

NORTH CAROLINA

LAWYERS WEEKLY

M DOLAN MEDIA
COMPANY

www.nclawyersweekly.com

VOL. 22, NO. 35

NOV. 9, 2009

\$8.01 PER COPY



Could there be a right to counsel in civil cases?

By **GUY LORANGER**, Staff Writer
guy.loranger@nc.lawyersweekly.com

A constitutional right to counsel in criminal cases has existed for more than four decades, thanks to the U.S. Supreme Court's decision in *Gideon v. Wainwright*.

But in most civil cases, where the issues can be complex and the stakes high, no similar right to legal representation exists for those

who are too poor to afford an attorney.

What crisis has this exclusion triggered? And what can the state's legal community do to solve the problem?

An all-star panel did its best to answer those questions during an event hosted Oct. 30 by the UNC Center on Poverty, Work and Opportunity in Chapel Hill as part of National Pro Bono Week.

The center's director, former William & Mary president and past dean of UNC's law school Gene R. Nichol, said the event showed there is significant interest in addressing an issue that strikes at the core of the justice system.

"What was heartening about it was how much energy and passion there is in so many different parts of the North Carolina legal

community for one way or another assuring greater legal representation for those who are economically locked out of the civil justice system," Nichol told *Lawyers Weekly*.

"I think this program could help in pushing this matter forward in North Carolina — but this program would be only a small part of a larger tide in which a lot of people have been working very hard."

A crisis

The state's indigent residents have a right to counsel in certain types of civil cases: Involuntary commitment and competency proceedings; abuse, neglect, dependency and termination-of-parental-rights hearings; and any proceeding involving a limitation on freedom of movement or access, such as

■ See **COUNSEL** page 6

COUNSEL

■ Continued from page 1

satellite-based monitoring for registered sex offenders.

However, in a May 2008 report, the N.C. Equal Access to Justice Commission stated that 80 percent of the civil legal needs of the state's poor still go unmet, including cases that involve domestic violence, divorce, child custody, housing, consumer protection, employment, benefits and health care.

The Washington, D.C.-based Brennan Center for Justice has estimated that, nationally, in 98 percent of the cases that directly involve a low-income person as a defendant or plaintiff, there is no statutory right to counsel.

For most civil matters, indigent residents must turn to overwhelmed and underfunded legal services agencies, hope for assistance from a pro bono attorney or — as in most cases — represent themselves.

The growing number of pro se litigants — few, if any, familiar with the substantive and procedural nuances of the law, and many of them unable to speak or read English — poses the gravest threat to our concept of equal justice under the law, state Supreme Court Chief Justice Sarah Parker told the audience at the event.

It's a problem that is seen at the District Court level, said Judge M. Patricia DeVine of Judicial District 15B, and one that can be felt at even at the highest levels of our justice system, said Associate Justice Mark D. Martin.

"You can call it justice because someone in a robe decides the case," said George Hausen, the executive director of Legal Aid of North Carolina, "but really, there's no adversarial process taking place."

Solutions

As several panelists noted, North Carolina has made tremendous strides

in recent years to expand meaningful access to justice for the state's low-income population.

The State Bar, in particular, has taken major steps, said the agency's immediate past president, John B. McMillan.

For instance, in 2008, the State Bar established mandatory IOLTA, and at its annual meeting last month, the State Bar Council voted to publish a rule that would adopt comparability IOLTA, requiring lawyers to hold their IOLTA accounts only at banks that agree to pay those accounts the highest rates available to other customers.

The result of those moves could be a huge increase in income for N.C. IOLTA, which has been a steady, vital source of funding for civil legal services agencies and volunteer lawyer programs since making its first grants in 1984.

The State Bar also recently adopted a version of the American Bar Association's Model Rule 6.1, which sets forth an aspirational goal for each member to perform at least 50 hours of pro bono work each year.

The N.C. Bar Association also has taken on a leading role in addressing the justice gap through its 4ALL campaign, which former NCBA president Janet Ward Black launched in 2007.

The program has raised awareness of the need for providing civil legal assistance to the poor, generated donations, promoted legislation and increased pro bono participation among the state's attorneys.

The campaign's signature event, a statewide service day in which lawyers volunteer to provide free legal advice at call centers across the state, has also received national recognition. The NCBA's current president, John Wester, said the event will continue next year on March 5, or "3-5-10."

But the crisis persists.

Funding from state and federal governments, for instance, has dropped for Legal Aid, which already must turn away eight of every 10 actionable claims that come through its doors because it

only has one attorney for every 15,500 of the state's residents who are eligible for its services.

And N.C. LEAF, which provides educational-loan-repayment assistance for attorneys who pursue public-service careers, nearly was eliminated from the state's latest budget.

These setbacks come at a time when the need for legal assistance continues to grow, with foreclosures and unemployment rising in the midst of the economic downturn.

That led many of the panelists to conclude that the most effective way to assure that the legal needs of the poor are met could very well be the establishment of a civil right to counsel — in other words, civil *Gideon*.

Civil Gideon: The argument

In 1963 in *Gideon v. Wainwright*, the U.S. Supreme Court held that there is a constitutional right to counsel in cases in which a person faces prison or a loss of physical liberty, but in 1981 in *Lassiter v. Dept. of Social Servs.* — a case from North Carolina — the high court found no similar federal constitutional right existed in civil cases.

"If *Gideon* was our roadmap, *Lassiter* was our roadblock," said Debra Gardner, the legal director of the Baltimore-based Public Justice Center and coordinator of the National Coalition for a Right to Civil Counsel.

But Nichol said that *Lassiter* did not extinguish the constitutional debate.

"All states are free to be more protective of rights to due process and equal protection than the U.S. Supreme Court has mandated," he said. "So, what would be more accurate would be to say that *Lassiter* created a floor — a really lousy one that does not take access to justice seriously — but states are free to be more serious than that."

During the event, Associate Justice Patricia Timmons-Goodson noted that the United States is one of the few Western democracies that do not guarantee the right to counsel in civil cases.

That should not be acceptable for a country that has "assumed the mantle of equality," Nichol said.

"I think it's important to remember that this question of the marginalized and left-out is not just a question of professional responsibility or important volunteerism or charity work or even a question of legislative policy determination," he said.

"It is, at bottom, a fundamental constitutional question as well."

Civil Gideon: The strategy

As Nichol noted, the civil *Gideon* movement throughout the nation has focused on establishing the right at the state level, whether through litigation or legislation.

Laura Klein Abel of the Brennan Center for Justice and John Pollock of the American Bar Association ran through a list of such initiatives.

Those efforts include cases in Maryland, Washington, Wisconsin and Alaska that have sought to establish a right to counsel for civil litigants, and legislation that was passed by the California Assembly earlier this year that would guarantee counsel for low-income people in cases affecting "basic human needs," such as shelter, sustenance, safety, health or child custody.

In terms of litigation, Gardner said that proponents of civil *Gideon* need to be "strategic" in choosing test cases and must craft their message around the idea that providing the right to counsel in civil cases is a "social obligation."

But Rep. Rick Glazier (D-Cumberland), a Fayetteville attorney, told the crowd that establishing such a right through legislation would need to be "incremental" because of the current strain on states' budgets.

Almost all panelists agreed that any civil *Gideon* movement would need to start at the grassroots level.

Hausen said he hoped that both the panelists and the audience left the event with a sense of urgency.

"I'm hoping this is the start of it," he said.