



How to Start Advocating a Right to Counsel in Civil Cases in Your State: A Look at Ohio

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Six legal aid staff members and managers sat in a conference room; they were interviewing an attorney for a staff position. They went through the usual questions about experience and interests. Someone even asked the pro forma interview question, “Where do you expect to be in five years?” Asked and answered. Then Ken Curtin, my friend, mentor, and longtime legal aid attorney, asked, “What do you think legal aid should look like in ten years?” The interviewee was somewhat flummoxed. Those of us on the inside tried to give clues to the poor, unsuspecting outsider. From earlier interviews, we had figured out that Ken was trying to find out if the person had a “vision” for how legal services *should* be provided to low-income people. There was no “right” answer, but we knew the answer should touch on the notion that legal services should not be a game of chance for poor people. Legal services should be a right—and the service providers should be the best attorneys in town. There would be no restrictions on the strategies that attorneys deploy to help the poor. The poor should have access to whatever works for people with money. Is a class action needed? Then poor people should have access to a class action. If all a poor person needs is advice on how to avoid legal problems—fine. But if what that person really needs is a legal advocate—a no-holds-barred attorney—then that is what he should get, and not just when there is an attorney available at a local legal services office but whenever and wherever necessary. Ken was talking about a right to counsel in civil cases.

That fall Ken died unexpectedly of a heart attack as he prepared to come to work. We were reminded of the long-term goals that sometimes got lost in the day-to-day grind and of why we became legal aid attorneys. We, too, had a vision that everyone should have access to the courthouse—not just those who can afford an attorney.

That is why I became interested in the civil Gideon, or the right-to-counsel-in-civil-cases, movement, although I usually give a simpler explanation. Having a vision for the future makes me less discouraged on a daily basis as we turn away people with real legal needs. Envisioning that there will be a day when we will not have to reject clients helps. My interest would very likely have remained passive had I not attended the National Legal Aid and Defender Association conference in the fall of 2003. There I heard eloquent words from Wilhelm Joseph, Debra Gardner, Alan Houseman, Justice Earl Johnson, Deborah Perluss, Lisa Brodoff, Raven Lidman, and Mary Schneider, scholars and advocates who had been working on civil-right-to-counsel cases for many years. Their passion, knowledge, and common sense convinced me that Ohio needed to become involved in the movement.

Why Should You Work Toward a Civil Right to Counsel on the State Level?

The history of the right to counsel in criminal cases reveals the importance of leadership by the states. In *Gideon v. Wainwright*, Justice Black, in the majority opinion, reviewed the line of cases from *Powell* to *Betts* to *Gideon*:

The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.”¹ ... *Betts* argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down “no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial,

and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.” [*Betts v. Brady*] 316 U.S. at 465. ... On the basis of this historical data the Court concluded that “appointment of counsel is not a fundamental right, essential to a fair trial.” 316 U.S. at 471. It was for this reason the [*Betts*] Court refused to accept the contention that the Sixth Amendment’s guarantee of counsel for indigent federal defendants was extended to or, in the words of that court, “made obligatory upon the States by the Fourteenth Amendment.”²

... Ten years before [*Betts v. Brady*], this Court, after full consideration of all the historical data examined in [*Betts*], had unequivocally declared that “the right to the aid of counsel is of this fundamental character.” *Powell v. Alabama*, 287 U.S. 45, 68 (1932)....³

[I]n deciding as it did—that “appointment of counsel is not a fundamental right, essential to a fair trial”—the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents.... Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.... That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.⁴

¹*Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

²*Id.* at 340.

³*Id.* at 342–43.

⁴*Id.* at 343–44.

Although the discussion of the legal precedents for the decision in *Gideon* is useful, the decision's next-to-the-last paragraph is what guides us in our goal of a right to counsel in civil cases: "Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree."⁵

Part of the reason *Betts* was overruled was that the states had already determined that it was unworkable. In his oral argument in the *Gideon* case, Abe Fortas, speaking on behalf of Clarence Gideon, made this very clear.⁶

So why does your state need to get started when there are so many brilliant legal scholars and litigators already working on the civil-right-to-counsel problem? The answer is in this brief history of *Gideon* itself. Civil *Gideon* will likely come about because of the "overwhelming support of the Bench and the Bar and even of the States themselves."⁷

How Can You Act on the State Level?

The early steps in getting your state involved in the civil-right-to-counsel movement are for you to become informed and find a passionate, diverse group of people with whom you can work. Our civil-right-to-counsel group in Ohio began less than two years ago. Although we are still struggling, we have worked together and reached the point where we have agreed on a type of case to pursue and are discussing how to find a client. We hope that our journey will help those of you who do not have a civil-right-to-counsel group in your state. We also hope that you will be able to use some tactics which have worked for us, avoid some of the problems we have confronted, and, most important, become motivated to start a movement in your state.

⁵*Id.* at 345.

⁶MR. FORTAS: [T]he judge that's sitting on the bench, he's hearing a lot of these cases. How is he going to decide at the beginning of the case whether there are special circumstances within the criteria laid down by this Court? The interesting thing, too, according to the study made by the American Civil Liberties Union, they have not encountered a single case in the State courts in which the trial has been stopped in midstream and the court has said: There are special circumstances here and you'd better have a lawyer, because it looks to me that you're not brighter than Clarence Darrow.... The whole point is just totally unadministerable.

THE COURT: Practically all the States have recognized that's so.

MR. FORTAS: Yes, sir, and there are 37 states now—

THE COURT: And they've done that under a line of decisions in this Court which, at least so far, would have permitted an opposite conclusion.

MR. FORTAS: Well, I don't believe they've done it so much under the decisions of this Court, Mr. Justice Harlan, I'm sorry to say. I believe that they have done it because of a growing conscience and growing awareness on the part of the Bar, stimulated by the opinions of this Court. But the decisions of this Court—and this is precisely my plea, here—the decisions of this Court are still struggling with this impossible question of: Do special circumstances exist in this case or don't they? Whereas the Bar and the States are far beyond that point.... No. There is a brief *amicus* here, a remarkable document, filed by the attorneys general of 22 States urging this Court to overrule *Betts* against *Brady*. It is filed here; I am proud of our country that we have this. It was not solicited by counsel ... and I am proud that it is here.... I think we can confidently ... say, that overruling *Betts* against *Brady* at this time is acting in accordance with the common opinion of those citizens of our country who are qualified to have an opinion.... [A]t the time of *Betts* against *Brady* there were less than a majority of the States that required it [the appointment of counsel] by statute or court rule.... [P]resently, in addition to the 37 States that require the appointment of counsel for indigents by statute or court rule, a recent study ... shows that there are eight States that ... do appoint counsel when requested. That makes a total of 45 States that appoint counsel either by statute, court rule or by practice; and it really leaves only five States. And of those five States ... [in] Florida there is a statute providing for a public defender that functions in the four largest counties.... So that my point here is that we may be comforted in this constitutional moment by the fact, as it clearly is, that what we are doing represents a deliberate change after 20 years, after 20 years of experience; and it represents a change that clearly has the overwhelming support of the Bench and the Bar and even of the States themselves.

Oral Argument by Abe Fortas in *Gideon v. Wainwright* (Jan. 15, 1963), www.rashkind.com/Gideon/Gideon_v._%20Wainwright_oral_argument_transcript.htm (last visited July 21, 2005).

⁷*Id.*

How Can You Become Informed?

You can avail of information-gathering opportunities.

Attend Conferences. I started to become informed when I attended the aforementioned NLADA conference in Seattle in November 2003. Among the many interesting sessions, one on civil Gideon caught my attention. Thanks to the work of many committed people throughout the country, finding such sessions is easy at almost all NLADA-sponsored events, including the Equal Justice Conference, the NLADA annual conference, and substantive law conferences. In March the 2006 Annual Edward V. Sparer Symposium presented “Civil Gideon: Making the Case,” devoted entirely to civil-right-to-counsel issues.

Read All About It. Although attending a conference and meeting people who have lived with civil Gideon for a number of years is the most exciting way to become informed, reading articles and pleadings on the subject is extremely worthwhile and can help you build both long- and short-term goals. You will need that broad perspective in order to find a path for your state through the maze. Start by visiting the websites of the Sargent Shriver National Center on Poverty Law (www.povertylaw.org), the Brennan Center for Justice at New York University School of Law (www.brennancenter.org), the Public Justice Center (www.publicjustice.org), the American Bar Association (www.abanet.org), and the National Equal Justice Library (www.equaljusticelibrary.org).

Join the National Discussion. In early 2004 a small group began discussing civil Gideon issues on a regular basis. Debra Gardner of the Public Justice Center hosted the group, now grown to include over 100 advocates. The group holds a national conference call once a month. Many of the people in this group have been working on civil Gideon issues for years and have thought long and hard about strategies and the state of politics and the law. Others are relatively new to the movement. Some of the early discussions were about whether we should focus on a national right to coun-

sel or focus on expanding the right to counsel within each state. Although subcommittees are working on a number of issues, including work with the American Bar Association, the focus is currently clearly on incremental increases in the right to counsel in individual states. People talk about whether to work on legislative initiatives or to work through the courts. Discussions of the scope of the right to counsel and how to coordinate efforts are ongoing. The law firm of Wilmer, Culter, Pickering, Hale and Dorr has been working on a state-by-state analysis of the state constitutions. As a result of one conference call, the firm was asked to expand that analysis to include whether courts in individual states had been open to arguments based on international laws. More recent discussions have been about how to find a client and how to proceed when you do. Each meeting allows participants to ask questions to a group of people who have expertise in a variety of areas. The group now calls itself the National Coalition for a Civil Right to Counsel.

One of your first steps should be to contact Debra Gardner (gardnerd@publicjustice.org) to become a part of this group and to ask for the already-prepared state constitutional memoranda. If your state is not in this group, you can find out when your state’s memo might be completed.

How Can You Form a Group in Your State?

After attending the civil Gideon session at NLADA, reading materials from the conference, and listening in on several national conference calls, I was eager to start a group in Ohio. At our first meeting there were only five of us, including two law clerks, but we have now grown to include people with a broad range of skills and interests. When getting started, do not get hung up on who is in your group and whether you have the right contacts. If you get a few people who share your passion, you will grow and find the people you need to make progress. Some skills and areas of knowledge may be helpful, so consider the following:

Statewide Contacts. Your group should include at least one person who has statewide contacts and knows what is happening in the legal services community and the pro bono community statewide. When our Ohio group was forming, Dave Ball was chairman of the Ohio State Bar Association Access to Justice Committee and staff member at the Ohio Legal Assistance Foundation (the Ohio Interest on Lawyers' Trust Account program) where part of his job was to serve as statewide Pro Bono Coordinator. Dave not only understood the need for a civil Gideon but also knew members of the private bar who might be interested in participating in a statewide group.

Experts in U.S. Constitutional Arguments and Appellate Practice. When time comes to decide how to frame constitutional arguments or prepare appellate briefs, having people with experience helps. We have the Ohio State University Moritz College of Law in Columbus, so we contacted Dean Nancy Rogers, former Legal Services Corporation board member, who recommended Prof. Dan Tokaji. Before teaching, Professor Tokaji was an American Civil Liberties Union attorney and litigated a variety of civil rights and civil liberties cases in the areas of free speech, racial justice, voting rights, disability right, poverty rights, and immigration. We are also fortunate to have Richard Cordray, who has argued cases in the U.S. Supreme Court and has done both state and federal appellate work in private practice and as Ohio state solicitor.

Knowledge of State Law and Its Legislative History. Depending on which area of law you are planning to pursue, you need someone who has knowledge of the state law and cases occurring throughout the state. Early in our discussions, we decided to focus on family law and turned to Mike Smalz, statewide support staff member for family law from the Ohio State Legal Services Association. He knows not only what is happening in family law in Ohio but also the legislative history of the right to counsel in family law cases.

Practical Experience. Since we decided to focus on family law, we needed someone who knew the practicalities of family law, including knowledge of local courts and low-income clients. In Ohio, from the Legal Aid Society of Columbus, we asked Susan Donofrio, a certified specialist in family law, to join the group.

Pro bono Coordinators of Large Law Firms. Most of the people involved in your group will be very busy with their jobs and will not have time to do major research for the project. The participants in the National Coalition for a Civil Right to Counsel, including Ohio, have benefited greatly from the work done by associates at Wilmer, Culter, Pickering, Hale and Dorr on individual state constitutions. Your group can benefit further by having access to similar work by law firm associates or summer clerks on your specific issues. Fortunately, Lisa Pierce Reisz, pro bono coordinator and partner at Vorys, Sater, Seymour and Pease, has a long history of contributing her time and skills to increase legal services for low-income people.⁸

Litigation Directors at Legal Aid Offices. Litigation or legal directors at local legal aid offices are very aware of the issues that confront low-income clients. Not only are they important for strategizing about direction, but also they have access to clients. Jim Daniels of Southeastern Ohio Legal Services has helped focus our group on the issue of private adoptions, and recently, adding new enthusiasm and expertise, Ed Marx and Jeanne Johns, litigation directors at Advocates for Basic Legal Equality and Western Ohio Legal Services, joined the group.

Understanding the Politics of State Funding for Civil Legal Services for the Poor. As we incrementally expand the right to counsel in civil cases, we have to be aware of the fights that will occur over who provides the increased funds. If you can find someone who is in a position to

⁸Vorys, Sater, Seymour and Pease, Columbus, Ohio, also has given us two other very important members of our group—Alexandra Schimmer and Kendra Carpenter.

understand the fight and come up with some practical solutions, you will be in a better position to pursue your course of action. In Ohio we are fortunate to have the executive director of the Ohio Legal Assistance Foundation, Bob Clyde, involved with our group. He adds another level of practicality to our discussions. He knows the politicians in the battle, and he has proven himself time and again a worthy advocate for funding for civil legal assistance for low-income people.

How Do You Move Forward?

Remember, you do not have to have everyone in place when you start. The direction the group takes will determine who some of the members will be. What is most important is to get a few people together and start meeting.

Meet Regularly. Here is an area where we hope you can learn from our mistakes. We have had some very exciting meetings where people were ready to forge ahead, but we have lost momentum because we have not met again quickly. Getting a statewide group together, even by phone, can be difficult and frustrating. We have finally learned from the National Coalition that having regular meetings is more practical than having everyone attend each meeting. We are setting up a regular schedule of meetings to be held once a month to keep momentum going. Members are encouraged to set aside that time each month. For those of us who live in the Columbus area, the meeting will be face-to-face over lunch. Others will be able to attend by phone.

Find a Focus. Within the National Coalition for a Civil Right to Counsel, there have been ongoing discussions of whether to pursue legislative changes or legal arguments in court, which areas of law are most appropriate for carving out a new civil right to counsel, what the scope of that right should be, where the funding should be found, and a wide range of other topics. Each state has to look at the political situation locally and decide what makes sense at this particular time and in this particular place. Our experience in Ohio demonstrates that

this can sometimes be the most difficult and frustrating part of the process. We know that only 20 percent of those who are eligible for services receive them. Every day we see how the lack of counsel is harming people in major ways, and so how can you begin to focus on a small piece of this huge puzzle?

Our early discussions were free-for-all with people just throwing out ideas. We were all keenly aware that we were a “red” state and that the political climate was not right for major changes. We discussed types of cases, including evictions, civil protection orders (plaintiff and defendant), custody, involuntary adoptions, and foreclosures. We discussed whether we should pursue change through legislation or through the courts. These are not easy decisions, and, even though, as with life, to come to some decision and to begin to focus your efforts is imperative, you must be ready to change directions as things around you change

Face Setbacks and Create New Strategies.

Because we knew that other jurisdictions were working on cases involving custody, we began seriously thinking about how we might pursue a right to counsel in custody cases. At the time of our early discussions, Ohio had a state statute and subsequent case law which gave the right to counsel to all parties in juvenile court proceedings, including custody proceedings involving unmarried parties. By contrast, there was no right to counsel in custody cases in domestic court involving married parties. We began discussing how we might form an equal-protection argument. Fortunately we had members with practical knowledge of the history of the statute and how state budget preparation threatens this statute. What soon became clear was not only that using an equal-protection argument to win the right to counsel for custody cases in divorces was not possible but also that the right to counsel in Juvenile Court was under serious attack. Unfortunately in the final budget bill, despite the efforts of the legal services community, a legislative rule change ended the right to court-appointed counsel in custody cases between unmarried persons in juvenile

court. The legal services community now had another group of poor people who were in need of legal services and for whom no one was available to provide those services. We felt discouraged to be farther from the ultimate goal than we had been a year earlier when the group first formed.

By the time the death knell had sounded on the Ohio statute which had given the right to counsel in all juvenile court cases, we had already begun working on a memorandum entitled "Potential Basis for Appointed Counsel in Civil Cases Under Ohio Law." Brian Murray, an associate at Wilmer, Culter, Pickering, Hale and Dorr, prepared the memorandum. Thanks to the efforts of Stephen Sach, associates have been preparing memoranda on a number of state constitutions. We determined that we needed more information on specific questions on Ohio law and the Ohio constitution. We received offers of services of the summer associates at Vorys, Sater, Seymour and Pease to research any issues which might help us proceed. The civil Gideon group worked up a list of ten or twelve issues which came out of the Wilmer memorandum and out of our hope that we could find a way around the loss of the right to counsel in private custody cases in juvenile court. Members of the group were invited to meet with the associates who were going to work on the memorandum. We gave a history of civil Gideon and statistics on legal services for the poor as well as a discussion of the legal issues which we felt needed to be researched.

Presented to the Ohio civil Gideon group, the fine memoranda from those summer associates served as the basis for a discussion allowing us to define our next move. One of the issues researched was whether there was an equal-protection argument that there should be a right to counsel in private adoption cases in probate court for the party whose parental rights were being terminated. Since the Ohio statute still provided for the right of counsel to indigent parents in juvenile court for abuse, neglect, and dependency proceedings in which the parent might face only the temporary

loss or restriction of parental rights, this seemed to be a sound argument.

In April 2006 the legal aid office in Columbus received a referral from the probate court. Attached was a court entry in which the judge had determined that a defendant in an involuntary adoption proceeding in probate court had a right to counsel under the U.S. and Ohio Constitutions. The judge had appointed legal aid as the counsel. Without this referral, we would have remained oblivious of having been already on our way toward a new goal. Elizabeth Hart, who had been serving as court-appointed counsel in a criminal matter for the respondent, and Steven Ellard (partners in the law firm of Ellard, Hart & Associates) prepared the brief used as a basis for the entry.



We are now focused on the first step in what we hope will be a progression of steps in Ohio toward the right to counsel in civil cases. We are going to bring litigation directors from all six regional offices of the legal services program in Ohio into the group to form a truly statewide coalition. We are also going to determine a statewide strategy for creating among the bench, the bar and the citizens of Ohio a political climate that will allow for additional steps in the future.

What I have found both surprising and encouraging about the civil Gideon movement is the expertise and enthusiasm of so many who are committed to the efforts to establish a civil right to counsel. Civil Gideon is not a Utopian fantasy but a mainstream movement. Each state is important. Find out if your state has a group working on civil Gideon issues. If so, join it. If not, start your own group. Be a leader by looking up from the grindstone of daily practice to find your "vision" and then pursuing that vision passionately.

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