to counsel (or Civil Gideon), the MSBA's Assembly voted overwhelmingly to endorse the resolution. That effort was spearheaded by the MSBA's Legal Assistance to the Disadvantaged (LAD) Committee.

The LAD Committee has held educational presentations for its membership, and promoted a Civil Gideon presentation at the MSBA Annual Convention, which included a presentation by California Appellate Chief Justice Earl Johnson in June 2006. Justice Johnson, whom I have known as a good friend for several decades, was a consultant to my ABA Task Force on Access to Civil Justice which drafted the ABA resolution and report.

I commend former MSBA President Brian Melendez for his leadership in appointing your Task Force early in 2008.

Your meeting today will be guided by the Task Force's statement of mission, which is to examine whether Minnesota will join the growing roster of states that are moving to implement a Civil Gideon right.

I want to tell you why I hope you will decide to do just that.

Despite the principled leadership and long and hard work of the Minnesota bar, you and I know that the organized bar as a whole throughout the US more must do more to address the legal needs of our nation's 50 million poor persons.

The need for a defined right to counsel in civil cases is greater now than ever before.

The overwhelming and growing legal needs of low-income Americans pose perhaps the greatest challenge to our nation's commitment to equal justice — and equal access to justice.

The importance of ensuring access to legal services for the poor simply cannot be overstated.

As all of you know, the ability to address civil legal needs with the help of a qualified lawyer can make the difference between stability and poverty, between hope and despair.

The US Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) noted that

*“In our adversary system of criminal justice, any person hauled into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided to him. This seems to us an obvious truth.”*

Eighteen years later the Court in *Lassiter v. Department of Social Services*, 425 U.S. 18 (1981), a civil matter, regrettably ruled in a 5-4 decision that there is no absolute due process right to court-appointed counsel for an indigent litigant in a civil case brought by the state to terminate parental rights.

I believe that *Lassiter* was wrongly decided (by one vote), and I hope to see the day when the decision is reversed, as other unsound decisions of the Supreme Court over time have been reversed. For example the Gideon decision itself

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<sup>270</sup> A video of these remarks can be viewed at <http://www.mnbar.org/committees/CivilGideon/index.asp>.

overturned the 1942 case *Betts v. Brady* in recognizing the right of indigents in criminal cases to the appointment of counsel paid by the state.

Why is adoption of a Civil Gideon now so urgent?

In the areas of *shelter, health, child custody, sustenance and safety*, legal services and *pro bono* representation are a lifeline to those who are most in need. For doing this, and so much more, the lawyers who provide *pro bono* services, and the supporters of legal services in Minnesota and across the country, deserve the thanks and appreciation of the entire organized bar, and indeed of our nation.

But legal services and *pro bono* attorneys, and the people they serve, need much more than thanks and moral support.

We need a new paradigm for the delivery of legal services to the poor. And that's what I want to discuss with you — the most ambitious effort of the past half-century to expand access to justice in America, an effort to which lawyers in every state and territory can and must contribute: the growing movement to recognize a defined right to counsel — a Civil Gideon — for low-income people in serious civil cases that threaten basic human needs.

When I became President of the ABA in August 2005, one of my first acts was to create the *ABA Task Force on Access to Civil Justice*.

The Task Force, chaired by Justice Howard Dana of the Maine Supreme Judicial Court, included the nation's leading practitioners and advocates for civil legal services.

The recommendation of the Task Force was adopted by a unanimous vote of the Association's House of Delegates at our annual meeting in August 2006.

That historic vote put the American Bar Association on record, for the first time, in support of a defined civil right to counsel, at public expense, for low-income people with serious legal needs.

The Minnesota State Bar Association showed its commitment to equal justice that day by co-sponsoring the recommendation.

The movement to establish a civil right to counsel in the United States continues to gain is momentum.

At the national level, the *ABA Standing Committee on Legal Aid for Indigent Defendants (SCLAID)* is working with the *National Coalition for a Civil Right to Counsel* to build support for a Civil Gideon.

This broad coalition of organizations, which includes non-legal groups interested in equal justice, is also drawing on the experiences of advocates across the country who are seeking judicial or legislative recognition of a civil right to counsel.

Our nation woefully lags far behind other major industrialized countries in providing meaningful help to poor people with legal problems.

And while it is considered “cutting edge” in the US, the constitutions of the Netherlands, Italy and South Africa, to name only several, explicitly recognize a right to counsel for the indigent in civil cases when substantial injustice would otherwise result. In other countries the right exists by statute or court decision.

When one compares our expenditure of public resources to address the legal needs of the poor in the United States with systems in place in other Western, industrialized nations, we are shamed.

Justice Earl Johnson has performed groundbreaking research on civil legal aid systems around the world; among other findings, his research shows that:

- the *least* generous other industrial democracies — France and Germany — spent about 3.5 times more of their gross national product than the United States did in serving the civil legal needs of lower income populations;
- England spent about 12 times more of its GNP than did the US.

It is clear that the deficiencies in our delivery of legal services to the poor require a new approach to access to justice in our country, whether one is facing a serious criminal charge or an equally serious civil matter.

Let me be clear: I am not suggesting that a lawyer be provided at state expense in all civil legal matters for *all* lower-income persons.

But in matters where a poor person's *shelter, health, child custody, sustenance or safety* is threatened by a legal problem, our system of justice must provide necessary legal assistance.

If we are to meet the goal of equal justice for all, such critically important assistance cannot be rationed by the teaspoonful.

It should not be subject to long waiting lists, limited capacity and narrow legal aid priority lists that increasingly are based on a triage approach.

No one in our country should have to face the denial of legal or governmental rights affecting those basic needs without counsel to help them.

*No one.*

By its unanimous vote in August 2006 the ABA House of Delegates the ABA adopted that principle as policy.

The ABA Task Force, in developing its resolution on a civil right to counsel, sought to articulate a broad principle.

The Task Force did not want to dictate to the states the exact nature of the right, or how it might be implemented in different states.

The broad principle can be stated this way:

*“As in criminal matters, a person involved in a serious civil legal matter who cannot afford a lawyer and who really needs one ought to be provided with counsel as a matter of right and at public expense.”*

As I have traveled the country over the past four years I have spoken to many audiences about the pressing need for a civil right to counsel.

I have been met with a uniformly warm reception to the principle of a Civil Gideon, even in places where I least expected it.

Many lawyers who know how bad the situation is for the poor among us are fully supportive of a right to civil counsel. But we need to educate and enlist the support of those — both lawyers and non-lawyers — who are either unfamiliar with or skeptical of the idea. Early in our nation's history people scoffed at and opposed, as too expensive and unworkable, the idea of educating every child through the twelfth grade at public expense. Today we take that right for granted.

Many Americans don't know, or don't appreciate, how one small legal problem for a low-income person can snowball into a series of problems that threaten the ability to remain a productive member of society.

In order to better to educate people about this issue and build support for a civil right to counsel, advocates and researchers must demonstrate the tangible cost-savings associated with nipping such legal problems in the bud before they result in a drain on public resources in other areas.

For example, I had the opportunity to visit an innovative court program in San Diego that serves homeless people — many of whom are veterans of our Armed Services.

In this program, which is supported by the *ABA Commission on Homelessness and Poverty*, because homeless persons don't get mail informing them of court proceedings, judges go to homeless shelters and veterans' service agencies to clear up lingering legal problems such as outstanding warrants for misdemeanor offenses and orders relating to child support and alimony payments.



As a result of this program, thousands of people experiencing homelessness have cleared not only their criminal or civil records, but have also cleared the way for a better life by removing legal obstacles to securing jobs, housing, health, and social service benefits.

This type of program represents a very small investment of public resources that can prevent tremendous costs to the individuals affected — and to society at large.

I believe that a strong case can be made — morally and jurisprudentially — for recognizing a right to counsel in serious civil cases, and that such a right makes economic sense for the states and our communities in the long term.

But we must provide advocates for the right with cost and other information to help them make the case persuasively in the legislatures and halls of justice across the nation. There is no doubt that this is a large and daunting undertaking, and that a long-term, concerted effort by the organized bar, citizens' and public interest groups, supportive elected officials, religious institutions, and others will be necessary. It may take years for the Civil Gideon movement to succeed. But as President John F. Kennedy reminded us, a journey of a thousand miles begins with the first step.

In making the case, advocates must be ready to address the tough questions and criticisms that are sure to be presented.

Many observers have asked, and will continue to ask, how much it will cost federal, state and local governments to provide counsel to lower-income Americans who qualify for legal assistance in even a limited range of serious civil matters.

We need to provide the answer to that question, and talented researchers and advocates in many states are working on it.

Preliminary estimates indicate that, while it would be a significant increase over current appropriations for civil legal aid, the amount needed to fund a limited right to counsel in civil cases would not overburden current budgets. We need to provide state-specific and careful financial analyses, the sooner the better.

We need also to calculate the current very real costs to communities and states, and our justice system, of our *NOT* providing counsel in these serious civil matters.

If poor persons received necessary legal services, the substantial financial and other costs that are now being incurred in our communities caused by homelessness, lack of health care and harm to the integrity of the family unit could be avoided. These are very real costs that must be calculated and factored into the financial analysis.

Others have legitimately asked how we can consider a civil right to counsel when so many jurisdictions in the United States continue to struggle to provide adequate counsel for criminal defendants, as has been documented in a recent ABA study, "Gideon's Broken Promise."

There are, of course, serious concerns about our failure to keep Gideon's promise that I share, and you do as well.

But we must reject the *false choice* of providing justice to only some in our society, and only in criminal matters, when counsel in civil matters are so desperately needed to provide help in securing needs that are so basic to human existence.

Another challenge is how to determine whether a civil matter is sufficiently "serious" to require the expenditure of societal resources to provide legal assistance. How can it be determined when a person "really needs" a lawyer's help in a life-threatening situation?

Also, as a practical matter, how can this new civil right to counsel be administered in such a way that it happens more or less automatically — so that there need not be additional costly proceedings, or so that it is not left up to the discretion of individual gatekeepers?

The recommendations of the ABA Task Force make it clear that each individual jurisdiction is in the best position to address these practical issues of implementation.

Each jurisdiction will decide for itself whether a right should be recognized by legislation or by interpretation of its constitution or other laws.

Each jurisdiction will determine how a right can be practically implemented and how it will mesh with the existing legal aid infrastructure.

In keeping with the ABA's practice of providing broadly-applicable standards and principles, the ABA Task Force's report (which I commend to your reading) did identify certain aspects of the right as key, minimum elements:

- *The right should establish a "bright line" test that is easily administered.*

In order to ensure that individual decision-makers do not have to apply and interpret a vague set of standards, a "bright-line" test for eligibility similar to the one used in criminal cases should be established.

- *The right should establish certain types or categories of matters where serious legal rights are at stake.*

Clearly defining and limiting the types of civil cases where a right to counsel applies will ensure that societal resources are focused only on the most serious issues, and not squandered upon trivial matters.

- *The right should apply in adversarial proceedings* — this includes both judicial and some quasi-judicial tribunals, because disputes are sometimes allocated to administrative agencies or tribunals.

Yes, there are difficult questions to address before a civil right to counsel can become a reality throughout our country.

But I encourage you to remember, and stress to others, that what is most important is the principle — we cannot ignore practical considerations, but we also must not sacrifice our ideals solely because we are unsure of the price tag or the additional work associated with fulfilling them.

Earlier in these remarks I offered my opinion that the Supreme Court erred in deciding *Lassiter v. Dep't of Social Services* as it did. The Court's 5-4 majority ruled that due process does not require the appointment of counsel for indigents, unless the Court's complicated and almost impossible due process balancing test can be satisfied.

Notwithstanding the *Lassiter* decision, advocates for a civil right to counsel do have other potent bases with which to advance the right — moral, economic and legal.

The moral imperative that underlies recognition of the right cannot be ignored.

How can this nation, perhaps the wealthiest nation on earth, continue to pay only lip service to the great American principles of justice and access to justice for all?

How can we as a nation morally justify doing next to nothing in ensuring that all in America have a fair chance at obtaining justice, and equal access to justice?

How can we as a democratic nation governed by the rule of law, turn a cold shoulder and a deaf ear to the daily suffering of millions of fellow citizens — men, women and children — who desperately need legal counsel to secure their rights and the protection of the rule of law?

The US government preaches to other nations respect for the rule of law, because, it is argued, order in a civilized society rests upon the confidence of all in a justice system that is "transparent, fair and just."

Yet in America there are now 50 million people who live in poverty every day, who qualify for civil legal aid that is unavailable to them — 80% of their legal needs annually are unmet.

These Americans — no less than the people in Third World or oppressive countries whom the US government seeks to convert to democracy — are denied access in *America* to a justice system that is "transparent, fair and just," and denied the supposed benefits of a democratic society based on the rule of law.

America is not a Third World country — why do 50 million fellow Americans live in one?

Today *one out of six* people living in America justifiably feel that the rule of law is only a tool for the wealthy, and not an instrument of justice for them. For these fellow Americans the "rule of law" is viewed as fiction, as non-existent, as

a meaningless phrase and even as an obstacle to protecting their needs — needs that are basic to every human being, whether wealthy or poor.

If we do not recognize and implement a civil right to counsel, the ranks of the 50 million disadvantaged and vulnerable Americans will continue to grow. And in time, the disenchantment, and anger, of the growing legion of poor Americans who are denied justice, and that of those who sympathize with them, will itself pose a serious threat to the stability and continuity of our cherished democracy and the rule of law.

What will *that* cost our nation?

Can we afford that cost?

But in addition to the moral imperative, and the rule of law imperative, is there a strong jurisprudential basis for advocating for the recognition of a civil right counsel?

Yes, there is.

While *Lassiter*, for now, may foreclose the due process rationale as a *federal* basis for establishing the right, there are state constitutional due process grounds, *state* and *federal* constitutional equal protection grounds, common law grounds that support a civil right to counsel.

The report of the ABA Task Force provides thoughtful and persuasive analysis of these jurisprudential alternatives. I urge you and our fellow advocates across the nation to study and consider those alternatives in making the jurisprudential case for a defined civil right to counsel.

Since August 2006 I have urged colleagues in my state of Massachusetts and in numerous states throughout the country, and today I urge you, to move quickly in reliably documenting answers to the cost and related questions that the legislature and courts appropriately will ask as they consider recognition of a civil right to counsel.

It has now been two years since the momentous vote of the ABA House of Delegates in support of a defined civil right to counsel, and there is a great deal of implementation activity in many states throughout the US.

The ABA, in partnership with state, local and other bar associations, and non-lawyer groups throughout the country, stands ready to assist the states in their implementation efforts. The time is now to start making the right a reality in Minnesota.

As I said to our colleagues in the 550-member ABA House of Delegates just before they voted unanimously on the ABA Task Force's resolution — there are moments in history when the lawyers of America can show — must show — the American people where we stand on issues of critical concern to them. This is one of those moments.

I believe that a civil right to counsel for poor Americans is the defining issue for the legal profession, and indeed for American society, in the 21st century.

The American Bar Association's policy on a civil right to counsel is a powerful statement about where America's lawyers stand on this issue. But if we, at long last, are to fulfill the eloquent promise of "Equal Justice for All" that is inscribed on the face of the United States Supreme Court and on so many other court buildings across our land, we have to commit the necessary resources to make that promise a reality. The time is now.

Thanks for your kind attention.

Michael Greco, ABA Past President

## Resolutions, Remarks and Other Materials, Continued

**2011 LETTER OF AMERICAN BAR ASSOCIATION PAST PRESIDENT MICHAEL GRECO  
TO CLERK OF THE SUPREME COURT OF WISCONSIN**

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**AMERICAN BAR ASSOCIATION**

Michael S. Greco  
Past President

September 9, 2011

Clerk of the Supreme Court of Wisconsin  
Attention: Carrie Janto, Deputy Clerk  
P.O. Box 1688  
Madison, WI 53701-1688

**RE: Supreme Court Rule Petition 10-08**

Dear Justices of the Supreme Court of Wisconsin:

This letter is submitted in support of Supreme Court Rule Petition 10-08, filed by Legal Action of Wisconsin and other signatories. The Petition asks the Court to amend Supreme Court Rule 11.02 to authorize circuit court judges to appoint attorneys at public expense for indigent litigants in a limited number of certain types of civil cases. By way of background, I am a past president of the American Bar Association (ABA), and currently serve as Chair of both the ABA Center for Human Rights and the ABA Working Group on Civil Right to Counsel. This letter is submitted on behalf of the American Bar Association, which is the largest voluntary professional association in the world, with nearly 400,000 members.

For reasons discussed in this letter, the ABA has long believed that there is a pressing need, one that begs to be addressed, to bridge the wide "justice gap" that exists in Wisconsin and throughout our nation between the needs of, and actual legal assistance provided to, low-income civil litigants. Only by narrowing the justice gap can there be equal access to justice for all in the U.S., a goal that has eluded us for far too long, and one to which the ABA firmly continues to be committed, as evidenced most recently by three adopted ABA policies regarding the appointment of counsel in civil proceedings that are discussed herein.

Moreover, ongoing economic studies and recent actual experiences in a number of states are reliably documenting the fact that a narrowing of the justice gap by providing counsel to indigent persons in civil matters in fact results in significant cost savings for individuals, the states, and society, and also lessens the overwhelming burden on courts that either directly or indirectly is caused by the justice gap.

For these reasons, discussed in more detail below, the ABA joins in the request of Petitioners that the Supreme Court of Wisconsin grant Rule Petition 10-08 and amend Rule 11.02 as proposed.

## 1. Background: The “Justice Gap” and the ABA’s Policy Response

A primary objective of ABA Goal IV is to “assure meaningful access to justice to all persons.”<sup>1</sup> This objective has proven particularly challenging in light of the longstanding “justice gap” that continues unabated throughout the United States.<sup>2</sup>

The ABA’s efforts to foster equal justice and address the unmet legal needs of low-income persons date back at least to 1920, when the ABA created “The Standing Committee on Legal Aid and Indigent Defendants” (SCLAID), chaired by future Chief Justice of the United States Charles Evans Hughes and charged with supporting the expansion of legal aid throughout the nation. SCLAID continues its work to this day.

In 1965, under the leadership of then ABA President, and later U.S. Supreme Court Associate Justice, Lewis Powell, the ABA House of Delegates endorsed the concept of federal funding of legal services for the poor, recognizing that charitable resources alone can never fully respond to the need. The ABA in the early 1970s had a prominent role in the creation of the federal Legal Services Corporation (LSC) and has consistently advocated for adequate federal funding for civil legal services. The funding provided by Congress to the LSC since its creation has never approached being adequate to meet the need.

In the past several years the vast and persistent unmet need for civil legal aid to eligible indigent persons has been exacerbated by one of the worst economic recessions in decades. State and local governments are challenged to provide even modest funding for legal services for indigent persons, yet the demand for such aid continues to increase dramatically, as countless individuals facing high unemployment and widespread home foreclosures are being plunged into poverty for the first time.<sup>3</sup>

Moreover, Interest on Lawyers’ Trust Accounts (IOLTA) program funding for civil legal aid has dramatically decreased due to declining interest rates and the economic downturn and, despite the diligent efforts of the Legal Services Corporation, the ABA, state bar associations and many other interested groups, Congressional appropriations continue to remain well below the amount necessary to meet the heightened need existing today.<sup>4</sup> Indeed, the FY2011 budget for LSC was reduced by 3.8% mid-year.<sup>5</sup> Meanwhile, the U.S. Census Bureau has reported that the number of individuals living below 125 percent of the federal poverty guideline (and therefore eligible to receive legal services from LSC-funded programs) increased from 49.6 million in 2005 to 53.8 million in 2008 alone.<sup>6</sup>

During 2011, LSC reported that the number of Americans who qualify for civil legal aid now is at

<sup>1</sup> See American Bar Association, Association Goals, Goal IV, Objective 4, available at [http://www.americanbar.org/utility/about\\_the\\_aba/association\\_goals.html](http://www.americanbar.org/utility/about_the_aba/association_goals.html).

<sup>2</sup> See LEGAL SERVICES CORPORATION, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, 2005 [LSC 2005 report]; LEGAL SERVICES CORPORATION, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans: An Updated Report of the Legal Services Corporation*, 2009 [LSC 2009 update].

<sup>3</sup> LSC 2009 update, *supra* note 2, at 5.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> LEGAL SERVICES CORPORATION, *Press Release: Fiscal Year 2011 Bill Would Cut Legal Aid by \$15.8 Million* (April 12, 2011), available at [http://www.lsc.gov/press/pressrelease\\_detail\\_2011\\_T274\\_R12.php](http://www.lsc.gov/press/pressrelease_detail_2011_T274_R12.php).

<sup>6</sup> LSC 2009 update, *supra* note 2, at 6.

an all-time high of more than 63 million persons.<sup>7</sup> Yet, according to results from national and state studies conducted from 1987 through 2009, fewer than twenty-percent of all low-income individuals in the U.S. who desperately need legal assistance obtain it.<sup>8</sup> The data is consistent with the findings of the latest legal needs study conducted in Wisconsin in 2006.<sup>9</sup>

In 2005, in my capacity as ABA President, I appointed the *ABA Task Force on Access to Civil Justice* to examine the issues surrounding, and to recommend effective measures for bridging, the widening justice gap. After more than a year of careful study the *Task Force* (chaired by Maine Supreme Judicial Court Associate Justice Howard Dana, who previously had served two terms as a member of the LSC Board of Directors by appointment of two Presidents) proposed that the ABA adopt a resolution calling on all federal, state, and territorial governments to recognize a right to publicly funded counsel for low-income individuals in certain, limited civil adversarial proceedings, specifically those involving the five basic human needs of shelter, safety, health, sustenance and child custody. In August of 2006 the ABA's policymaking body, the 565-member House of Delegates, without a single dissenting vote, took an historic step toward realizing the goal of ensuring meaningful access to justice by adopting as policy the *Task Force's* proposed resolution on a civil right to counsel.<sup>10</sup>

Although the 2006 ABA policy has had a substantial influence in efforts in states across the country to recognize a right to counsel in civil proceedings involving basic human needs, the *Task Force's* resolution by design did not contain detailed guidance for jurisdictions interested in implementing such a right, leaving it to each state to determine how best to proceed. The ABA offered to assist the states in their implementation efforts. The ABA is providing that assistance.

In 2009, the *ABA Working Group on Civil Right to Counsel* (which is comprised of representatives from ABA sections, standing committees, and other entities interested and involved in access to justice issues) was formed to provide further assistance to jurisdictions considering the implementation of a right to counsel in civil proceedings based on the ABA 2006 resolution.

The *ABA Working Group*, which I have chaired since its inception, in 2010 proposed two additional policy resolutions that were adopted by the ABA House of Delegates in 2010. The two new policies provide two useful "tools" to assist the implementation efforts of states and other jurisdictions: the "*ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings*"<sup>11</sup> and the "*ABA Model Access Act*."<sup>12</sup>

<sup>7</sup> LEGAL SERVICES CORPORATION, *supra* note 5.

<sup>8</sup> LSC 2009 report, *supra* note 2, at 1.

<sup>9</sup> ACCESS TO JUSTICE STUDY COMMITTEE, STATE BAR OF WISCONSIN, *Bridging the Justice Gap: Wisconsin's Unmet Legal Needs* 1 (March 2007).

<sup>10</sup> AMERICAN BAR ASSOCIATION, RECOMMENDATION 112A (August 2006), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lsc\\_laid\\_06A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lsc_laid_06A112A.authcheckdam.pdf) [ABA Resolution 112A].

<sup>11</sup> AMERICAN BAR ASSOCIATION, RECOMMENDATION 105 (August 2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lsc\\_laid\\_105\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lsc_laid_105_revised_final_aug_2010.authcheckdam.pdf).

<sup>12</sup> AMERICAN BAR ASSOCIATION, RECOMMENDATION 104 (August 2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lsc\\_laid\\_104\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lsc_laid_104_revised_final_aug_2010.authcheckdam.pdf).

Together, these two tools are designed to help local policymakers, advocates, and other interested parties to implement a system providing for a civil right to counsel in situations involving basic human needs. The *Basic Principles* and *Model Act* acknowledge that because budgetary and other important considerations differ widely among states and localities, the decision as to recognition and implementation of a civil right to counsel should be made by each jurisdiction.

The *ABA Working Group* currently is developing a third tool to assist in the nationwide implementation of a civil right to counsel: a *Judge's Resource Manual for Appointing Counsel in Civil Proceedings*. The *Manual* is intended to inform judges about laws and rules in each jurisdiction regarding judicial powers to appoint counsel in civil matters. Important research and other assistance to the *ABA Working Group* in the production of the *Manual* is being provided by numerous law schools, law firms and access to justice organizations throughout the U.S.

## **2. The Proposed Rule Amendment is Consistent with ABA Policy and Will Address the Justice Gap in Wisconsin**

The rule amendment sought by the Petitioners in Rule Petition 10-08 is consistent with ABA policy on civil right to counsel. The amendment closely tracks the language of the 2006 ABA policy.<sup>13</sup> As noted, the 2006 policy was the product of a more than year-long process of careful study by the members of the *ABA Task Force on Access to Civil Justice*, who determined that the incremental approach suggested by the resolution—a civil right to counsel in certain limited proceedings, involving basic human needs, as determined by each jurisdiction, is both timely and necessary in order to close the ever-widening justice gap between the legal needs of indigent persons and the assistance they in fact receive.<sup>14</sup> By granting Rule Petition 10-08, the Supreme Court of Wisconsin would be taking a step necessary to ensure that the vast unmet civil legal needs of low-income Wisconsin residents will be addressed in a systematic manner.

## **3. The Proposed Rule Amendment is Cost-Effective: It Will Produce Significant Social and Economic Benefits While Easing the Existing Burden on Courts**

Since adoption of the 2006 ABA policy on a right to counsel at least fifteen states in varying degrees and approaches have been taking steps to recognize such a right. I have been invited to speak in most of those states and have done so. An overriding concern in those states and other jurisdictions is cost: What will it cost to implement such a right? Where will the funds be found, especially in this economic recession? Isn't this a bad time to be considering such a right? Why not wait five, ten years to consider the idea? These are legitimate questions. There are encouraging answers to these questions.

Providing counsel at public expense to indigent civil litigants in Wisconsin, and in any state, will have a price tag. However, a growing body of evidence from several ongoing state studies being conducted for example in California, Massachusetts, Texas and Maryland, as well as recently documented actual cost/savings data in a number of states, demonstrate that *providing* counsel in all or any of the "five basic human needs" categories of legal needs significantly *reduces* expenses for a state, and *produces* substantial economic and social benefits for the community, while

<sup>13</sup> ABA Resolution 112A, *supra* note 10.

<sup>14</sup> *See id.*

simultaneously freeing up resources for court budgets already stretched too thin by chronic underfunding and the recession.<sup>15</sup> These studies are demonstrating that the consequential costs of *not* providing counsel for eligible indigent persons in those “five basic human needs” categories may cost a state as much as, or more than, it would to provide counsel in cases involving those needs.

For example, civil legal representation for eligible indigent persons directly and positively affects a state’s economy by “bringing federal funding into a state and helping people secure benefits, work authorization, and child support.”<sup>16</sup> Some concrete examples are these:

- In FY 2009, the Disability Benefit Project of the Massachusetts Legal Assistance Corporation (MLAC) brought a total of \$8.5 million in federal disability benefits to the state.<sup>17</sup> Further, as of April 2009, a Massachusetts program known as “Heat and Eat” had garnered an estimated \$35 million annually for its clients (over 98,000 households) by providing access to food stamps for people applying for or already receiving fuel assistance.<sup>18</sup> Overall, MLAC estimated that the provision of civil legal aid in FY 2009 yielded \$71.1 million in new revenues and cost-savings for the state.<sup>19</sup>
- In 2007, federal disability benefits obtained by Legal Aid of Nebraska totaled \$1.3 million.<sup>20</sup>
- A 2003 report of the Minnesota State Bar Association indicated that civil legal aid in that state assisted clients in obtaining more than \$5 million annually in new federal disability benefits.<sup>21</sup>
- In an eleven-month period during 2005-06, New Hampshire Legal Assistance reported obtaining \$723,974 in Social Security and SSI disability benefits for its clients, as well as approximately \$237,632 in Medicaid coverage.<sup>22</sup>

<sup>15</sup> In California, for example, due in part to the strong advocacy last year of Supreme Court Chief Justice Ronald George that led to enactment of the *Sargent Shriver Act*, \$11 million will be allocated per year for six years to establish right to counsel pilot programs designed to measure the costs, and the savings, of providing a right to counsel in the five basic human needs defined in the ABA’s 2006 right to counsel policy.

<sup>16</sup> Laura K. Abel and Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUSTICE 140 (2010).

<sup>17</sup> See PHILLIP GRANBERRY & RANDY ALBELDA, *Assessing the Benefits of Provision of Legal Services Through the Disability Benefits Project* 8-10 (2006), available at <http://www.nlada.org/DMS/Documents/1236007115.86/Disability%20benefit%20report%207-07.doc> (taking into account reductions in public assistance funds that might result from awards of federal disability benefits).

<sup>18</sup> MASS. LEGAL ASSISTANCE CORP., *Civil Legal Aid Yields Economic Benefits to Clients and to the Commonwealth: Some of the Economic Effects in FY09* 4 (2010), available at [http://mlac.org/pdf/Economic\\_BenefitsFY09.pdf](http://mlac.org/pdf/Economic_BenefitsFY09.pdf).

<sup>19</sup> *Id.* at 1.

<sup>20</sup> See ROD FEELHAVER & JEROME A. DEICHERT, *The Economic Impact of Legal Aid of Nebraska 2007* 4 (2008), available at <http://www.nlada.org/DMS/Documents/1236007550.3/NE%20impact%202007.doc>.

<sup>21</sup> MINN. STATE BAR ASS’N, *With Liberty and Justice for All Legal Aid: Essential to the Justice System* (2003), available at <http://www.nlada.org/DMS/Documents/1195246760.09/MN%20aid-essential-mar03.pdf>.

<sup>22</sup> N. H. LEGAL ASSISTANCE, *Civil Legal Services and the “Working Poor” Pilot Project 3* (2006), available at <http://www.nlada.org/DMS/Documents/1236007823.5/Civil%20Legal%20Services%20%26%20Working%20Poor%20>



In addition to *directly* increasing revenue within a state, civil legal representation for eligible indigent persons produces *indirect* economic benefits by preventing harms to individuals and society as a whole. For example, it has been documented recently that “legal services for domestic violence victims reduce domestic violence rates and the associated law enforcement costs; representation for parents in child welfare cases keeps families together and reduces the time children spend in foster care; medical legal partnerships for clients with medical and legal needs improve clients’ health and generate revenue for hospitals; and civil legal help for children with criminal records reduces re-arrest rates, which, in turn, lowers law enforcement costs.”<sup>23</sup> Specific examples documenting these types of indirect benefits include the following:

- In 2006, Florida State University economists found that civil legal representation provided through the Team Child program (in which attorneys help children with criminal records to obtain access to necessary medical, social, and education services) lowered the re-arrest rates of children with criminal records by 45% in one locale and 31% in another.<sup>24</sup> The study determined that, for each arrest avoided, the first locale saved \$9,368, and the second locale saved \$7,362, (by avoiding court costs, juvenile detention center costs and victim of crime and other costs).<sup>25</sup>
- In 2009, the Southwest Virginia Legal Aid Society reported that an expansion in its services to all low-income victims of domestic violence in southwestern Virginia during 2003-2007 coincided with a 35.5% decrease in requests for domestic violence protective orders within the same geographic area; further, the Society used statewide data (regarding requests for protective orders, the availability of civil legal aid, and rates of violent crime) to demonstrate that the increase in civil legal aid was responsible for this decline.<sup>26</sup> Decreasing domestic violence also translates into substantial cost savings by, for example, avoiding the use of costly medical and police resources and preventing property loss;<sup>27</sup> in fact, a Wisconsin study has estimated savings of approximately \$115,000 for each rape prevented and \$30,000 for each physical assault prevented.<sup>28</sup>
- In FY 2009, the Massachusetts Legal Assistance Corporation reported that its services prevented or delayed eviction and homelessness for 1,851 households, an intervention that, when combined with legal aid provided by Greater Boston Legal Services and Neighborhood Legal Services, saved the state more than \$8.4 million in homeless shelter costs (since 25% of the individuals assisted would have ended up in a homeless shelter if not for such civil legal representation).<sup>29</sup>

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-%20Nov.%202006%20complete.pdf.

<sup>23</sup> Abel and Vignola, *supra* note 15, at 140.

<sup>24</sup> See STEFAN C. NORRIN & DAVID W. RASMUSSEN, *An Evaluation of Team Child in Florida* 54 (2002), available at <http://www.nlada.org/DMS/Documents/1195243887.58/FL%20TeamChild%20Evaluation%20Report.pdf>.

<sup>25</sup> See *id.* at 44-46 (2002).

<sup>26</sup> Abel and Vignola, *supra* note 15, at 147-8.

<sup>27</sup> *Id.* at 148.

<sup>28</sup> See LIZ ELWART ET AL., *Increasing Access to Restraining Orders for Low-Income Victims of Domestic Violence: A Cost-Benefit Analysis of the Proposed Domestic Abuse Grant Program* 12-13 (2006), available at

<http://www.wisbar.org/am/template.cfm?template=/cm/contentdisplay.cfm&contentid=63633>.

<sup>29</sup> MASS. LEGAL ASSISTANCE CORP., *supra* note 17, at 9.

In addition to producing the direct and indirect economic and social benefits discussed above, providing counsel to eligible indigent persons in the “five basic human needs” categories results in outcomes that are more just because of the presence of counsel, and less of a drain on court resources spent on *pro se* litigants, easing the burden on state court systems that already are operating on shoe-string budgets.

In 2010, the *ABA Task Force on the Preservation of the Justice System*, co-chaired by lawyers David Boies and Theodore B. Olson, investigated the crisis resulting from chronic underfunding of the nation’s courts and exacerbated by the current economic recession. This crisis, when combined with our nation’s ongoing justice gap, has led to a significant increase in the number of low-income litigants appearing *pro se* before courts, which in turn leads to unjust outcomes for such litigants.

The *Task Force* (which will continue its work into the coming year) conducted and released the results of an informal survey of ABA members in March of 2011; among those results were these: (1) 75% of respondents stated that litigants who represented themselves in court are more likely to lose their cases; (2) 76% of respondents said that these cases move more slowly through court dockets; and (3) 86% indicated that proper court procedures are not being followed in these cases.<sup>30</sup>

A preliminary report of the *ABA Coalition for Justice* in 2010 regarding its “*Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts*” contained these similar findings: (1) 60% of the judges surveyed stated that fewer litigants were being represented by counsel; and (2) 62% of the judges said that the lack of representation has led to unjust outcomes. The unjust outcomes noted by this group (i.e., by 62% of the judges surveyed) include the following: failure to present necessary evidence (according to 94% of this group); procedural errors (89% of the group); ineffective witness examination (85% of the group); failure properly to object to evidence (81% of the group); and ineffective arguments (77% of the group).<sup>31</sup>

At a time when courts are under intense pressure to become more efficient due to severe cutbacks, the increase in *pro se* litigation has caused increased *inefficiency*: 78% of the judges surveyed by the *ABA Coalition for Justice* stated that the court is negatively impacted by parties who are not represented by counsel. The negative impacts reported by this group (i.e., by 78% of the judges surveyed) include longer court hearings and other procedures (according to 90% of this group); greater use of court staff time to assist *pro-se* litigants (71% of the group); lack of competent presentation of testimony and relevant facts (56% of the group); and frequent interventions by judges to avoid injustice, which many believe compromises the impartiality of the court (42% of the group).<sup>32</sup> By authorizing judges to appoint counsel for eligible indigent persons in certain limited civil matters, the proposed rule amendment in Rule Petition 10-08 will serve to decrease *pro se* litigation in Wisconsin, thereby lightening the load for judges and court staff to deal with other

<sup>30</sup> ABA COMMUNICATIONS AND MEDIA RELATIONS DIVISION, *Backgrounder on The Growing Crisis of Underfunding State Courts* (March 16, 2011) available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1300287161court\\_funding\\_crisis\\_background.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1300287161court_funding_crisis_background.pdf).

<sup>31</sup> ABA COALITION FOR JUSTICE, *(Preliminary) Report on Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts* 3-4 (July 12, 2010), available at <http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.authcheckdam.pdf>.

<sup>32</sup> *Id.* at 4.

pressing matters, as well as easing the fiscal crisis faced by over-burdened state courts in the process.

But, one may ask, even if it can be documented in Wisconsin that recognizing a limited right to counsel for eligible indigent persons in civil matters is cost-effective, and produces substantial economic and social benefits, while easing the existing financial and human resource burdens on the courts, what about the timing concern? Isn't this a bad time economically to be considering such a right, even if it is limited to eligible indigents in the "five basic human needs" categories of legal needs? Why not wait a few years? What harm would there be if this Court were to revisit this subject in the future, when state funds and the budget resources of the counties that pay for appointed counsel may be more plentiful?

The "timing" question, and the related "cost" questions addressed above, were asked -- a hundred or more years ago -- in virtually every other Western civilized country that has considered and recognized the importance of providing counsel at public expense to those who are most vulnerable in a society. In those countries -- by express language in the constitution, or by court decision, or legislative enactment, or court rule -- a right to counsel in civil matters has existed for a century or longer.

In those same countries public funding today for legal services for eligible indigents puts the U.S. to shame. The World Justice Project's comparative *2010 Rule of Law Index* ranked the United States dead last among developed countries on providing access to civil justice. Retired Justice Earl Johnson of the California Court of Appeals, a long-time national leader on civil legal aid issues, discovered in his research that in 2010 England spent more than *seven* times per capita and more than *ten* times as much of its GDP than the U.S. did on civil legal aid—even after accounting for funds from all U.S. sources, including LSC, IOLTA, and state and local governments. Further, in 2010 New Zealand spent *three* times as much per capita, while the Netherlands spent more than *four* times as much per capita, than the U.S. did on legal aid to the poor. Even the Canadian province of Ontario in 2010 spent *three* times more per capita than did the U.S. on civil legal aid.

Moreover, *all* forty-six member countries in the Council of Europe since 1979 have been *required* to provide counsel in civil cases. This shocking disparity between the U.S. and the civilized nations of the world is unacceptable for a country with our rich resources and our avowed and proud promise of "justice for all." Sadly, that promise today rings hollow for countless millions of people in America, including Wisconsin.

More to the point, it is evident that during the past hundred years, even in robust economic periods in Wisconsin and throughout the nation, the "timing" has never been "right" for providing meaningful access to justice to indigent persons. In the current economic downturn, according to 2011 LSC data, more than 63 million persons qualify as indigent persons, up from 53.8 million in 2008. Providing counsel to persons in this group has never been more timely or necessary, the heavy economic burdens on them never more severe.

What of the harm if the Court deferred granting Rule Petition 10-08?

Harm would continue without relief for countless individuals among the 80% of indigent persons in the U.S. whose shelter will be lost without aid of counsel, causing homelessness and consequential

costs to them and the state; for indigent persons whose desperately needed (and available) government health benefits will be lost because they lack counsel's assistance in accessing them; for indigent persons facing loss of child custody because they lack counsel who can competently and clearly explain the facts and applicable law to the tribunal; for indigent persons who daily suffer physical injury, and fear for their very lives, because of unending domestic violence to a spouse or child due to lack of counsel. These are real, not speculative, harms. They are harms to human beings.

Also real is the crisis-increasing burden on the courts in dealing with burgeoning *pro se* caseloads without counsel present. Why should the Court defer acting on Petition 10-08 in view of these deplorable harms? Why should such human conditions, which have existed for untold decades, be allowed to continue without relief for additional years to come?

Rule Petition 10-08 affords the Supreme Court of Wisconsin the rare opportunity to take a historic, cost-effective, step toward assuring equal justice under the law by, all at once, addressing the pernicious justice gap, enabling outcomes that provide justice to indigent persons, bringing financial savings to the state, and reducing the drain on court resources. The proposed rule does so in a manner designed to assure efficiency in use of resources by vesting the courts with authority to determine when and under what conditions appointment of counsel is warranted.

In its storied history, Wisconsin has often led the way in the U.S. in recognizing and implementing, and not avoiding, necessary reforms based on legal or moral principle. There should never be a bad time, or inconvenient time, or better time to uphold principle. The principle at issue here is the principle, and the promise on which this country was founded: *equal justice for all*. We do not have equal justice today in the United States. We have not yet kept the promise that was made more than two centuries ago. This Court can take a major step to achieving equal justice in Wisconsin, and in so doing lead the other states to do the same.

For all the foregoing reasons, the Court should grant the Petition. The American Bar Association stands ready to assist the Court in every way possible.

Sincerely,



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