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Subject: **Civil Right to Counsel Update**  
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## Civil Right to Counsel Update

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The National Coalition for a Civil Right to Counsel is an association of individuals and organizations committed to ensuring meaningful access to the courts for all. Our mission is to encourage, support and coordinate advocacy to expand recognition and implementation of a right to counsel in civil cases. For more information visit <http://civilrighttocounsel.org/>.

### Litigation Update

Litigation continues to take on steam at the state and federal levels, and all the way up to the U.S. Supreme Court.

- In *Merryfield v. State*, the **Kansas Court of Appeals** found that the failure to provide appointed counsel for a person challenging the quality of his treatment under the Kansas Sexual Predator Treatment Program violates both due process and equal protection. The petitioner had brought a habeas corpus petition alleging that the facility where he had been confined for over a decade did not provide constitutionally adequate care and challenging the training of staff and some of their methods. While the court found that the petitioner had no right to counsel under several different *statutes*, it found a *constitutional* right based on the strength of the liberty interest at stake and the fact that the petitioner was detained not as punishment for a crime (as with other habeas proceedings where there is no right to counsel) but rather for purposes of treatment and safety. The court also could find no rational basis for the state to provide counsel to people committed under other civil commitment statutes who challenge conditions of their confinement but not to those confined pursuant to the sexual predator treatment program.
- In *In re DR/AR* (right to counsel for children in Washington termination of parental rights cases), the **Washington Supreme Court** released an order on February 1 finding that the writ for review had been improvidently granted. The court based its decision on the fact that a statute had been amended after the trial court's decision to require the state to notify children of their right to request counsel. However, the statutory amendment still leaves the trial court with discretion about whether to appoint counsel and does not create a right to counsel, leaving unclear how the amendment mooted the right-to-counsel question. Furthermore, the amendment had already been passed before the court granted review.
- In *In re E.H.*, in September 2010, the **Washington Court of Appeals** found that as a matter of statutory interpretation, parents have a right to counsel in family court non-parental custody proceedings that proceed concurrently with juvenile court proceedings. Because of this statutory holding, the court declined to reach whether the state or federal constitutions required counsel in such proceedings. Although the decision was originally unpublished, Washington advocates successfully petitioned the court to publish the opinion.
- In the **U.S. Supreme Court**, *Turner v. Rogers* (right to counsel in South Carolina civil contempt proceedings) continues to attract attention. A half dozen amicus briefs, many of them from multiple organizations, were filed in support of the petitioner. The United States' amicus brief argues that the lower court's contempt finding should be overturned due to the court's failure to properly investigate the indigent father's ability to pay, but opposes a categorical right to appointed counsel. The case is set for oral argument on March 23.
- Lastly, in *Franco-Gonzalez v. Napolitano*, a **federal district court in California** held that under the Rehabilitation Act, two plaintiffs with mental disabilities were entitled to the appointment of "qualified representatives" for their immigration proceedings. Because the decision is based on statutory interpretation the court declined to reach the constitutional issues.

### California Pilot Projects

California's Shriver Civil Counsel Act authorizes pilot projects between 2011 and 2016 that will experiment with a right to counsel when necessary to achieve justice in selected categories of cases. Applicants must be a partnership of a local court and an IOLTA grantee; 21 partnerships submitted letters of interest last fall to an Implementation Committee named by the Chief Justice, pursuant to the statute. (For more background see the [October](#) and [March](#) 2010 issues of *Civil Right to Counsel Update* and [Stepping Across the Threshold: Assembly Bill 590 Boosts](#)

*Legislative Strategies for Expanding Civil Right to Counsel* from the March-April 2010 issue of *Clearinghouse Review*).

Full proposals were due February 25. The Implementation Committee and court staff will evaluate the proposals and applicants. On April 1 the committee expects to recommend partnerships to receive the first round of grants. The California Judicial Council will consider the recommendations and likely announce the grants in late April, with projects to begin operation in October.

Planning for pilot project evaluation of both process and impact is proceeding on a parallel track. A consultant is helping to design the evaluation and has formed a national advisory committee that will meet quarterly by conference call. In April the Administrative Office of the Courts will release a request for proposals for an evaluation contractor.

Site visits to projects should begin this summer. Collection of baseline data will begin shortly after the pilots are chosen and data collection for the evaluation should begin when the pilots begin operation. The first data analysis report is expected in June 2013, and the Legislature will receive a final evaluation report in Jan. 2016.

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## Legislation/Advocacy Update

The latter part of 2010 featured some victories in state legislatures, as well as significant lobbying of one court system on the right to counsel front.

- In **Illinois**, [Public Act 96-0272](#), which took effect in 2010, provides that when sterilization of a ward of the state is sought, the ward has a right to appointed counsel upon request if the ward objects to sterilization or takes a position contrary to that of the court-appointed guardian ad litem. Even without a request by the ward the court has discretion to appoint counsel in "the interests of justice".
- In **Massachusetts**, the governor signed H5028 in October. The bill provides an ongoing right to counsel for children ages 18-22 who continue to receive voluntary services from the Massachusetts Department of Children and Families.
- In **Wisconsin**, 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 judges to appoint counsel in cases involving basic human needs, once the judge determines that counsel is "needed" (based on a number of factors, including complexity of the case). The petition has 1,300 signatures, including a number from judges and court administrators. In January 2011, advocates filed a lengthy [memorandum](#) in support of the petition that explains how much appointed counsel would cost, where the money might come from, and the court's inherent authority to create the sought-after rules.

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## Maryland Access to Justice Commission Tackles Civil Right to Counsel Implementation, Cost

Anticipating a day when a right to counsel in civil matters involving basic human needs may be recognized in Maryland, the state's Access to Justice Commission rolled up its sleeves and created a working framework for the implementation of such a right. Civil legal services providers and other Maryland stakeholders participated in developing the framework, which builds on the existing legal services delivery system. Among other resources, the Commission relied on the [ABA Model Access Act](#) adopted by the ABA House of Delegates in August, 2010.

In the same report, the Maryland Commission also began the process of estimating the cost of providing counsel throughout the state in basic human needs cases, relying on data from the courts, legal services providers, self-help clinics, and other resources. A major piece of the puzzle that remains missing is good data on the extent to which providing counsel in such proceedings will save the state money, for example, in reduced homeless services, reduced health care costs, etc. See [Implementing a Civil Right to Counsel in Maryland](#).

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## Education/Advocacy Efforts

The National Coalition, as well as other advocates across the country, continue discussion and education about the right to counsel in civil cases. At a well-attended panel at the 2010 NLADA conference the Coalition explored how the right to counsel fits within the spectrum of other legal interventions such as self-help, unbundling, and pro bono assistance. That panel, moderated by John Pollock of the Public Justice Center, featured Coalition participants Bonnie Hough, Laura Abel, and Gerry Singen. At the 2011 Equal Justice Conference the Coalition will co-host a panel that will examine how to approach the civil right to counsel in a time of economic crisis, including exploring lower-cost efforts and attempting to prove via study that providing counsel is less costly than the alternative. John Pollock and Laura Abel will appear on the EJC panel. John will also give a general presentation on the background of civil right to counsel for the Texas State Bar in May 2011 and will appear with Debra Gardner and Laura Abel on a panel at the Texas State Bar's Poverty Law Conference in April 2011.

Besides Coalition efforts, other leaders are stepping up as well. The Kentucky Bar Association will have a presentation in June 2011 on the civil right to counsel featuring former ABA

President Michael Greco, and New York Chief Judge Jonathan Lippman spoke at CUNY on Feb 3 regarding his plan to fully fund legal services.

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