Civil Service

MoFo's Jim Brosnahan says now is the time for a civil *Gideon* rule to give court-appointed attorneys in civil matters.

THE RECORDER

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THE RIGHT TO COUNSEL IN CIVIL CASES:

IF NOT NOW, WHEN?

By Jim Brosnahan

NEWSCOM

Some call it "civil *Gideon*" after the U.S. Supreme Court decision establishing the right to counsel in criminal cases. Some talk of starting an organization called "When" to support the idea. The American Bar Association house of delegates passed a resolution urging it, as did the California Bar Association's conference of delegates. The Bar Association of San Francisco, under the leadership of President Jim Donato, is making it one of his year's priorities. Unrepresented litigants flooding the courts of California makes the job of the judges much harder. Justice (Ret.) Earl Johnson, until recently a member of the California Second District Court of Appeal, and who was the second director of the Legal Services Program of the U.S. Office of Economic Opportunity (OEO), has advocated the concept for years. Jack Londen, my partner, has worked hard to move other bar leaders to support its basic reform.

What is this modest but important stir in the California legal profession?

It is the desire to establish the right to counsel in civil cases.

THE CASE FOR THE RIGHT

The present legal system in California is clearly suffering due to the lack of this kind of representation. It's like a restaurant where the patrons are asked to do their own cooking or a hospital where many of the patients are required to operate on themselves. We not only have to recognize the problem, we need to fix it.

In 1963, the U.S. Supreme Court decided *Gideon v. Wainwright*, 372 U.S. 335. The court viewed the right to counsel in criminal cases as included in the Sixth Amendment. The opinion, written by Justice Hugo Black, provided:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."

In 1965, federal funding for legal aid began as part of the OEO. Its purpose was to provide representation to the poor. There suddenly sprung up volumes on how to represent tenants, debtors, fired employees and the poor.

Some political forces saw it as a threat. During his eight years as governor of Califor-

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nia, Ronald Reagan constantly urged President Richard Nixon to end all federal support for free legal services for the poor. In 1970, Gov. Reagan vetoed a $1.8 million grant to California legal assistance. In 1973, with President Nixon's support, Congress created the Legal Services Corporation (LSC) to increase funding for legal aid nationwide.

At its high water mark in the late 1970s, federally funded legal aid programs nationwide employed 6,200 lawyers. But beginning in the 1980s, federal funding has been cut dramatically. Today there are just 3,845 lawyers in LSC-funded programs.

The present documented need in California is wrenching. According to the California Commission on Access to Justice, only one third of the legal-services needs of low-income Californians are met. In 2005, there were only 754 California legal aid attorneys. Not only are clients being denied justice, their voices — which might effectively address systemic inequalities — have been silenced.

THE SCOPE OF THE RIGHT

Both the ABA's and California Conference of Delegates' resolutions limit the scope of civil representation to where fundamental human needs are at stake. Examples include shelter, safety and health.

But important policy questions arise when the legal system does not provide counsel to the needy who must enter court for any reason.

Here's a scenario: A spouse who has paid all child support in a timely manner suddenly has her bank account wrongfully attached. She goes to a court, which offers self-help lawyers to give her advice, but the remedy of wrongful attachment is not available because she cannot afford a lawyer. So the wrongful, spiteful attachments continue, and the help of the law is illusory.

The definition of a "fundamental" need may need to change when it comes to impoverished litigants.

THE ARGUMENTS AGAINST IT

"It would cost too much." "It's just the lawyer's employment act." "It's not clear what delivery mechanisms would be used." These and other assertions will likely come about and can be duly addressed. They're the same arguments relied on by those who opposed legal representation for persons charged with a crime. But with all its limitations, the criminal *Gideon* system has been an improvement and has been financially feasible. Likewise, the expense associated with recognizing the civil right to counsel could be reliably estimated and tolerated.

Here are three ways the right could be established in California:

1. By legislation

This year, the governor, at the request of Chief Justice Ronald George, a strong supporter of legal services for the poor, put $5 million in the early budget designed to fund an experiment in three counties to supply some civil representation. The Legislature cut it to $2.5 million and then eliminated it entirely. The California Legislature has very few members who are lawyers and even fewer who have ever gone to court. So it appears there is no practical hope that the Legislature will ever address, much less enact, a program for civil representation.

2. By initiative

There is greater hope with an initiative. Some public-opinion surveys suggest support among the populace. Proponents of a civil *Gideon* initiative would probably need $25 million to $30 million to mount such an effort. Coalitions would have to be built and legal leaders would need to lend support. The possibility of a future successful initiative should not be eliminated.

3. By court decision

The case for a favorable court decision was strongly made in an article by Justice Earl Johnson Jr. in 1978 in the Loyola Law Review: "Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants," 11 Loy. L.A.L. Rev. 249 (1978). Johnson advanced four rationales for it: the adoption of the common law at the time of statehood; due process; equal protection; and a right to equal justice.

In 1981, the U.S. Supreme Court decided *Lassiter v. Department of Social Svcs*, 452 U.S. 18 (1981), denying the right to counsel to a woman who was losing her child in the proceedings. But in *Airey v. Ireland*, 2 Eur. Ct. HR Rep. 305 (1979), the European Court of Human Rights held that there is a right to counsel in cases involving civil rights. In *Airey*, an unrepresented Irish woman sought legal separation from an abusive husband. Ireland, with far less income per capita than California, now has legal aid offices all over the republic.

Many countries and states have recognized the right in various forms, some more expansively than others. Last July, Judge Mark Rindner of the Alaska Superior Court held there was a right to counsel in a case hhof denial of parental rights under the Alaska Constitution. The California Supreme Court certainly could write an opinion or opinions establishing the right to counsel in civil cases. It could be done, over time, in case-by-case increments.

For now, perhaps it is enough to suggest that no Californian should be required to be in court without a lawyer. The present system violates any concept of fundamental justice. It seems wrong to record a judgment or sign an order against a party that has no lawyer. But it happens every day in our state. I am just one of a growing number of Californians asking, when? ■