

national coalition for a



Civil Right to Counsel Update

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Welcome to the second issue of *Civil Right to Counsel Update*, a quarterly e-newsletter distributed to participants in the [National Coalition for a Civil Right to Counsel](#) and other interested persons. Please feel free to forward this issue to interested colleagues. For more information, please contact [Marcia Henry](#).

Alaska Update: ABA Files Amicus Brief in Support of Civil Right to Counsel

As reported in the October issue of [Civil Right to Counsel Update](#), the Alaska Supreme Court is poised to consider whether an indigent mother has a right to counsel in a disputed custody proceeding in which the father has an attorney. All briefs have been filed, including that of the American Bar Association, which received permission to file an amicus brief in support of the mother's right to counsel. Amicus briefs were also filed by retired Alaska judges and by legal assistance providers, among them the Alaska Legal Services Corporation and the Alaska Network on Domestic Violence and Sexual Assault. Briefs of the parties and amici are available at www.civilrighttocounsel.org. Oral argument has not yet been scheduled.

The case, *Office of Public Advocacy v. Alaska Court System, Randall Guy Gordanier*, is before the state's high court following the appeal by the Alaska Office of Public Advocacy of a lower court order that the mother be provided counsel. Alaska has been ahead of the curve on civil right to counsel since its Supreme Court decided *Flores v. Flores* in 1979. In that case, the court decided that a pro se litigant up against a publicly funded lawyer had a right to appointed counsel. In the case currently under review, the lower court ruled that due process and equal protection require the extension of the *Flores* rationale to a pro se custody litigant up against private counsel on the other side, reasoning that, regardless of the source of counsel, the pro se parent faces the same steep uphill battle.

For more information about the case, contact [Christine Pate](#), counsel for amici legal assistance providers.

Civil Right to Counsel Before

Virginia Supreme Court



The Supreme Court of Virginia will consider whether an indigent birth father has a right to counsel when, without his consent, the birth mother initiates a private adoption by third parties. Oral argument is scheduled in January.

The case, *Mitchell, et al v. O'Brien et ux*, Va. Sup. Ct. Record No. 072633, involves unmarried parents and their daughter who was an infant when the adoption was initiated. The father's appellate lawyers argue that he was unable to contest the adoption because he was denied counsel, and that such denial was an abuse of discretion, denied due process and equal protection, and violated English common law that was incorporated into Virginia law. The [Virginia Trial Lawyers Association](#) supports the father's cause in an amicus brief.

The brief of the proposed adoptive parents is notable in two ways. First, it relies heavily on procedural snares, including whether the indigent pro se litigant preserved various issues for appeal, to urge the Virginia Supreme Court not to reach the right to counsel. Second, it relies upon a decidedly lopsided lower court record to argue that counsel would not have affected the outcome of the case. In so doing, it falls prey to the fatal flaw in the U.S. Supreme Court's opinion in [Lassiter v. Department of Social Services](#), as noted by Justice Blackmun in his dissent in that case: it is impossible to tell, from a record where one party was unrepresented, what the record might have looked like had the beleaguered litigant had the guiding hand of counsel, and thus it is impossible really to determine whether representation would have mattered.

A brief filed by the child's guardian ad litem does not contest that the father had a right to counsel but focuses on preserving the child's placement in the home of the proposed adoptive parents during any necessary remand.

The GAL's brief thus sheds light on one of the most important arguments for an easily administered categorical right to counsel in high-stakes cases, and another of the most significant reasons that the *Lassiter* analytic framework is unworkable. Had the lower court appointed counsel for the father at the outset, there would be no need to face the wrenching dilemma of how to proceed with a new trial, with a lawyer for dad, now that his daughter is four years old.

NLADA Workshop Highlights Connection Between Right to Counsel and Female Poverty

The worsening economic picture provided a grim backdrop to this year's [National Legal Aid and Defender Association \(NLADA\)](#) conference. One workshop, *The Right to a Lawyer in Civil Cases: a Powerful Tool to Combat the Feminization of Poverty*, moderated by Sharon Rubinstein of the NCCRC, featured three experts whose interlacing presentations

emphasized the terrible vulnerability of women facing disastrous financial threats without legal assistance.

Joan Kuriensky, Executive Director of Wider Opportunities for Women, noted the protective benefit of counsel to make sure that life passages such as divorce, custody determinations, and need for public benefits can be navigated without a resulting downward spiral. The workshop went on to address one of today's most topical issues: the foreclosure crisis. Anne Balcer Norton, head of the Foreclosure Prevention Unit at St. Ambrose Housing Aid Center in Baltimore, shared statistics showing that women are disproportionately likely to have gotten subprime loans.

Robin Murphy, Supervising Attorney in the Domestic Violence/ Family Unit at the Legal Aid Society of the District of Columbia, illustrated the importance of counsel to a level playing field particularly when women seek relief from domestic violence and in contested custody cases. (Researchers Amy Farmer and Jill Tiefenthaler have found that the assistance of a lawyer is the most important factor among a number of variables in lessening domestic violence.) Robin described an evidentiary hearing she observed where an attorney, appearing pro se against an opposing party represented by experienced counsel, was so disadvantaged by her lack of familiarity with the rules of evidence that her request for a civil protection order was denied.

A list of resources distributed at the workshop is [available online](#).

New York Bar Supports Counsel in Housing, Unemployment Insurance Contexts

On November 1, the House of Delegates of the New York State Bar Association (NYSBA) [passed a resolution](#) urging the state to create a right to counsel for vulnerable individuals facing eviction or foreclosure, and for employees defending against an employer's appeal of an unemployment insurance award. The organization simultaneously [issued a report](#) comparing the cases in which New York has a right to counsel with the [cases in which the ABA has recommended](#) that states provide counsel as of right.

The action followed a March 2008 conference, sponsored by NYSBA and the Touro Law Center, at which civil legal aid lawyers, judges, legislative staff, and academics from across the state discussed the current state of the civil right to counsel and where the need for expansion was most urgent.

Conference participants recommended immediate work toward a right to counsel in certain cases concerning evictions, foreclosures, and unemployment insurance, while pushing for a broader civil right to counsel in the long term. Bills are pending in the New York City Council and in the state Assembly that would provide counsel for certain vulnerable litigants in such cases. Employees who are in court defending against an employer's appeal of a unemployment insurance award have a right to counsel, but employees defending against an appeal at the Unemployment Insurance Appeals Board do not, and so NYSBA

recommended that counsel be appointed at that stage. For more information, contact [Laura Abel](#).

SF Bar Association Discusses Civil Right to Counsel

On October 28, 2008, the San Francisco Bar Association sponsored a Town Hall Meeting on "Bridging the Justice Gap-The Right to a Lawyer" moderated by the former long-time *San Francisco Chronicle* publisher Phillip Bronstein.

After a welcoming speech from San Francisco Bar President Jim Donato, retired appellate judge Earl Johnson, Jr., surveyed the history of civil legal aid in the United States and the development of rights to counsel in foreign countries. Three panels provided an overview of the need and how failure to meet the need affects the poor and society as a whole.

The final panel focused on solutions and practical considerations. Justice Maria Rivera spoke about existing and potential changes in court procedures and former Justice Johnson described how a right to counsel could be provided in a cost-effective manner.

In a telling admission, Bronstein conceded during discussion that despite being an experienced journalist he had never realized there was any problem with justice for the poor in the civil courts--until he had read the materials and heard the presentations at this conference.

Jim Brosnahan, a member of the California Access Commission's new right to legal services committee and one of the pro bono lawyers who prepared the ABA's amicus brief now before the Alaska Supreme Court, delivered the closing address. Generally considered one of the nation's leading trial advocates, Brosnahan made a compelling case for the next steps toward a right to counsel in civil cases and for starting immediately on the road toward that goal.

ABA Section of Litigation Symposium on Access to Justice

An ABA Section of Litigation December symposium in on access to justice focused in significant part on civil right to counsel. Section Chair Bob Rothman kicked off the event with opening remarks; [ABA President-Elect Carolyn Lamm](#) joined in to point out that despite *Gideon v. Wainwright*, state public defender programs remain underfunded. The tanking economy will make it even harder to get public money for legal aid at the local, state and federal level, said Lamm, while traditional sources of funding are drying up. Interest on Lawyers Trust Account Funds have dropped precipitously in many states due to dwindling real estate closings, she pointed out.

Much of the symposium's focus was on the 2006 ABA resolution in support of civil right to counsel and the potential of the right to achieve broader access to justice. Several NCCRC participants, including Earl Johnson and Russell Engler, presented papers; coordinator Debra Gardner served as a commentator.

Support for Coalition Work



Every significant change-making movement includes people who believe enough in the vision to finance the day-to-day work. The National Coalition for a Civil Right to Counsel is grateful for such support. Current underwriters include the [Open Society Institute](#) and the [Ford Foundation](#), whose generous grants afford the resources for litigation and legislative support, research, communications efforts and the infrastructure that makes this a vibrant coalition. Staff from these foundations partner with the NCCRC to elevate the importance of legal services within philanthropic circles. Together, we are hosting conversations with foundation leaders to explain how a right to civil counsel could help with issues that concern them and to encourage them to support the effort. In addition, the ABA Section on Litigation has stepped forward to fund a fellow to be housed at the Public Justice Center and devote a year to furthering the coalition's work toward a civil right to counsel. Gifts from individual donors, private law firms and other Foundations are always welcomed. For more information on how you can make a gift of cash or stock, please contact [Jennifer Pelton](#), Director of Development, Public Justice Center, One N. Charles Street, Suite 200, Baltimore, MD 21201; (410)625-9409.