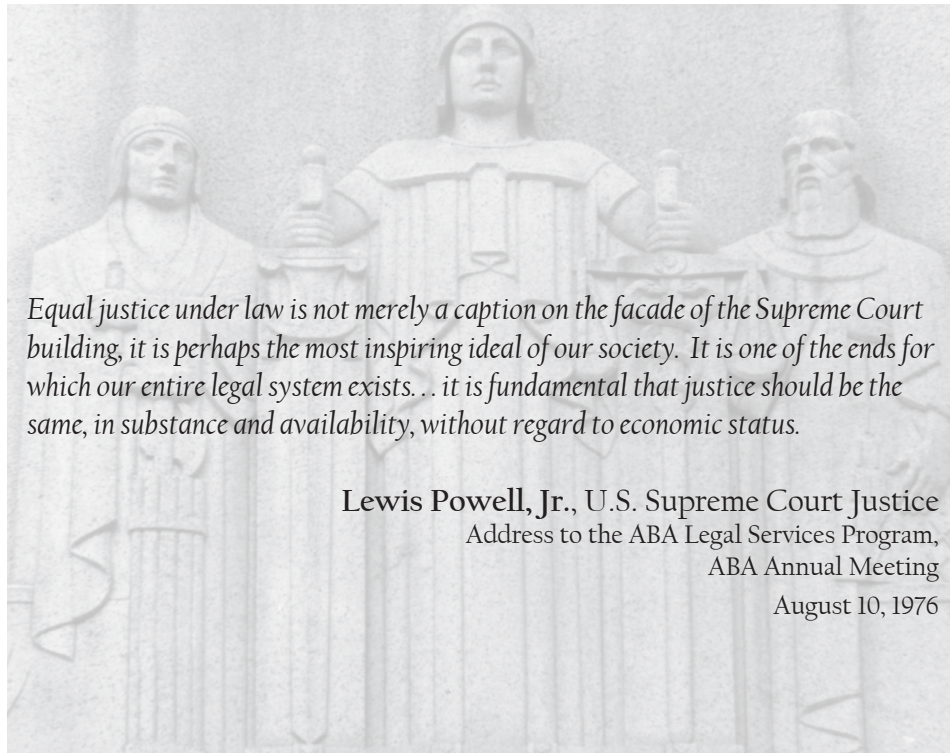


# GIDEON'S NEW TRUMPET:

## EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS



*Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists. . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status.*

Lewis Powell, Jr., U.S. Supreme Court Justice  
Address to the ABA Legal Services Program,  
ABA Annual Meeting  
August 10, 1976

**Boston Bar Association Task Force on  
Expanding the Civil Right to Counsel**

September 2008

## FOREWORD

The idea behind the creation of the Boston Bar Association Task Force on the Civil Right to Counsel came, quite simply, from the belief that it was time to move beyond the debate of whether it is a good and desirable thing for there to be a right to counsel for indigent parties in civil proceedings in which vital human interests are at stake. By the late summer of 2007, when the task force was formed, the Boston Bar Association had long embraced the Civil Gideon resolution of the ABA (indeed, the BBA Council had adopted this resolution before it was submitted to the ABA House of Delegates in 2006). The Massachusetts Bar Association and the Massachusetts Access to Justice Commission had also embraced the concept. The time had come to move to the next phase and ask, how should this important concept be implemented? Frankly, in appointing the task force, I hoped to encourage a debate about whether the answer lay in court challenges, model legislation, or model projects. Little did we anticipate that this task force would quickly move to a yet higher and more practical level, and to suggest specific ways to do it, to evaluate it, and thus to make it a reality. The success of the task force, as reflected in this Report and in the on-going planning to implement the carefully planned pilot projects in different substantive areas, is due in no small part to the remarkable, energetic and inspiring leadership of the task force's co-chairs, Mary K. Ryan and Jayne B. Tyrrell. These two great leaders brought direction and focus to the work of the task force, extracted great thought, debate and writing from its members, and have put this project now on a course that I believe will make a huge contribution, both in Massachusetts and nationally, to the efforts to make this concept a reality in our justice system. I am deeply thankful to them for their unstinting commitment and hard work on this endeavor.

This report is a remarkable achievement. I hope it serves as a document to inspire other bar associations and access to justice groups to move the civil right to counsel ideal closer to a reality. It would be foolish to think anything other than that this work is still only a beginning—pilot projects will have to be evaluated, the results measured not only in terms of costs and cost savings, but also in terms of access to justice ideals. But an important beginning it is, and for this we are all grateful.

*Anthony M. Doniger,*

*President Boston Bar Association, September 1, 2007 to August 31, 2008*

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## LIST OF ATTACHED APPENDICES

1. Roster of Task Force members and liaisons.
2. List of the committees and their members and advisors.
3. “Observations on the Right to Counsel in Civil Cases in Massachusetts” by Allan Rodgers, Massachusetts Law Reform Institute, April 5, 2004.
4. Memorandum by Mintz Levin (from Poonam Patidar to Susan M. Finegan) dated January 22, 2008, on the full list of known civil cases in which appointment and state payment of legal counsel is required, addendum to Allan Rodgers Memorandum on Observations on the Right to Counsel in Civil Cases, April 5, 2004.
5. Housing Committee Appendices
  - A. Survey of housing court judges, pro bono lawyers for the day, legal services lawyers and landlord attorneys.
  - B. Questionnaire and summary of results circulated by the Committee to a larger group after the initial proposals were developed.
  - C. Housing Committee Proposal.
6. Family Law Appendices
  - A. Family Law: Civil Contempt: The findings of the Litigation and Research Committee (legal precedent on right to counsel in civil contempt proceedings).
  - B. Proposal for Pilot Project regarding Civil Contempt.
  - C. Family Law Survey providing a list of various types of family law cases and requesting input as to where counsel is most needed to ensure a just outcome.
  - D. Proposal for Pilot Project regarding the Guardianship of Elders.
7. Listing of All Fee Shifting Statutes, Lia Marino, Suffolk Law Student, February 21, 2008.
8. Statistical Appendix to Report to Boston Bar Association Task Force on Expansion of the Civil Right to Counsel, on Legal Representation in Public Benefits Agency Hearings, by Allan Rodgers, Jul. 1, 2008 draft.
9. Costs of the Pilot Proposals by Gerry Singen.

## ACKNOWLEDGMENTS

On behalf of the Boston Bar Association, we want to thank the many people and organizations whose efforts have contributed so greatly to the work of the BBA Task Force on Expanding the Civil Right to Counsel (“Task Force”) and to this report. We begin with Tony Doniger, the BBA President whose vision led to the creation of the Task Force and gave it its mandate to formulate recommendations for expansion in specific areas, and with specific funding and enabling proposals. Without his leadership and commitment, the Task Force would not have accomplished all that it has.

We must express our gratitude for the unstinting support of the entire legal community concerned with expanding access to justice who contributed greatly to our work this past year - the Housing Courts, Probate and Family Courts and the District Courts, legal services organizations, the Access to Justice Commission, the Massachusetts Bar Association, the Women’s Bar Association, academia, the pro bono community, and many practitioners from large and small firms. We are grateful to Retired Chief Justice Herbert Wilkins, Chief Justice Paula Carey and Chief Justice Lynda Connolly for their constant input, cooperation and support in the design of the pilot programs.

Every member of the Task Force has made a significant personal contribution in terms of the time, experience, thoughtfulness and insight that each has contributed to the Task Force’s work. Particular acknowledgments must be made of the efforts of Kathy Jo Cook, Russell Engler, Jay McManus and Gerry Singsen, who served as members of the drafting committee with us. Allan Rodgers and Jessica Giglia, a summer intern at the IOLTA office, also drafted sections of the report. In large part, the Report is based on the individual reports drafted by the various committees, chaired by James Van Buren, Susan Cohen, Russell Engler, William Leahy, Joseph Kociubes, Jay McManus, Eva Nilsen, Michael Ricciuti and Richard Soden.

In addition to the Task Force, many others contributed to the work presented in this report. Committee members Jenny Chou, Joshua Dohan, Barbara Kaban, Joyce Kauffman, Megan Christopher and Jeff Wolf actively drafted sections of the Task Force report and/or Committee reports or made presentations to the Task Force but all of the Committee members, listed in Appendix 2, made a vital contribution. Others contributed in different ways by providing the Task Force with valuable information. For this, we thank Judge Jay Blitzman, Judge Michael Edgerton, Judge Wilbur Edwards, David Eppley, Fern Frolin, Judge David Kerman, Edward Leibensperger, Ilene Mitchell, Lonnie Powers, Robert Sable, Ellen Shapiro, Gayle Stone-Turesky, DYS Commissioner Jane Tewksbury and her staff, the Domestic and Sexual Violence Council and the Legal Services Family Law Task Force. Special mention should also be made of the numerous law students and lawyers who did research for the Task Force, including Timothy Blank, Joybell Chitbangonsyn, Joseph Kociubes, Lia Marino, Michelle Moor, Alicia Novak, Poonam Patidar, Michelle Peters, and Jennifer Stewart. Special thanks are also due to Brianne Miers, Donna Southwell and Kevin Decker for their production assistance.

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*Mary Ryan and Jayne Tyrrell, Co-Chairs*

## I. EXECUTIVE SUMMARY

“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. . . . He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.”<sup>1</sup>

With these famous words, the United States Supreme Court capped its landmark decision in *Gideon v. Wainwright*, establishing the right to counsel for indigent defendants in criminal cases. Forty-five years later, no comparable right exists on the civil side of our legal system. As a result, indigent litigants are forced to navigate the legal system without legal representation even in cases where basic human needs are at stake.

A rigid delineation that presumes that counsel is important in criminal cases but not civil cases is untenable in the United States in the twenty-first century. Most parents would choose to serve thirty days in prison before giving up custody of their children, yet no right to counsel currently exists in private custody matters. Most parents would similarly choose a temporary loss of liberty to avoid eviction and homelessness, yet no right to counsel exists in eviction matters. Many people believe they have such rights, but they are sadly mistaken.

The absence of a right to counsel in certain civil matters has devastating consequences for the residents of the Commonwealth of Massachusetts. Consistent with reports across the country, large numbers of litigants appear without counsel in civil cases. The primary cause of self-representation is the high incidence of unmet legal needs among the poor, working poor and middle income litigants, combined with the shortage of lawyers available to represent those litigants.

Studies of courts and administrative agencies consistently show that indigent litigants without counsel routinely forfeit basic rights, not due to the facts of their case or the governing law, but due to the absence of counsel. On the other hand, the few who are fortunate enough to obtain representation stand a dramatically increased chance of obtaining a favorable outcome and preserving basic human needs. Such an unequal system of justice, that is available to some but not all, is untenable.

Massachusetts has been at the forefront in its efforts to achieve justice for the poor. Our legal services programs work tirelessly providing high quality representation and assistance to many who flood their offices, while forced to turn away even more. The Massachusetts Legal Assistance Corporation (“MLAC”) plays a unique and innovative role in supporting the legal aid community. The Committee for Public Counsel Services (“CPCS”) not only serves as a model for the nation in providing high quality criminal defense work, but also dedicates one-third of its budget to representation on the civil side where the right to counsel has already been recognized by statute or case law.

The Boston Bar Association’s 1998 Report of the Task Force on Unrepresented Litigants provided analysis and recommendations that have guided legal communities not only in Massachusetts but across the country. Innovative programs both inside and outside courthouses across the state provide various forms of assistance short of full representation that improve the plight of those without counsel. The Supreme Judicial



Court's ("SJC") Steering Committee on Self-Represented Litigants has developed wide-ranging proposals, including the landmark Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants and Limited Assistance Representation Pilot Programs. The SJC's Standing Committee on *Pro Bono* Legal Services fosters voluntary pro bono efforts to help close the justice gap for poor people in Massachusetts, consistent with SJC Rule 6.1. The Massachusetts Access to Justice Commission ("ATJ Commission") has held hearings around the state and produced its first report and recommendations calling for changes to increase access to justice for the poor in civil cases.

Despite these efforts and accomplishments, the crisis persists, and the basic human needs of those without counsel continue to be jeopardized in civil matters. The ATJ Commission's 2006-2007 hearings consistently confirmed the desperate call for enactment of a civil right to counsel to solve the crisis caused by the gap between the need for representation and the availability of lawyers for the poor. The Boston Bar Association ("BBA"), Massachusetts Bar Association ("MBA"), and the ATJ Commission have all supported and followed the landmark call of the American Bar Association ("ABA") for representation at public expense in adversarial proceedings where particular basic human needs are at stake.

The report that follows reflects the Task Force's recommendations to establish starting points for an expanded civil right to counsel. The report documents the history of the Task Force's work and the extensive research involved in producing the findings. The report explains the process of identifying basic needs that require the most immediate attention, crafting pilot projects designed to yield solutions to the challenges, and discussing steps to move the projects from the planning stages to reality. The stories told in each section about what a difference having a lawyer makes are true stories based on Massachusetts cases. The nine pilot projects, involving areas of housing, family, immigration and juvenile law, can be implemented for a total cost of approximately \$9 million, assuming each pilot runs for three years. In many instances, particularly those involving detention, incarceration or eviction, the expenditure for counsel will yield direct financial savings that exceed the cost of counsel. In other cases, such as custody and school exclusion, the financial costs may be harder to measure, but the financial, emotional and societal savings nonetheless will be significant. While the Task Force urges that all be fully implemented, the projects need not be launched all at once.

For too long, recognizing a Civil Gideon right has been resisted due to fears that do not comport with the reality of the concept. Civil Gideon, as understood by members of this Task Force, stands for the basic proposition that when a civil proceeding involves a basic need or right, and nothing short of representation by counsel will preserve that right, counsel must be provided. No one is calling for a lawyer for all litigants in all civil matters. No one is calling for representation by counsel when more limited forms of assistance will provide meaningful access to justice. No one is calling for representation when the rights at issue do not involve basic human needs.

The bar association resolutions, unmet legal needs surveys, ATJ Commission hearings, and experience of those familiar with courts confirm that an untenable gap exists in the provision of representation where basic human needs are at stake. Massachusetts has consistently led the nation in providing justice for the poor, and the plight of unrepresented litigants in civil cases begs for our leadership once more. It was a Massachusetts lawyer, Michael Greco, whose leadership as President of the ABA led to the landmark resolution; as he observed: "Above the doors to the Supreme Court Building are etched the words "equal

justice under law.” That eloquent statement, in this bountiful land full of hope and promise, today is hollow rhetoric to far too many in our society.”<sup>2</sup> In appointing the Task Force, BBA President Anthony Doniger observed: “I believe that we are now beyond the point of debating whether the civil right to counsel concept is a good idea.”<sup>3</sup>

Forty-five years after *Gideon*, the time for action is long overdue. The recommendations of the Task Force provide tangible starting points for achieving justice for all in our courts. While the details of particular pilot projects may be open to discussion or revision, the need for action that moves toward the expansion of a civil right to counsel is not negotiable. The desperate plight of far too many residents of the Commonwealth cries out for nothing less.

## II. THE JUSTICE GAP IN MASSACHUSETTS

The United States was founded upon the notion of equal justice. The founders of this nation established the Constitution in order to form a more perfect union and to establish a system of laws to guarantee justice to all. The Fifth and Fourteenth Amendments ensure equal protection of the law and due process from both the federal government and the state governments. Even the edifice of the Supreme Court re-enforces that aspiration as “Equal Justice Under Law” is proudly inscribed above the entrance through which each litigant passes on their way to the Court chamber. The Massachusetts Constitution, too, contains the assurance that all citizens should have equal access to justice.<sup>4</sup>

Unfortunately, however, for many in Massachusetts, the promise of equal justice remains a hollow one. Equal justice must mean equal access to the legal system, particularly the courts. The barriers to equal access to justice are real, and for poor persons and those historically disenfranchised, they are often insurmountable. Chief among them is the unavailability of counsel to assist those who cannot afford to pay a lawyer to handle a civil matter.

Approximately 15% of Massachusetts’ six million residents have incomes below 125% of the poverty line.<sup>5</sup> The poor and marginalized need access to the courts when they face the most serious possible losses involving basic human needs: tenants are threatened with eviction; parents are challenged for custody of their children; students face expulsion; immigrants face deportation; and the list goes on and on. The lack of counsel in these high stakes cases may mean that a family becomes homeless or a mother loses her children. The lack of counsel may mean that a child can no longer attend school, resulting in a downward spiral, refuge in criminal activity, and ultimately, prison. The lack of counsel may mean that a man or woman is forced to leave this country and return to a homeland where he or she will be beaten, tortured or killed due to political beliefs. In situations so dire, in cases so complex, those with the least resources and knowledge should not be turned away to fend for themselves. Despite a growing sensitivity by the bench to pro se litigants, the laws and rules are simply not designed to accommodate an untrained party.

Although more than 965,000 of Massachusetts’ residents are eligible for free legal services, most of them are turned away because legal aid programs do not have the resources to assist everyone needing counsel.<sup>6</sup> A total of 272 attorneys work for the twenty-one legal services organizations funded by MLAC and the federal Legal Services Corporation (“LSC”), or one lawyer for every 3550 poor persons in the state.<sup>7</sup> By contrast, there are 21,000 practicing lawyers in Massachusetts, one for every 252 people in Massachusetts.<sup>8</sup>



Despite studies showing that lawyers make an invaluable difference in the outcomes of these cases, pro se litigants dominate the dockets of many of the civil courts. MLAC reports that a majority of eligible applicants for legal services are turned away by its programs due to lack of resources. Legal needs studies find that over 80% of the needs of applicants are unmet.<sup>9</sup> In the Massachusetts Housing and Probate and Family Courts, often over 90% of the docket involves matters with unrepresented parties.<sup>10</sup> Again, many of the unmet legal needs concern issues of the utmost importance to people's lives, including housing, health, employment, and family and domestic issues.<sup>11</sup> Yet, because of the unavailability of counsel to aid those who need it most, these individuals have no choice but to represent themselves.

This is an unacceptable state of affairs. A society is not truly democratic, and its justice system not truly just, when its poorest citizens do not have access to the protection of its laws. When the result is that families are unable to protect their basic human rights, it can fairly be called an ongoing state of emergency. No person who can afford counsel would ever go into the courtroom unassisted if the outcome of the case could result in the loss of the family home or the removal of a child from the family. Poor persons should not be required to do so, either. Surely, as a society, we can do better than this. If the idea of equal justice under the law is to have genuine meaning, lawyers must be available to the broad masses of people, not just those with private means to pay for counsel.<sup>12</sup>

Currently, the pressing need to provide legal services to the poor in Massachusetts is addressed through legal services programs funded by the federal and state governments, other legal services programs created and funded by non-profits or charitable organization and pro bono efforts by the private bar, often in conjunction with these legal services programs. The legal services provided run the gamut from full representation to limited representation (telephone hot lines, for example, or lawyer for the day programs) to legal information made available at clinics or on web sites. The courts facing the greatest numbers of unrepresented litigants also now offer various forms of assistance and legal information to such persons.

The BBA Task Force set out to demonstrate how to move beyond the inadequacies of the current resources for providing legal aid for the poor through the creation and expansion of a legal right to counsel, not in every civil case, but in those in which critical human needs are at stake and only full representation by a lawyer will ensure equal access to justice. As described in the next section, dedicated advocates in states across the country are engaged in efforts to do the same: to create a civil right to counsel as another tool that can be used to narrow the gap between the promise of equal justice and the reality that it is denied to so many people today. The challenge for the Task Force was not to decide whether there should be a civil right to counsel, but rather, how to make it a reality in Massachusetts. The Task Force set out, therefore, to answer the important questions: In what types of cases do unrepresented litigants forfeit the most important rights? Does providing counsel in such cases preserve those rights and produce a more just outcome? What is the effect on the courts and the parties if low income parties have and exercise a right to counsel? What is the cost of counsel when certain tenants, landlords, immigrants, juveniles and parents in child custody cases are entitled to representation? What is the most effective use of counsel? What are the potential cost savings to the Commonwealth and to society if counsel is provided in key areas implicating basic human needs?

Expanding the right to counsel in civil cases is an essential way to ensure that, in truly vital cases, low income people have access to the justice system. A right to counsel in these cases will assure that low income people do not forfeit fundamental rights or lose

out on basic human needs without a fair hearing of their cases. Ironically, most Americans believe that a right to counsel already exists for these types of cases.<sup>13</sup> It is time to transform that optimistic belief from myth to fact.

### III. BACKGROUND AND CREATION OF TASK FORCE

#### A. HISTORY OF CIVIL GIDEON

In 2006, the ABA unanimously adopted Resolution II2A that reads, in its entirety:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.<sup>14</sup>

The report accompanying the resolution traces the history of legal aid in the United States, as well as common law antecedents, state and federal constitutional principles and policy considerations that support a right to counsel in civil cases. The report discusses current efforts to establish a civil right to counsel and describes the resolution as offering a careful, incremental approach to making effective access to justice a matter of right.

The current efforts to establish a civil right to counsel reflect the surge of activity across the country, coinciding with the fortieth anniversary of the United States Supreme Court's 1963 decision in *Gideon v. Wainwright*, establishing a right to counsel in the criminal matters.<sup>15</sup> The activity has included conferences, websites and articles supporting the call for a Civil Gideon in various formulations, as well as the formation of a National Coalition for a Civil Right to Counsel. Advocates in some states, such as Maryland, Washington, Wisconsin and Alaska, filed litigation seeking decisions to create an expanded right to counsel in certain civil contexts. Others, including those in California, New York and Texas, have explored legislative responses to the issue. The adoption of the ABA Resolution has spurred discussions in many states about how to implement the resolution.<sup>16</sup>

In Massachusetts, the right to appointed counsel currently exists, by statute or case law, in a number of types of civil cases. Examples of these areas include care and protection cases, child guardianship cases, children in need of services ("CHINS"), mental health commitments and waiver of consent to adoption.<sup>17</sup> Roughly one-third of the budget for CPCS provides counsel in civil, as opposed to criminal, matters. The expansion of the right to counsel in Massachusetts has progressed steadily, and continues to do so, as evidenced by the 2008 decision of the Massachusetts SJC in *In Re Hilary*.<sup>18</sup>

Nonetheless and despite progress which ensures a right to counsel in some civil matters, the right has not been established in most cases in which basic needs are at stake, as envisioned by the ABA Resolution. The BBA, therefore, became an original sponsor of the resolution. The MBA and the ATJ Commission subsequently adopted similar resolutions.<sup>19</sup> In a report issued in June 2007, the ATJ Commission recommended the expansion of a civil right to counsel in several areas: evictions; civil contempt hearings where incarceration is a possibility; proceedings in which the Department of Youth Services ("DYS") seeks to revoke a juvenile's conditional release; civil actions involving the same issues as a criminal case in

which counsel was appointed; and guardianship proceedings including the custody of a youth.<sup>20</sup>

## B. CREATION AND MISSION OF THE BBA TASK FORCE

It was against this backdrop of activity that BBA President Tony Doniger created the Task Force on Expanding the Civil Right to Counsel<sup>21</sup> over the summer of 2007, which convened for the first time in September 2007.

### Formation of the Task Force

As constituted the Task Force was intended to represent stakeholders from all sectors of the legal community concerned with expanding access to justice – the judiciary, legal services, MLAC, the IOLTA Committee, CPCS, Massachusetts Law Reform Institute, the MBA, the Women's Bar Association of Massachusetts, academia, the pro bono community and practitioners from large and small firms – along with experts from each of the substantive law areas most likely to be affected by the work of the Task Force. The Task Force's work was enhanced by the substance of the Civil Gideon Symposium held in October 2007, which was jointly convened by the MBA and the BBA. In particular, former Chief Justice Herbert Wilkins, the Chair of the ATJ Commission, urged bar leaders to expand the Task Force to include the broadest possible input to ensure that its work would not have to be redone. The Task Force was subsequently expanded to include representatives from key statewide groups. James Van Buren, Vice Chair of the ATJ Commission, was appointed to the Task Force as its representative, and Gerry Singsen, consultant to the ATJ Commission, was asked to participate in Task Force efforts. A list of Task Force members and liaisons may be found in [Appendix I](#).

### Mission of the Task Force

The Task Force adopted the following mission statement:

The need for a civil right to counsel in matters of basic human need such as those involving shelter, sustenance, safety, health or child custody having been recognized by the BBA Council vote of June 20, 2006, as well as by the ABA, MBA and the Supreme Judicial Court's Access to Justice Commission, the mission of the task force will be to foster the expansion of a civil right to counsel by analysis of areas where the right will be most crucial and formulating recommendations for expansion in specific areas, and with specific funding and enabling proposals.

From the earliest discussions with President Doniger, the Task Force focused on expanding the areas in which Massachusetts, by judicial decision or legislation, already mandated a right to civil counsel in some civil matters. As a result, the Task Force established committees in substantive law areas of Family, Housing, Immigration and Juvenile Law. A Funding Committee was appointed to work on how to obtain funds for the proposals the substantive committees were expected to recommend. A Litigation/Research Committee was appointed to support the efforts of the Task Force and its committees. Individual members of the Task Force began looking at legal matters affecting rights to sustenance and the collateral consequences of criminal convictions. In order to broaden the input from stakeholders, the committees were encouraged to invite as members or advisors interested parties who were

not members of the Task Force. A full list of the committees and their members and advisors may be found in [Appendix 2](#).

The Task Force discovered that not enough was known about how to implement a right to counsel in most substantive law areas. Consequently, the Committees developed pilot project proposals that would allow it to learn more about the mechanisms for providing counsel, the effect of creating a right to counsel, the costs involved and the potential saving of some kinds of costs to the state. A pilot project could demonstrate the value of counsel to the parties and the courts and provide data for evaluation of alternatives such as the use of staff lawyers or private attorneys on assignments. The cost of pilot projects would be far less than full implementation of a right to counsel, and therefore more manageable.

#### IV. OVERVIEW OF COMMITTEE REPORTS

The following sections present the reports and recommendations of the Task Force committees in the substantive areas of housing, family, juvenile and immigration law. Although each committee followed its own path in tailoring its proposals to address the substantive issues identified by the committee, common themes emerged during the development and discussion of the proposals. This section briefly identifies those.

The committees determined that counsel is most essential when it is likely that counsel will be necessary to preserve basic human needs, and the proposals of the various committees broadly fit into two categories. In the first, the need for counsel arises because the civil case relates to a criminal matter in which the deprivation of liberty potentially is at stake. Proposals fitting this category include the Family Law Committee's proposal for representation in contempt proceedings, in which the defendant faces incarceration as a possible outcome, the Immigration Law Committee's proposal for representation of immigrants in detention, and the Juvenile Law Committee's proposal to represent juveniles in hearings in which the juvenile faces lock-up if his or her grant of conditional liberty is revoked. Closely related are cases in which the civil case is a collateral consequence of the criminal case, resulting in inefficiencies and unfairness in that counsel may be provided on the criminal side, but not on the civil side. Examples include the Housing Law Committee's proposal for counsel for evictions resulting from criminal conduct, and the Immigration Law Committee's proposal for increasing advice and support to non-citizens in the Massachusetts criminal courts.

With regard to the second category, the committees felt that counsel was also needed when a potential loss of basic human needs due to a dramatic power imbalance was at stake. Those imbalances often flow from the vulnerability of a family whose basic needs are in jeopardy and the comparative power of an adverse party. Examples of these scenarios include the Housing Law Committee's proposal for representation in eviction cases involving household members with mental disabilities, the Family Law Committee's proposals in the custody and adult guardianship areas, the Immigration Law Committee's proposal for representation for asylum seekers and the Juvenile Law Committee's proposal for counsel in school exclusion cases.

The process of identifying common threads affected not only the selection of certain areas of the law for the development of the proposals, but the details of the proposals themselves. For example, the common thread of power imbalances and unfairness in the legal

system caused the committee to place much of its focus on situations in which the adverse party is represented by counsel. At best, the result is a severe challenge to the adversary system and the judges, mediators, clerks and opposing counsel who must navigate the ethical quagmire which can result when one party is unrepresented. At worst, the situation reflects the ultimate breakdown of an adversary system that depends upon a rough equality between the parties. While that imbalance exists in all cases in which the government is the adverse party, the same is often true in civil cases in the areas of housing and family law. As a result, both the housing and family law proposals specifically include a right to counsel for a litigant when the opposing party is represented by counsel. The Task Force refrained from putting forward proposals that would create the imbalance, providing counsel for one side against an unrepresented party. Even in the contempt area, where counsel might be appointed for a defendant facing incarceration, the proposal includes the equivalent possibility that counsel be appointed for the victim of the contemnor's behavior as well.

To the extent possible, the proposals were developed and shaped with input from the courts, agencies and community groups that will be engaged with those working in the pilot projects. As described below, the housing proposals were developed after extensive input from judges and court personnel in the housing and district courts, as well as housing lawyers and other advocates. DYS' interest in the Juvenile Parole Revocation project enabled that proposal to move to the top of the Juvenile Law Committee's list of proposals. In contrast, resistance from the domestic violence community and some involved in the court system led the Family Law Committee to withdraw a proposal in the area of restraining orders. The active support of CPCS for the Immigration Law Committee's proposal regarding non-citizens in criminal court not only helped to shape the development of that proposal, but also to begin its implementation during the course of the Task Force's work. Moreover, and because the Task Force included a liaison to the Access to Justice Commission, who was fully aware of the Commission's work, hearings and report, four of the Task Force proposals were geared toward addressing problems identified by the Commission.

Finally, the Task Force sought to ensure that the proposals were balanced and complement one another. One form of balance was geographical. The Task Force shaped its proposals in such a way that the pilot projects would not be concentrated in one part of the state and exclude other parts. A second form of balance concerned the manner in which the proposal would be delivered. Some proposals use a staff model, similar to that which exists in legal services offices. Others utilize a mechanism similar to the fee-based system that exists with CPCS and involves the private bar. In addition, the proposals reflect the recognition of important roles for the private bar, including mechanisms that provide enhanced opportunities for pro bono work. All recognize that creating a right to counsel in a limited group of cases is but one aspect of a multi-tiered approach to fostering access to justice through various forms of assistance to low income people, including full representation, limited representation (attorneys for the day) and self-help (training for pro se litigants, self-help centers).

## V. HOUSING LAW COMMITTEE

### A. THE NEED FOR COUNSEL

Shelter is a basic human need. The loss of shelter may jeopardize a family's safety and health, may negatively affect a child's education and development and even lead to loss of



custody. The need for assistance in cases involving eviction is great. Almost 35,000 summary process eviction cases were filed in the housing and district courts in fiscal year 2007.<sup>22</sup> In Massachusetts, as elsewhere around the country, most tenants and some landlords appear without counsel.<sup>23</sup> With no right to counsel established in the eviction area, indigent tenants obtain full representation only when legal services offices or a pro bono attorney are able to take their case, a relatively rare occurrence because housing cases are high on the list of unmet legal needs. Tenants who are represented are much more likely to obtain a better result, whether it be maintaining possession of the premises, reaching a favorable settlement or winning at trial.<sup>24</sup> Two examples illustrate the critical role counsel can play in protecting these vital rights.

*Susan and her foster children were being evicted from her apartment of twenty years. Susan's subsidized rent went up when she got a new job after a period of disability. When later she got an eviction notice for nonpayment of rent, she went to housing court alone. Fortunately, she received assistance in court from an attorney who realized that the public housing authority had charged Susan \$4455 more than she owed. The housing authority dropped the eviction, eliminated Susan's debt, covered her next two month's rent and wrote her a check for the balance of \$1079.*

*Ray, a brain-injured, wheelchair-bound resident, faced eviction from his apartment for alleged threats. Without counsel in district court, Ray had signed a "move-out" agreement, giving up his fifteen-plus-year tenancy with no alternative housing. Although eligible for services through the Statewide Head Injury Program for almost a decade, Ray had fallen through the cracks. Ray was able to secure a lawyer who helped vacate the judgment. The eviction case was dismissed six months later, and services were put in place.*

Courts handling eviction cases in Massachusetts have been at the forefront in developing techniques and programs to ameliorate the impact of appearing without counsel. Nonetheless, many of the problems that exist across the country persist in Massachusetts. For example, a recent study of eviction proceedings in Cambridge District Court found that, while landlords were represented in 355 of the 365 cases studied, tenants were represented in only thirty-nine (8.5%). Most cases involved nonpayment of amounts less than \$1000 owed. After analyzing the case outcomes, the authors concluded: "[t]enants with representation have a better chance of retaining possession of their housing."<sup>25</sup>

Given the scope of the problems involved with unrepresented litigants in summary process eviction cases, the Task Force recommends this as an area wherein counsel should be provided as a matter of right.<sup>26</sup> The specific pilot proposal endorsed by the Task Force is presented below, although the Committee believes that at least two other types of cases merit future consideration: cases involving conditions in violation of the housing code which are serious enough to jeopardize health and safety; and cases linked to the foreclosure crisis which would not otherwise come within the ambit of this proposal.

## B. THE PROCESS

The development of a housing proposal was delegated to a committee of the Task Force. Members of the Committee consulted advocates and court personnel about existing programs to assist unrepresented litigants; they met with representatives of the district court, the Tenancy Preservation Program's Statewide Steering Committee,<sup>27</sup> and the housing court; they surveyed housing court judges, pro bono lawyers for the day, legal services lawyers and landlord attorneys and analyzed the responses;<sup>28</sup> they collected statistics and



relevant data regarding summary process eviction cases in housing and district courts; and they reviewed reports on the impact of counsel in housing courts, as well as reports regarding various limited assistance programs, including those currently in operation in the various housing courts in Massachusetts, New York and Connecticut. Members of the Committee also collected and reviewed reports and information related to cost savings in homelessness prevention and cost data in representation programs, such as data from CPCS, discussed below in connection with the Funding Committee.

As the Committee worked to identify discrete areas for representation around which a feasible pilot project could be constructed, several tensions emerged that shaped the structure of the final proposal. The first was whether one could actually identify the features of the most important cases for representation in advance, without leaving any role for judicial discretion to cover scenarios that cried out for counsel but did not fit the exact categories prescribed in a proposal. Some felt that there should be no role for judicial discretion while others felt that the appointment of counsel, in any instance, should be discretionary. The second tension was the dramatic difference between resources in the housing and district courts, which could make it difficult to implement a one-size-fits-all program. The third involved the potential imbalance in any representation proposal regarding assistance for landlords and tenants. Given that the “basic human need” is shelter, tenants would seem to be the ones more often at risk, but the Committee recognized that there are vulnerable, unrepresented landlords who need assistance to preserve their own shelter by pursuing eviction cases. The final tension involved the recognition that a pilot program could not provide representation to all unrepresented litigants. Thus, an important component of providing access to justice would be to ensure that there are sufficiently staffed assistance programs to reach litigants who desire assistance such as the Lawyer of the Day program and other limited assistance programs.<sup>29</sup>

Once the initial proposals were developed, the Committee circulated them, along with a short survey to a larger audience.<sup>30</sup> In view of the generally favorable reaction to the proposals, the Committee felt that there was no need to revise them further.

### C. THE PROPOSALS

#### Tenants

The proposals for representation of tenants focus on three areas. Subsection one of the tenant proposal focuses on those tenants who potentially are the most vulnerable, those with mental disabilities, and the proposal largely tracks language that guides the Tenancy Preservation Projects. Subsection two responds to the concerns about cases in which criminal behavior of an alleged household member puts the tenancy at risk, avoiding the anomalous and inefficient situation in which representation is available by right in the criminal context, but not the related eviction. Subsection three is crafted to guide the careful exercise of judicial discretion in selected cases, requiring consideration not only of the tenant’s vulnerability, but in cases in which the landlord is represented, focusing further on the affordability of the housing unit and whether the tenant has potentially meritorious claims and defenses.<sup>31</sup>

Specifically, the proposal would provide legal counsel for tenants in eviction cases where: (1) the case involves household members with mental disabilities where the disability is directly related to the reason for eviction; (2) the case involves criminal conduct (including cases brought pursuant to M.G.L. c. 139, sec. 19 and those brought as summary process cases); or (3) the judge concludes that the absence of representation for the tenant will lead to a

substantial denial of justice. In the exercise of judicial discretion, judges shall consider the following: a) factors relating to a tenant's vulnerability, such as disability, domestic violence, education, language, culture and age; b) factors relating to the landlord, such as whether the landlord controls a large or small number of units, whether the landlord is legally sophisticated, whether the landlord is represented by counsel, and whether the landlord lives in the building; c) the affordability of the unit for the tenant, including whether the unit is in public or subsidized housing; d) whether there appears to be cognizable defenses or counterclaims in the proceeding; e) whether the loss of shelter might jeopardize other basic needs of the tenant, such as safety, sustenance, health or child custody; and f) other indicia of power imbalances between the parties.

### Landlords

The proposal for representation of landlords focuses on parallel goals, providing representation for indigent litigants where shelter is at stake and the opposing party is represented.

The proposal would provide legal counsel for landlords where: (1) the landlord resides in the building that is the subject of the eviction proceeding; (2) the landlord owns no other interest in real property; (3) the tenant is represented by counsel; and (4) the landlord's shelter is at stake in the proceeding.

### D. IMPLEMENTATION AND EVALUATION

Because summary process eviction cases are heard in both housing courts and district courts, the Committee believes it is important to initiate pilot programs in at least one session of both the housing and district courts. After discussions with both courts, it appears feasible to do so. The pilot hopes to utilize available assistance and screening mechanisms, but if they are unavailable, a method for assistance and screening will also have to be provided. Further, the Task Force anticipates using two models of staffing, one involving legal services staff and one based on the model of appointed counsel utilized by CPCS. The Task Force expects that the small number of landlord cases will permit them to be handled by pro bono attorneys. The pilot in both courts is anticipated to cost approximately \$350,000 annually based on current estimates from advocates, judges and court personnel regarding the number of cases that are expected to fit the criteria of the project. It is anticipated to run for one to three years, depending on available funding. In terms of outcomes, the evaluation of the pilot will focus on retaining possession, whether temporarily or long term.

The Task Force also believes that the project may provide a cost savings as a result of reducing displacement and homelessness and associated costs. The state spends almost \$120 million on homeless shelters and related services.<sup>32</sup> A New York study found that nearly 30% of the homeless became homeless because of eviction.<sup>33</sup> If just 20% of the evictions could be averted, the state could save nearly \$6 million. Based on a similar rationale, New York City started funding lawyers to represent low income tenants in eviction proceedings. The city's social services department subsequently calculated that the city saves \$4 in shelter and other social services costs for every \$1 spent on legal representation.<sup>34</sup>

## VI. FAMILY LAW COMMITTEE

### A. THE NEED FOR COUNSEL

The probate and family courts in Massachusetts have been at the forefront in developing materials and programs to make it easier for litigants to navigate the legal system when they are forced to appear without counsel and to lessen the impact of the lack of counsel on the outcome of cases. There are Lawyer of the Day programs, family law facilitators in two courts, a pro se coordinator in one court, self-help centers and self-help materials. These programs, however, do not and cannot fully address the need. The unfortunate reality is that every day unrepresented litigants, often with a limited education, try to navigate a complex system to resolve important matters, such as their rights to see and to raise their children.<sup>35</sup> The Task Force has identified three types of case in which it believes that counsel should be appointed; they are cases involving child custody, guardianship and civil contempt.<sup>36</sup>

#### Child Custody

Recognizing the importance of custody proceedings, the Supreme Judicial Court has held that a parent has a right to counsel at the dispositional phase of a CHINS proceeding when a judge is considering an award of custody to the Department of Social Services.<sup>37</sup> There is, however, presently no right to counsel in custody disputes between private parties. The Task Force believes that there is a compelling need for a lawyer in contested child custody cases when one side has an attorney and the other party is unrepresented due to indigency, given the complexity of the issues and the important rights that may be at stake, including physical and legal custody and visitation. One brief example illustrates the critical role counsel can play in protecting these vital rights:

*Ms. A had been ordered to transport her four year old daughter to her husband's home for court-ordered visitation. When she did so, however, her husband beat her. The local police department was notified and referred Ms. A. to Greater Boston Legal Services ("GBLS"). A GBLS attorney represented her through multiple proceedings. Eventually Ms. A. was awarded full custody of her daughter, child support, and visitation arrangements that were safe. Ms. A. was then able to focus on finding a job, raising her daughter and rebuilding her life.*

This example is typical. Every day indigent parents are faced with the potential loss of the custody of their children. Studies show that counsel can make a difference and that parents represented by counsel are more likely to request and obtain joint custody arrangements,<sup>38</sup> shared decision making arrangements<sup>39</sup> and reasonable visitation arrangements,<sup>40</sup> results which are more satisfactory than the alternatives.<sup>41</sup> Counsel can dramatically increase the likelihood of a just outcome in these cases.

The challenges faced by a litigant who must represent herself in her custody case were described in great detail in the appellate brief filed on behalf of Brenda King in the case of *King v. King*.<sup>42</sup>

She had to wear multiple hats simultaneously: party, witness, lawyer, scrivener. . . . She had to do so during highly emotional testimony . . . and in the presence of Michael [her husband] who had been abusive toward her and the children. . . . She faced these challenges with a background of little formal education. . . . These difficulties

**“It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect. . . . If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”**

Learned Hand,  
Address at the  
75th anniversary  
celebration of the  
Legal Aid Society of  
New York, February  
16, 1951

were compounded by [her] lack of legal training. She could not master the difference between offering testimony, questioning witnesses, and making argument. . . . She did not know until the second day of trial that the judge would not consider as evidence pretrial reports, motions or other submissions, except the GAL's [guardian ad litem] interim reports. . . . She was unable to have some exhibits admitted, or introduce the evidence they contained through other means. . . . [She] struggled to handle issues that lawyers normally address through expert testimony, such as whether she has Attention Deficit Disorder and if so its impacts. . . . She had not obtained documents that a lawyer could have obtained through discovery. . . . The trial court gave explanations of how to admit exhibits . . . the hearsay rule, [and the like]. . . . But as a layperson, [she] was unable to follow the judge's instructions. . . . The court's efforts to accommodate for [her] lack of a lawyer had limits. . . . Some highly relevant evidence never came before the court because [she] lacked the skills that lawyers have. . . . [Her husband's] case included inadmissible evidence because [she] did not know to object, or how to impeach witnesses, or was unable to do so because she was simultaneously testifying.<sup>43</sup>

This description illustrates exactly why an unrepresented parent is at great risk of forfeiting the basic right to custody.

#### Guardianship of Elders<sup>44</sup>

Elders often become physically or mentally unable to care for themselves. But if they do not have living relatives or friends that they can trust and rely upon to make important decisions about living or medical arrangements or finances, they are at risk of losing their independence and control of their financial affairs, as well as significant personal and civil rights, to a court-appointed guardian. The elder population of the United States is expected to grow from an estimated 31.5 million in 2000 to a projected seventy million by 2030. Within this astronomical number, a significant proportion of these individuals are likely to be "unbefriended elders," those who have no living relatives or friends upon whom to rely or who could potentially be appointed as guardians if needed. In 2007, over 3500 petitions were filed in the probate and family courts statewide, seeking guardianship of persons who were allegedly mentally ill or incapacitated. Although the exact figure of unrepresented individuals is unknown, it is likely that a vast majority of these individuals do not have benefit of counsel.

In guardianship proceedings, often there is an initial hearing, during which a petitioner presents evidence to support his or her request for temporary guardianship. The question of whether guardianship is necessary is often complex and requires investigation of the potential ward as he or she may indeed have some incapacity. Determining whether the level of incapacity is such that he or she requires a court-appointed guardian may require a close evaluation of complex and voluminous medical evidence. Often, however, the court will have only the information provided by the petitioner, which may be biased. One brief example illustrates the critical role that counsel can play in protecting the rights of these potential wards.

*Seventy- four year old Grace was admitted to the hospital for a heart related condition. Hospital staff planned surgery, but Grace advised them that her primary care doctor had previously recommended against surgery, given other health problems. The hospital filed a petition asking the court to appoint a guardian to make a decision about the surgery, claiming that Grace was mentally ill. The judge granted the motion and appointed a guardian.*

*After the appointment of the guardian, Grace's clothing, purse and wallet were taken from her by the hospital staff, and she was transferred to a skilled nursing facility against her will. Ultimately GBLS intervened on Grace's behalf, filed an objection to the guardianship petition and a motion for an independent competency evaluation. Grace was found competent, and the guardianship was dismissed.*

Grace was fortunate to have GBLS's assistance, but there are thousands of elders just like Grace who do not have attorneys to represent them. Instead, they are left to rely on judges and guardians, most often strangers, to make important decisions for them. The drastic need for reform in this area has been broadly recognized<sup>45</sup> and is the subject of pending legislation in the proposed Uniform Probate Code, Article V, which is widely supported by the bar. The Probate and Family Court has adopted administrative reforms and has recently revised the required medical affidavit to provide more detailed and specific information from a treating physician to support the petition. Also, working together with Senior Partners for Justice,<sup>46</sup> the Court instituted a pilot project for volunteer lawyers to serve as *guardians ad litem* in guardianship cases involving mentally and physically disabled adults, including the elderly.<sup>47</sup>

### Civil Contempt

A defendant who does not comply with a court order, typically an order to pay support, may be brought into court and charged with civil contempt, and if found in contempt, incarcerated. Poor defendants are vulnerable to incarceration for civil contempt as they may not have the resources to satisfy the court order. Because of the potential loss of liberty at stake in civil contempt cases, the Task Force believes that this class of litigants should be entitled to appointed counsel.<sup>48</sup> Notably, this was also one of the recommendations of the ATJ Commission in its June 2007 report.<sup>49</sup>

At present, it is the practice of some judges to request an attorney who happens to be in the courthouse to serve as counsel for a defendant then present and facing incarceration. The current practice of appointing counsel on the day of likely incarceration does not allow an attorney time to meet with the client or to prepare, develop evidence or investigate the allegations. Though this is not adequate representation, there should be a continuing role for such pro bono volunteers in the future.

### B. THE PROCESS

In developing its three proposals, the Family Committee surveyed probate and family court judges, judicial case managers, probation officers, clerks, pro bono attorneys, family law advocates, BBA and MBA family law section members and legal services attorneys statewide. The initial survey provided a list of various types of family law cases and requested input as to where counsel is most needed to ensure a just outcome.<sup>50</sup> Respondents were asked to explain their reasons for selecting the types of cases that they chose and their estimates of the number of cases that would be involved. The Committee received hundreds of survey responses, which provided important insight that guided the Committee in narrowing the potential categories of cases to those ultimately chosen. The Committee then collected statistics and relevant data regarding custody, civil contempt and guardianship proceedings, researched law and practice in other jurisdictions, and met with advocates and court personnel to discuss existing programs to assist unrepresented litigants and their usefulness. It also reviewed recent relevant cases in Maryland, Wisconsin, Washington and Alaska and



determined that advocates in those jurisdictions have focused on custody, civil contempt and guardianship because of the compelling nature of the underlying rights at stake. Finally, once the proposal was developed, the Committee took the further step of circulating it widely to seek final input as to its feasibility. The revised proposal and questionnaire was sent not only to all judges and court personnel who had responded to the original survey, but to others as well. In addition, Committee members met with family law advocacy groups to discuss the proposal. None of the responses suggested a need for any changes to the proposal.

### C. THE PROPOSALS

#### Custody

The Task Force proposes a pilot project in two probate and family courts that will provide legal assistance and representation to low income parties in divorce actions pursuant to G.L. c. 208, §§ 1, 1B and paternity actions pursuant to G.L. c. 209C where custody is contested and (1) the other party is represented or (2) the party herself or himself has an abuse prevention order. The proposal rests on three basic principles: that parents risk forfeiting their basic rights to custody when, in cases involving custody, the other parent has an attorney and they do not; that the risk of forfeiting basic rights to custody increases in adversarial proceedings; and that parents risk forfeiting their basic rights to both safety and custody when they have an abuse prevention order but do not have an attorney to communicate with the opposing party and represent them.

#### Guardianship of Elders

Under this pilot project, referrals to counsel would be made at the request of the proposed ward, someone acting on behalf of the ward, or by the court if it determines that it is in the best interests of the ward. Various procedural safeguards would be provided, including a two week continuance to allow counsel to prepare for the hearing. This proposal substantially mirrors the proposed legislation with respect to guardianship proceedings, and it is hoped that the pilot project will provide further substantive support for enactment of the UPC.<sup>31</sup>

#### Civil Contempt

The Task Force proposes a pilot program in two counties, the goal of which will be to ensure that low income defendants at risk for incarceration will be appointed counsel to protect their procedural rights and to be their advocate. Further details of this proposal may be found in [Appendix 6B](#). Prior to appointment, there should be a determination of whether there is a risk of incarceration.<sup>32</sup> In order to address potential imbalances of power, counsel may also be appointed for plaintiffs as well as for defendants, taking into account: (1) whether the defendant is represented by counsel; (2) whether the Department of Revenue is representing the interests of the plaintiff;<sup>33</sup> (3) whether the plaintiff is capable of articulating a claim; (4) whether there is an imbalance of power arising from disability, domestic abuse, language barrier, or cultural difference; and (5) whether the claim is complex.

### D. IMPLEMENTATION AND EVALUATION

#### Custody

In terms of implementation, court clerks would screen cases scheduled for a hearing



to determine if custody was contested and if the case might be appropriate for the pilot project. Those cases would be referred to the Lawyer of the Day or Family Law Facilitator, who would further screen as need be and assist the litigants in securing counsel.

The court would hear the requests for counsel first, prior to any substantive court proceedings, including before meeting with a Probation Officer. The court would then rule on the request. If the request was allowed, counsel would be appointed and the case would proceed. Whether the appointment was allowed or denied, the court would issue a continuance to give the litigants sufficient time to prepare.

The Family Law Committee recommends that the Lawyer of the Day and Family Facilitator programs be expanded in order to meet the anticipated need.

The cost estimates for this proposal flow from the numbers of cases of the type described and would also be dependent upon the probate and family courts chosen to participate.

Locations for the custody pilot will be determined by the Chief Justice of the Probate and Family Courts, in consultation with the Task Force. The Committee estimated the likely number of cases in each county in order to determine overall costs.<sup>54</sup> Regarding funding, the Task Force has begun to approach funders to help develop the project in a manner which will identify the number of cases and focus on the most effective delivery system.

As stated previously, available studies confirm that counsel can dramatically increase the likelihood of a just outcome in custody cases. When a custodial parent is unrepresented in a contested custody dispute in which the other side has a lawyer, an important power imbalance results, raising basic fairness and due process concerns. As a result of the pilot, we expect to obtain valuable information on the number of contested custody cases in which one of the three types of situations involved in the pilot arise: paternity is involved; one side has an attorney and the other side does not; or an abuse order has been issued. The pilot project will look at how appointment of legal counsel in these types of cases impacts the outcome, the effect on clients' lives and well being, and any cost savings with regard to other government or social services costs.

### Guardianship of Elders

Before MassCourts<sup>55</sup> was implemented in the Probate and Family Court, the court knew how many cases guardianships cases were filed but not how many elders were placed under the control of guardians each year. Even with MassCourts, in most instances there is no means to track the whereabouts of these elders, monitor their treatment, determine whether they have recovered enough to reclaim their freedom and autonomy, or even learn whether they are dead or alive.<sup>56</sup>

The pilot program would appoint counsel in cases where the ward is indigent with the important goal of preventing people from being committed into nursing homes who might thrive in a less restrictive setting. If the proposed ward has adequate resources, counsel would be paid from the estate. The estimated cost of this proposal is \$120,000 annually.

Improving the rights of potential wards would go a long way towards making the process fairer. The evaluation would keep track of the number of people needing the

appointment of counsel and calculate the costs statewide when Article V is adopted by the legislature.

There is likely to be a savings to the taxpayer given the strong likelihood that the cost of counsel would be significantly less than the cost of placing the elder in some sort of facility outside of his or her home.

### Civil Contempt

The initial cost estimate for this pilot is \$620,000 per year, based on the estimated number of 1000 civil contempt cases that went to judgment in two of the larger counties. Evaluation data would include the impact on the class to be protected: contempt defendants. An important benchmark would be how many, or what percentage of, defendants were incarcerated. The goal is that the number would decrease significantly. Other important factors are the number of court appearances in a single case before incarceration or resolution; the amount of money owed and the purge amount; whether the plaintiff or his/her interests were represented by counsel; whether having a lawyer involved increases compliance with court orders by studying payment histories; and whether the defendant who had an attorney was more likely to pay regularly, to pay on time and to pay in full. If so, the pilot would evaluate whether there was a net gain to the taxpayer, i.e., whether the cost of counsel offsets an employed – not incarcerated – individual, current on his/her obligations.

## VII. JUVENILE LAW COMMITTEE

### A. THE NEED FOR COUNSEL

Providing lawyers for children in critical legal proceedings is both just and wise because children are categorically different from adults. In 2005, the Supreme Court of the United States acknowledged what every parent knows: youth is more than a mere chronological fact.<sup>57</sup> Children and adolescents differ from adults in their decision-making, risk assessment and ability to evaluate future consequences. They are more apt to be motivated by short term gain than a realistic appraisal of long term consequences and are more susceptible to outside pressure than are adults. Such deficits do not arise out of a specific disability, but rather reflect the average youth's immature neurological, cognitive, social and emotional development, which adversely impacts his ability to exercise the reasoning, judgment and decision-making exhibited by the average adult.<sup>58</sup> By the very fact of being young, children and youth are ill-equipped to protect or advocate effectively for themselves. As a result, they are more easily and profoundly injured by unfair practices and procedures that deprive them of their liberty or access to educational and other services critical to healthy youth development.

In 1967, the Supreme Court established a juvenile's affirmative right to appointed counsel in juvenile court proceedings, recognizing that juveniles "require the guiding hand of counsel . . . to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [he] has a defense and to prepare and submit it."<sup>59</sup> Subsequent federal decisions reiterated the developmental differences between juveniles and adults.<sup>60</sup> Yet in some instances children may not be entitled to representation, specifically, children in DYS custody facing revocation of their "parole" or grant of conditional liberty and those

**"Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion."**

Wiley Rutledge,  
U.S. Supreme  
Court Justice,  
Speech to American  
Bar Association,  
September 29, 1941

facing permanent exclusion from school. The Task Force recommends that these children have access to counsel.<sup>61</sup>

### Revocation of Grants of Conditional Liberty

Under Massachusetts law, a child between the ages of seven and seventeen found in violation of the criminal law may be adjudicated delinquent and committed to the custody of the juvenile correctional agency, DYS.<sup>62</sup> Once committed, regardless of age, the child remains in DYS custody until age eighteen or twenty-one.<sup>63</sup> Judicial oversight and legal representation ends with the decision to commit the juvenile.<sup>64</sup>

The committed population is overwhelmingly male, minority, poor and suffering from educational deficits, cognitive disabilities and mental health disorders.<sup>65</sup> Most juveniles are not confined for the entire period of their commitment; rather they are placed in the community where they reside under a "Grant of Conditional Liberty" which is supervised and can be revoked by DYS.<sup>66</sup>

DYS recognizes that revocation of a grant of conditional liberty triggers substantial due process rights. DYS regulations provide for a revocation hearing utilizing procedures that mirror adult parole revocation hearings. Absent counsel,<sup>67</sup> however, it is highly unlikely that a juvenile parolee facing revocation of his liberty will have the maturity and skills required to determine whether he has a defense, to prepare and submit it, to confront and cross examine adverse witnesses, to establish a record sufficient to support an appeal, or to indeed possess the knowledge necessary to decide whether there is a basis for an appeal. Nor will such youth be able to identify appropriate alternative sanctions or to develop and present information in mitigation of the alleged violation, as illustrated by the following example.

*Jonny, now fifteen years old, was committed to the DYS at age fourteen. Like many youth involved in the state's juvenile correctional system, Jonny has learning disabilities and struggles to read at a fourth grade literacy level. Raised in a low income family and community, Jonny is forced daily to contend with the effects of poverty: violence, drugs and the lure of gangs, among other threats. When released from DYS after his original commitment one of the conditions of his "grant of liberty" was that he avoid contact with gang members in his home city. Not surprisingly, Jonny found himself returned to lockup, his liberty revoked. Upon his return to DYS, Jonny was without representation. When asked whether he wanted to waive his rights to a hearing challenging the revocation of his parole, he turned to his DYS caseworker for advice, unaware that this individual was the same person who "charged" him with the violation leading to his parole being revoked, and who would "prosecute" the case against him. Jonny, confused and overwhelmed, waived his right to a hearing and was confined for thirty days in a secure facility.*

### School Exclusion

All children need education to succeed, and all communities need an educated citizenry to thrive. Yet in Massachusetts, once a child is permanently expelled from one public school, no other public school system is obligated to educate that child. Research documents that school exclusions lead to increased school dropout rates, lower test scores, poor academic achievement, social isolation and delinquency.<sup>68</sup> It also results in a lifetime of lower earnings and increased public assistance costs. The majority of children subject to punitive exclusionary proceedings are poor, minority and suffering from educational disabilities. Although it is difficult to measure, it is reasonable to assume that the social

costs of an inadequate education outweigh the costs of providing counsel for students facing school exclusion. Increasing high school completion 1% for all men ages twenty to sixty would save \$1.4 billion per year in crime-related costs. There is an estimated loss of \$50 billion per year in federal and state income tax revenues, or 5% of the individual income tax revenue collected in 2004, from 23 million high school dropouts between the ages of eighteen and sixty-seven.<sup>69</sup> Locally, in 2005, the average school dropout in Massachusetts earned \$456,000 less over a lifetime than the average high school graduate and \$1.5 million less than the average bachelor's degree holder. This translates into lower income and payroll taxes and higher Medicaid, Medicare and public assistance costs.<sup>70</sup>

Seemingly benign and informal school exclusion hearings are actually technical in nature, with statutes, regulations and rules that are complex, arcane and biased in favor of exclusion. Hearings are generally held on school property with school officials acting as fact witnesses, expert witnesses, judge and jury. Even the most well-informed adult has difficulty navigating these proceedings without the advice of counsel.

In many instances, the basis for combating disciplinary action is grounded in federal and state law. Attorneys have the knowledge and training to navigate and enforce the complex and interrelated laws and policies, to identify and preserve rights for future appeals, and to otherwise equalize the inherent and inevitable power imbalance students and their parents face when fighting to preserve a child's educational rights. Kevin's story illustrates the problem.

*Kevin is a well-liked, ten-year old student in a large public school system, a hard worker described by his teachers as a "good kid." Occasionally exhibiting behaviors that reflected what his teachers described as "emotional challenges," the rather diminutive Kevin was alleged to have pushed one of his teachers. Though the teacher later acknowledged that she had suffered no injury or bruising from the incident, the school moved to expel Kevin, relying on Ch. 71, § 37H. Kevin went the last months of the school year without any educational services. Not until his family received assistance from a legal aid program was there an effort made to secure those services and seek to overturn the expulsion. Left unchallenged, the school's course of action could have left this young boy without a legal right to ever gain admission to any other public school system in the state.*

## B. THE PROCESS

From among the Task Force members, two persons extensively familiar with juvenile law in Massachusetts were appointed to co-chair the Juvenile Committee. Other experts beyond the Task Force were invited to join the Committee. Two judges in the Juvenile Court volunteered to serve as advisors to the Committee. In addition, the Committee opened a dialogue with DYS concerning the pilot project for youth facing revocation of grants of conditional liberty. The Committee anticipates that it will approach the school districts in which the pilot project for counsel in school exclusion cases is expected to be implemented.

## C. THE PROPOSALS

### Revocation of Grants of Conditional Liberty

The Task Force, with the support of the CPCS and the stated commitment by DYS to engage in discussion, planning and training regarding this matter, proposes that a CPCS administrative position be created to identify lawyers to represent youths facing revocation

of grants of conditional liberty and to oversee their training.<sup>71</sup> CPCS will also recruit a fellowship attorney to do direct representation, training and creation of legal information materials for youth and DYS.

This model of representation recognizes and responds to the developmental vulnerabilities of committed youth and ensures the fundamental fairness of proceedings impacting their liberty interest. Without access to counsel, DYS committed youth who face revocation risk unwitting forfeiture of constitutional, appellate and administrative rights.

#### School Exclusion

The Task Force proposes a pilot project that will provide representation to students in school exclusion proceedings in school districts which have high numbers of school exclusions, high numbers of dropouts, low rate of MCAS proficiency, low numbers of graduates, high enrollment of low income students whose first language is not English, high rates of juvenile incarceration, and few existing advocacy resources.<sup>72</sup>

Because of the need for regionalized expertise, the pilot project would be based at the local offices of either the county bar advocate program or the CPCS in the selected geographical area. Information about the pilot project will be distributed through local Parent Information Centers, legal services agencies, CPCS and local bar associations.

After initial screening, parents and/or students requesting services would then be assigned counsel to represent the student at the disciplinary hearing as well as any other related meeting, negotiation or hearing to ensure that the student's educational rights are protected.

#### D. IMPLEMENTATION AND EVALUATION

Much of the information concerning implementation of the two pilot projects has been provided above. The anticipated costs for the DYS project is \$80,000 per year; the Task Force, CPCS, and DYS, along with other interested parties, will seek funding from the legislature for this expense in the first instance. The budget for the school exclusion project is \$160,000 per year; funding will be sought from foundations with particular interests in youth and education. Ideally, both projects would run for two to three years to allow the collection of sufficient information. Outcome measures will differ for each of the projects, as described below. For both projects, consideration will be given to comparing outcomes with cases in which no representation was available.

For the revocation of grants of conditional liberty project, outcome measures will consist of the following: (1) of all youth facing revocation in each year, the percentage of youth who waive their right to a hearing after consultation with counsel and (2) of those youth who elect to go to hearing, the percentage of favorable outcomes, as perceived by youth and as perceived by attorneys.

For the school exclusion project, outcome measures will consist of the following: (1) the number of requests for counsel per year as a percentage of total long term suspensions/expulsions from the designated school districts; (2) percentage of children returned to school after hearing; (3) favorable outcome achieved as perceived by student and family; (4) favorable outcome achieved as perceived by attorney; and (5) nature of the conduct at issue, including whether any violence is involved.



## VIII. IMMIGRATION LAW COMMITTEE

### A. THE NEED FOR COUNSEL

Each year, thousands of low income people appear in Immigration Court facing severe consequences, such as deportation or detention. Because of the complicated nature of immigration law, many of these individuals do not understand the proceedings or potential results. The Immigration & Nationality Act affords the right to counsel to these non-citizens, but they must exercise that right at their own expense.<sup>73</sup> The Task Force believes that representation should be provided in cases where individuals have the most at stake in terms of their liberty and their right to assert defenses to removal, that is, those who have been detained, those facing deportation as a result of a criminal offense (often minor) and those seeking asylum.

#### Non-Citizens in Immigration Detention

Immigration and Customs Enforcement (“ICE”) detains almost all immigrants with criminal convictions and is increasingly detaining other non-citizens, such as people who have overstayed their visas or entered without proper documents.<sup>74</sup> These detainees face complicated proceedings in Immigration Court, proceedings which will usually determine whether they will ever be able to live in the United States again. Because of the expense of detention, their cases are typically heard more quickly than those who are not in detention, leaving less time to prepare. Free and low-cost legal services are extremely limited for detained non-citizens. For those who cannot obtain free legal services, the likelihood of affording private counsel is diminished by their inability to work and raise funds to pay for counsel.

Currently resources to represent detainees without charge are extremely limited.<sup>75</sup> Thus, despite the dramatic effect that counsel has on the ultimate outcome of a case in Immigration Court, most non-citizens appear in Immigration Court without representation.<sup>76</sup> The example below illustrates the difference that having an attorney can make.

*Recently, the Political Asylum/Immigration Representation Project (“PAIR”) Detention Attorney kept the government from wrongfully deporting three different U.S. citizens and gained their release from detention -- men born in Trinidad, Argentina, and Dominica who had each become U.S. citizens through their U.S. citizen relatives. The PAIR Detention Attorney also stopped the deportation of a Haitian man whom Immigration had already sent to Louisiana to be deported immediately to Haiti. It was only through the legal expertise of the PAIR attorney that anyone even realized that he was not deportable. The government brought him back to Boston and terminated the deportation case against him.*

#### Non-Citizens in Criminal Courts

When Congress amended the Immigration & Nationality Act in 1996, many minor criminal convictions became automatic grounds for the deportation of immigrants, even immigrants *Orlando* married to U.S. citizens or whose children were U.S. citizens. This includes petty crimes, like theft or minor assaults for which the immigrant received a sentence of only probation. Deportation for these crimes is automatic without even the possibility of showing rehabilitation or other positive contributions to the community. Only those who face a probability of torture or persecution in their home country can apply for relief in Immigration Court if they have certain criminal convictions known as aggravated felonies, which include minor crimes that are misdemeanors.

“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

U.S. Supreme Court  
Justice Hugo Black,  
*Griffin v. Illinois*, 373  
U.S. 12, 19 (1964)



In some instances, deportation could have been avoided if the sentence had been structured differently or reduced by even one day. For example, the definition of “conviction” in the Immigration & Nationality Act includes cases that are continued without a finding (“CWOFF”) - essentially a dismissal - in state court. The consequences of criminal convictions to these non-citizens can be devastating, especially for long-term legal residents who have lived in the U.S. for many years with families who are U.S. citizens.<sup>77</sup> The following example is illustrative of the problem.

*Alphonse, a twenty-year-old from Jamaica, was arrested by the police for marijuana possession and possession of marijuana with intent to distribute. Alphonse has been a legal resident of the U.S. since he was nine years old, with family in the U.S.. Under Massachusetts law, these offenses are misdemeanors. The judge urged the defendant to plead guilty and accept a disposition that the case was “continued without a finding” (“CWOFF”). While under Massachusetts law a CWOFF is not considered a conviction, under federal immigration law it is, and the possession with intent to distribute charge is an “aggravated felony” subjecting the defendant to mandatory detention, automatic removal from the U.S. and denial of re-entry to the U.S. for the rest of his life. After consulting with an attorney in the CPCS Immigration Impact Unit, Alphonse’s defense attorney filed a successful motion to suppress; the possession with intent to distribute charge was then dismissed. Alphonse subsequently pled guilty to the remaining charge, which is not a deportable offense for a legal permanent resident such as Alphonse. Without the advice of the CPCS Immigration Impact Unit, Alphonse likely would have unknowingly pled guilty to an aggravated felony which would have caused his automatic and permanent removal from the U.S.<sup>78</sup>*

Federal immigration consequences of state criminal charges are an extremely complex area of law. Few attorneys in Massachusetts specialize in this area or have significant experience in both immigration and criminal law. CPCS currently provides limited support and advice in this area to its staff attorneys and bar advocates. Prior to May 2008, the only support offered by CPCS was through a part-time Immigration Law Specialist position. Recognizing the urgent need and skyrocketing number of immigrant defendants facing deportation for minor criminal offenses, CPCS recently hired an additional attorney. These two attorneys now comprise the CPCS Immigration Impact Unit, which provides advice and support on a limited number of individual cases and general support to 200 CPCS staff attorneys and the 2700 court-appointed bar advocates.<sup>79</sup> CPCS staff attorneys and bar advocates handle well over 200,000 cases a year.<sup>80</sup> A significant percentage of the clients are non-citizens. As the supervising agency for indigent representation in Massachusetts, CPCS should provide comprehensive training and support to all CPCS-affiliated attorneys representing non-citizen clients. Current staffing of the CPCS Immigration Impact Unit is insufficient to do this.

### Asylum Seekers

The Immigration & Nationality Act provides that individuals facing persecution or torture upon return to their home countries may seek asylum, withholding or removal, or relief under the Convention Against Torture as defenses to removal.<sup>81</sup> These claims often present complicated factual issues and require substantial documentation of conditions within the applicant’s country as well as the personal circumstances of the applicant. Despite the drastic consequences of deportation, which can include severe harm, torture and death, individuals seeking asylum and other forms of protection do not have a right to court-appointed counsel. Free and low-cost legal services are extremely limited and cannot meet

the need.<sup>82</sup> As a result, many individuals present asylum claims without representation by counsel. Because the law of asylum is complex and evolving, without legal assistance, many potential applicants remain unaware of their legal options and accept voluntary departure or are ordered to be removed without even exercising their right to apply for relief. Yet asylum applicants represented by counsel win asylum five times more often in Immigration Court than those who are unrepresented.<sup>83</sup> Marie's story provides an example of the seriousness of asylum cases and the need for representation.

*Marie fled Haiti after suffering persecution for her support of the deposed Haitian President, Jean Bertrand Aristide. Although Marie had very little education she was active politically. When a violent coup d'état forced Aristide from power, Marie was targeted on three occasions. The last time she was beaten and raped. Her domestic partner was kidnapped and has not been heard from since that time. Following this final act of violence, Marie fled to the Dominican Republic and then to St. Thomas, Virgin Islands and applied for asylum to the U.S. Severely traumatized, facing language and cultural barriers and knowing little about the legal system, she did not reveal the details of her past, including the fact that she was raped. She also did not present documentation of her own situation or of the political situation in Haiti. Fearing that she would be stigmatized in the community, she did not reveal the rape during her interview. By then Marie was in Boston, where the asylum officer found that she was not credible and referred her case to the Immigration Court to begin removal proceedings. Luckily, Marie was able to obtain legal representation and the Immigration Judge found her to be credible and granted her application for asylum. Marie was able to obtain employment authorization. She is currently working, attending school and will soon be eligible to apply for lawful permanent resident status. Without representation, she would almost certainly have been denied asylum and ordered deported. Because she was able to obtain representation in her removal hearing, she is safe, working in the U.S. and on a path to U.S. citizenship.*

## B. THE PROCESS

The Immigration Committee consulted with immigration practitioners with years of varied experience, including attorneys at PAIR, GBLS and CPCS. The Committee also reviewed data from a variety of sources, many of which are cited herein. Although the Committee sought input from judges in the Boston Immigration Court, the judges were not permitted to speak informally to the Committee.

## C. THE PROPOSALS

### Detainees

The pilot projects will provide legal assistance and representation in the Boston Immigration Court to low income non-citizens who are being detained by ICE at the Suffolk County House of Corrections.<sup>84</sup> Project staff will screen for income eligibility and conduct further intake as necessary to determine whether the Project will accept a case for full representation or for limited representation in bond proceedings for release from detention.

A client will be considered for limited representation in bond proceedings where: (1) the client is eligible for bond (numerous factors specified in the Immigration & Nationality Act prevent a person from being released on bond); (2) the client has children, family members or other significant ties to the community; (3) the client is eligible for relief from removal; or (4) the case presents a complex or innovative theory on bond eligibility factors.

A client will be considered for full representation where: (1) the client's case presents statutory or constitutional issues relating to the circumstances of his or her arrest by ICE, suppression of evidence, termination of proceedings due to lack of deportability, and related matters; (2) the client is potentially a United States citizen; (3) the client is seeking asylum, withholding of removal or relief under the Convention Against Torture, and the client presents a credible claim showing a likelihood of harm in the future if deported or the client has suffered harm in the past; (4) the client is eligible for other forms of relief from removal, such as a waiver of a ground of deportation or adjustment of status to lawful permanent resident, and representation in such cases would promote family unity or prevent removal to a country in which the client lacks current ties; or (5) the client is eligible for release from detention after remaining in immigration detention for more than ninety days after a final order of removal.

### Criminal Charges

The pilot project would provide assistance to immigrants who would potentially be deported because of relatively minor criminal convictions through the expansion of the Immigration Impact Unit within CPCS. The Unit would provide criminal defense attorneys throughout Massachusetts who represent indigent immigrants with the support, training and advice needed to fully and competently advise their clients in this area.

A fully funded Immigration Impact Unit within CPCS would be comprised of four staff attorneys and an administrative support person. The unit would provide support, advice and training regarding relevant immigration law to staff attorneys and bar advocates throughout Massachusetts. The majority of resources would be devoted to indigent criminal defense and delinquency attorneys; however, support would also be provided to children and family law attorneys, as well as mental health attorneys, who required assistance.

### Asylum Seekers

The pilot project will provide legal assistance and representation in Immigration Court to low income non-detained asylum seekers in Boston. Because the existing agencies are unable to meet the need for asylum representation and because many non-citizens who are eligible for asylum do not realize they are, the pilot would address both issues by: (1) placing one Attorney of the Day in the Boston Immigration Court and (2) adding two additional Asylum Staff Attorneys, one to be employed at GBLS and to directly represent asylum seekers, and the other to be employed at the PAIR to recruit, train and mentor pro bono attorneys to represent asylum seekers.

The agencies on the list of free legal services would conduct intake according to their current procedures. The Attorney of the Day would also assist in increased intake generated from these referrals.<sup>85</sup>

## D. IMPLEMENTATION AND EVALUATION

Anti-immigrant sentiment has been on the rise since September 11, 2001, and this potentially reduces public support for funding legal assistance programs for non-citizens.<sup>86</sup> Yet, in the context of an analysis of the civil right to counsel, the stakes are as high or even higher with immigration proceedings as these cases often result in loss of liberty (detention) and indeed for asylum seekers, often loss of life itself, if the applicant is deported.<sup>87</sup>

With assistance of counsel, many non-citizens are able to avoid detention. This can have a variety of positive effects, including individuals being able to work and contribute to the economy and the tax base; individuals being allowed to remain with their families, promoting family unity; and the government avoiding detention costs, which can average \$70 per day. Funding for the detainee and asylum projects<sup>88</sup> will be sought from private foundations and other funders who are focused on immigration issues as a priority. As to the second proposal (full funding for the CPCS Immigration Impact Unit), CPCS is a state-funded agency that provides representation of indigent defendants. Its budget includes funding for training and support of attorneys who provide such representation. Due to rapidly increasing deportation of immigrant defendants for minor criminal offenses, the training, advice and support provided by a fully funded Immigration Impact Unit is necessary for attorneys supervised by CPCS to represent their immigrant clients fully and effectively. The Task Force will seek to build support for CPCS's budget requests for a fully-staffed Unit.

Based on the estimated number of cases, the cost for each of the pilots in Immigration Court would be \$360,000 per year. Funding for one to three years of pilot operation will be sought. CPCS will seek additional funding in the amount of \$290,000 for full staffing of the Immigration Impact Unit.

For the proposals regarding detainees and asylum seekers, the funding agencies or providers will track, through their databases, the number of clients assisted and the scope of the assistance provided. They will track work authorizations and work history to the extent possible to show the benefits of regularizing status. After one year, they will report back on the increase in case load and the unmet need for counsel to represent both detained individuals (proposal one) and low income asylum seekers (proposal three) as well as estimates of the costs savings from removing clients from detention and the societal benefits from clients being in the work force. At that time staffing recommendations could be adjusted based on actual need. For the proposal regarding non-citizens facing criminal charges, CPCS will also track the number of clients and attorneys it has assisted throughout the year.

## IX. NEXT STEPS IN EXPANDING THE CIVIL RIGHT TO COUNSEL

### A. BEYOND THE PILOT PROJECTS

As discussed in the preceding sections, the Task Force's approach to implementing a Civil Gideon was to identify the most likely starting points for an expanded right to counsel. That assessment involved an analysis of competing basic needs, available data regarding the actual impact of counsel in various proceedings, and implementation concerns, specifically, which pilot projects could most effectively be established at this juncture. The pilot projects discussed in this report are not meant to be a complete list of types of cases in which a civil right to counsel is needed; rather, they are starting points.

In some instances, the need for counsel is so intertwined with potential changes in the substantive area of the law that those areas seemed to be problematic as starting points. Depending on the nature of changes not simply in the law, but in the practices and procedures of the relevant institutions, the need for counsel might become more or less urgent. For example, one basic need identified by the ABA and in the Task Force's Mission Statement is health. There are many health-related issues facing low income individuals,

ranging from access issues (e.g., discrimination, refusal of emergency services, denial of Medicaid or Medicare or veteran's benefits) to insurance claims to challenging a mental health commitment. With the Commonwealth's landmark health care initiative in its earlier stages, the need and appropriateness for legal representation on health issues will be greatly influenced by the experience with the system over time. Similarly, in the housing area, the foreclosure crisis compels widespread assistance for homeowners and tenants alike, which is currently under consideration and/or in the process of being implemented at the state and federal level. While it seems likely that counsel could make an impact on the outcome of many foreclosure cases, that impact will be affected by the nature of the substantive and procedural changes that are occurring and will likely continue to occur in the foreclosure process. Thus, crafting a specific pilot at this time seemed to be premature.

Not all changes, however, will necessarily lead to the expansion of the need for counsel. For example, in the housing area, many advocates and judges urged the Task Force to include eviction proceedings in all public housing cases, indicating that this is the type of eviction proceeding in which counsel is most needed. Recent data from the Cambridge District Court revealed that a large percentage of eviction cases in that court are brought by the Cambridge Housing Authority, often for small amounts of rent owed. To the extent housing authorities across the state can implement changes, either in their administrative processes or eviction practices that reduce the flow of cases to the courts, the need for counsel in turn might shrink. Similarly, changes in debt collection proceedings might reduce the need for counsel over time as well.

In other areas, the need for and effectiveness of representation is well established, so that there seemed little point in prioritizing those areas for pilot projects. Administrative hearings in public benefits matters provide one example that cuts across substantive areas. Cash benefits fit within the basic need of sustenance, while benefits tied to health care clearly implicate the basic need of health. The divisions in some instances are artificial, as the nature of the public benefit might well implicate more than one of the articulated needs of shelter, safety, sustenance, child custody and health.

Data available to the Task Force indicate both the importance of legal representation, and the limited benefit of new pilot projects, particularly where the goal of a pilot project is to learn more about the impact of counsel so as to develop the most effective statewide program. Data from across the country reveal that the addition of competent representation consistently increases the likelihood of success of a claimant by 15% to 30%.<sup>89</sup> Allan Rodgers of the Massachusetts Law Reform Institute analyzed recent data from Massachusetts agencies and confirmed a similar pattern for administrative hearings in Massachusetts.<sup>90</sup>

While the need for representation is acute, legal services programs have sufficient experience in these areas so that the design of an effective program is not a mystery. The problem instead is that the need for representation simply outweighs the current capacity. Expanding existing programs, rather than developing new pilot projects, seems to be a better step toward expanding access to counsel and increased representation. Moreover, with administrative proceedings at issue, the potential pool of candidates who could provide representation could easily include not only lawyers but lay advocates who currently are permitted to provide representation in those proceedings. Expansion of pro bono private bar representation might help meet the need as well. Only 10% of claimants have representation at hearings held by the Department of Transitional Assistance.<sup>91</sup> As with the example of housing authority evictions, the need for representation also could be reduced dramatically



with changes in agency practices that would improve the chances for unrepresented claimants to be successful.

Finally, the dynamic nature of our understanding of the basic needs in a civilized society will change over time. Changes in the law in the areas of the articulated basic needs, such as health and sustenance, may alter the need for counsel for the reasons explained above. This Task Force's work represents a confirmation of the principle that the division between criminal cases and civil cases as an automatic determinant of where counsel should be provided is an outmoded concept. Similarly, the articulated list of basic needs may not be exhaustive. The mission statement articulates the need for representation where basic needs, such as those involving shelter, safety, sustenance, health or child custody, are at stake. As it becomes clear that other basic needs are jeopardized in our legal proceedings, the need for representation in those areas may become clear as well.

## B. FINDING THE NECESSARY RESOURCES TO ADVANCE TO THE NEXT STAGE

One of the greatest challenges facing the Task Force is to ensure that the recommended pilot projects described in this report are funded and implemented, though as noted earlier, it is unrealistic to think that they will all happen right away or exactly as described. There is a major role for pro bono work in this effort, consistent with the strong pro bono tradition of the Massachusetts bar and the growing presence of law students handling pro bono work as well. Voluntary efforts alone cannot fill the gap; financial resources are also necessary. With the Task Force's recommendations in place, the Funding Committee has begun its work. In moving forward, the Task Force is guided by several principles.

First, whether considering permanent long term funding or short term funding for the pilots, the goal is to find new funds without taking away any of the current funds dedicated to legal services delivery and facilitating access to justice for the poor.

Second, the best way to stimulate new, permanent funding by the legislature is to demonstrate the economic and social benefits that flow from providing a lawyer to low income people to assist them in protecting basic human needs at jeopardy in adversarial proceedings, such as those involving shelter, sustenance, safety, health and child custody. Efforts by legal services providers and social scientists alike are underway to examine the cost savings benefits of such programs,<sup>92</sup> and the pilot programs themselves should provide additional data on this issue.

Third, short term funding for the pilot programs may come from a different source than long term funding. The Funding Committee considered a number of suggestions for ways to raise funds, such as civil filing fee surcharges or contribution of a percentage of punitive damage awards, but none seemed to be promising. Instead, the focus shifted to the fact that many of the goals underlying the civil right to counsel pilot projects are shared with other stakeholders – including state and local governments, civic institutions and private foundations. A focus group of bar leaders with broad and deep experience in the philanthropic community was assembled to assist the Task Force in brainstorming about possible funders. Initial discussions with several private funders have been encouraging, and private funding will be vigorously pursued. Given the broad range of interests served by private foundations, the goal will be to match the core interest fostered by each of the pilots, including safe housing, homelessness prevention, protection of the disabled, strong families, respect for elders and concern for the men, women and families who have immigrated to the



United States seeking a better life – with the particular goals of the foundation. While a private foundation may be unlikely to fund a full right to counsel in any of the key areas on a permanent basis, many typically fund two to three year efforts such as those proposed by the Task Force.

### C. ADDITIONAL RESEARCH PURSUED BY THE TASK FORCE

The Litigation/Research Committee of the Task Force has identified areas in which litigation might well be appropriate to establish a civil right to counsel, most notably, civil contempt, as discussed above in Section VI and below in [Appendix 6A](#). For now, however, the Task Force is focused on working with the courts, legal services providers, the private bar and stakeholders in the broader community who wish to approach these cases concerning critical human needs by implementing targeted pilot projects. Those projects will enable a better understanding and clearer analysis of the need for a civil right to counsel and what that right will mean, both in terms of cost and social benefit, and the non-monetary resources required to make it happen. Realizing, however, that litigation demonstrating the need for the civil right to counsel may be brought by others, the Task Force engaged in discussions with the staff of the Supreme Judicial Court to encourage the Court to notify the bar when cases involving the civil right to counsel in particular matters are pending so that the Task Force can evaluate whether assistance of some sort would be helpful.

The Litigation/Research Committee collected existing data about the cost of counsel in civil cases from CPCS. During FY06, approximately 20% or 46,667, of the total cases in which CPCS provided full legal representation to indigent or partially indigent clients were civil cases handled by staff attorneys in the Children and Family Legal Program of CPCS or by private bar appointments, an increase of 2010 over FY05. The ratio of civil to criminal case was similar to previous years.<sup>93</sup> The average cost of legal representation in all CPCS cases in the 2006 calendar year was \$493.13 (9.25 average hours billed), and the average cost in a civil case was \$799.53 (15.95 average hours billed).<sup>94</sup> For the 2007 calendar year, the average cost of representation in all cases was \$521.75 (9.72 average hours billed), and the average cost in a civil case was \$824.31 (16.43 average hours billed).<sup>95</sup> In FY06, civil cases saw an increase in new private counsel case assignments from the previous year (936 cases, or 4.4%), over the previous five-year period (FY00-FY05), while the number of civil cases overall increased by 1738 (8.9%). The CPCS Report notes that the overall FY06 increase occurred largely in the District and Juvenile Courts. The CPCS data, together with data from other sources, such as legal services offices, helped the Task Force to estimate costs for the pilots, though the estimates provided in this report will be refined as funding proposals become more specific.

The Committee also researched existing fee-shifting authorities, recognizing that fee-shifting mechanisms are important and provide a means for the private bar to represent low income clients as part of their regular practice and not just on a pro bono basis. The law firm of Heisler, Feldman, McCormick & Garrow, P.C., which received the Adams *Pro Bono* Award from the SJC's Standing Committee on *Pro Bono* Legal Services in 2006, has been recognized as visionary because their reliance on fee-shifting statutes enables them to represent low income clients who cannot afford the usual fees and costs.<sup>96</sup> While the Task Force is not making any recommendations to expand fee-shifting mechanisms, this is information that is clearly useful for interested practitioners and as such copies of the memoranda prepared for the Committee are attached in [Appendix 7](#).

D. CONTINUATION OF THE TASK FORCE

The mission of the BBA Task Force is not one that can be accomplished overnight or even in one year. But in the months since BBA President Doniger convened the Task Force, progress has already been made on expanding the civil right to counsel. Earlier this year, the SJC held that parents are entitled to counsel in certain proceedings if an award of custody to the state is under consideration.<sup>97</sup> In part due to the efforts of the Task Force, CPCS established an Immigration Impact Unit, and DYS is engaged in discussions with CPCS and legal services providers about a pilot project which would provide counsel to youth facing the revocation of a conditional grant of liberty. All concerned parties have agreed to seek funding from the legislature for the two projects. As outlined in this report, much more remains to be done to implement, evaluate and build on the recommended pilot projects. The BBA leadership strongly supports the mission of the Task Force and its continuation. The members of the Task Force look forward to the next stages of their work with energy and dedication to the mission of the Task Force as they prepare to work collaboratively with all those who share their commitment.

## APPENDICES

1. Roster of Task Force members and liaisons.
2. List of the committees and their members and advisors.
3. “Observations on the Right to Counsel in Civil Cases in Massachusetts” by Allan Rodgers, Massachusetts Law Reform Institute, April 5, 2004.
4. Memorandum by Mintz Levin (from Poonam Patidar to Susan M. Finegan) dated January 22, 2008, on the full list of known civil cases in which appointment and state payment of legal counsel is required, addendum to Allan Rodgers Memorandum on Observations on the Right to Counsel in Civil Cases, April 5, 2004.
5. Housing Committee Appendices
  - A. Survey of housing court judges, pro bono lawyers for the day, legal services lawyers and landlord attorneys.
  - B. Questionnaire and summary of results circulated by the Committee to a larger group after the initial proposals were developed.
  - C. Housing Committee Proposal.
6. Family Law Appendices
  - A. Family Law: Civil Contempt: The findings of the Litigation and Research Committee (legal precedent on right to counsel in civil contempt proceedings).
  - B. Proposal for Pilot Project regarding Civil Contempt.
  - C. Family Law Survey providing a list of various types of family law cases and requesting input as to where counsel is most needed to ensure a just outcome.
  - D. Proposal for Pilot Project regarding the Guardianship of Elders.
7. Listing of All Fee Shifting Statutes, Lia Marino, Suffolk Law Student, February 21, 2008.
8. Statistical Appendix to Report to Boston Bar Association Task Force on Expansion of the Civil Right to Counsel, on Legal Representation in Public Benefits Agency Hearings, by Allan Rodgers, Jul. 1, 2008 draft.
9. Costs of the Pilot Proposals by Gerry Singen.

## ENDNOTES

- <sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).
- <sup>2</sup> Michael Greco, *Court Access Should Not Be Rationed: Defined Right to Counsel in Civil Cases Is an Issue Whose Time has Come*, 91 A.B.A. J. 6 (2005).
- <sup>3</sup> Anthony Doniger, *A Civil Right to Counsel*, 51 BOSTON B.J., Sept.-Oct. 2007, at 2, 2.
- <sup>4</sup> MASS. CONST. art. XI.
- <sup>5</sup> U.S. Department of Commerce, Bureau of the Census (2006). *Current Population Survey: 2006 Annual Social & Economic Supplement*. URL: [http://pubdb3.census.gov/macro/032007/pov/new46\\_100125\\_01.htm](http://pubdb3.census.gov/macro/032007/pov/new46_100125_01.htm).
- <sup>6</sup> According to the U.S. Census Bureau, the population of Massachusetts in 2006 was 6,437,193. U.S. Department of Commerce, Bureau of the Census (2006). *State & County Quickfacts*. URL: <http://quickfacts.census.gov/qfd/states/25000.html>.
- <sup>7</sup> Massachusetts Legal Assistance Corporation, Program Revenue & Staffing Table, FY 2007. This number has been calculated using the number of citizens living with incomes below 125% of the poverty line; it is these individuals who are eligible for free legal services. URL: <http://www.mlac.org>.
- <sup>8</sup> The American Bar Association reports that in 2008, there are 42,501 active attorneys in Massachusetts. URL: [http://www.abanet.org/marketresearch/2008\\_NATL\\_LAWYER\\_by\\_State.pdf](http://www.abanet.org/marketresearch/2008_NATL_LAWYER_by_State.pdf). Approximately 50% of these are associated with IOLTA accounts, bringing the estimate to approximately 21,000 practicing attorneys in Massachusetts.
- <sup>9</sup> The November 1987 Massachusetts Legal Services Plan for Action by Massachusetts Legal Assistance Corporation states that five out of every six civil legal needs of low income persons are not being met by the legal services system.
- <sup>10</sup> Northeast Housing Court Survey by Rena Pike, Neighborhood Legal Services, June 2004 and Summary Process Survey Number 3, MLRI, September 1999, p. 14.
- <sup>11</sup> Of these critical issues, housing problems account for the highest rate of unmet needs, reported by 19% of low income households. Additionally, significant unmet legal needs relating to healthcare (13%), employment (9%), public benefits (8%), consumer issues (12%), and municipal services (20%) were reported. Policy Implications of the Massachusetts Legal Needs Survey presented by the Legal Needs Study Advisory Committee, May 2003.
- <sup>12</sup> Jonathan Smith, *Closing the Courthouse Door on Maryland's Poor*, 34 MD. B.J., Jul.-Aug. 2001, at 19, 20.
- <sup>13</sup> State Bar of California, State Bar Report: Bar Survey Reveals Widespread Legal Illiteracy, in Cal. Law., June 1991, at 68, 68-69 (noting more than two-thirds of Californians believe such a right already exists).
- <sup>14</sup> Resolution 112A, and the accompanying report appear online at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>. The Resolution was approved unanimously on August 7, 2006.
- <sup>15</sup> *Gideon v. Wainwright*, *supra* note 1.
- <sup>16</sup> For a more detailed explanation of recent activity, see Paul Marvy, *Advocacy for a Civil Right to Counsel: An Update*, 44 CLEARINGHOUSE REV. 644 (2008).
- <sup>17</sup> The full list of known civil cases in which appointment and state payment of legal counsel is required appears in a memorandum of Allan Rodgers of Massachusetts Law Reform, dated April 5, 2004, and updated by Mintz Levin Cohn Ferris Glovsky & Popeo, P.C., in a memorandum from Poonam Patidar to Susan M. Finegan, dated January 22, 2008. Both may be found in the Appendices, respectively as Appendix 3 and Appendix 4.
- <sup>18</sup> *In re Hilary*, 880 N.E.2d 343 (Mass. 2008). The case holds that, pursuant to G.L. c. 119, § 29, parents

are entitled to counsel at the dispositional phase of a CHINS proceeding if the judge is considering awarding custody to the Department of Social Services.

<sup>19</sup> The Massachusetts Bar Association (“MBA”) adopted the following language unanimously on May 23, 2007:

“RESOLVED, That the Massachusetts Bar Association urges the Commonwealth of Massachusetts to provide legal counsel as a matter of right at public expense to low income persons in those categories of judicial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as defined in Resolution 112A of the American Bar Association.” In its resolution, the AJC resolved to support “the concept of providing legal assistance, as a matter of right and at public expense, to low income person in those proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”

<sup>20</sup> Massachusetts Access to Justice Commission, *Barriers to Access to Justice in Massachusetts*, June 2007, Appendix C, p. 41 (“ATJ Report”).

<sup>21</sup> The Task Force generally uses the phrase “civil right to counsel” rather than Civil Gideon, in acknowledgement that the right to counsel on the civil side is likely to be far less universal than the right the criminal side.

<sup>22</sup> The Massachusetts Court System reports that 22,944 summary process cases were filed in the Housing Court Department in Fiscal Year 2007, and 11,880 in the District Court Department. See, <http://www.mass.gov/courts/courtsandjudges/courts/housingcourt/2007stats.html> and <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/allstats2007.pdf> (visited July 24, 2008).

<sup>23</sup> Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, FORDHAM URB. L. J. (forthcoming 2009)(manuscript at 11, on file with author). In Cambridge, MA, a recent examination of 365 cases found landlords represented in 355 of them (97.3%), compared to 39 for tenants (10.7%). Jennifer Greenwood, et al, *Tenancy at Risk: Leveling the Playing Field*, Northeastern University School of Law Legal Skills in Social Context Community Lawyering Program, 16 (May 2008).

<sup>24</sup> Engler, *supra* note 22, manuscript at 11-14. Professor Engler reports:

The courts are high volume courts, with few cases going to trial, and the vast majority resolved by default or settlement, typically the result of hallway negotiations. Tenants rarely are represented by counsel, while the representation rate of landlords varies from low rates in some courts, to highs of 85-90% in others; where landlord representation is high, the typical case pits a represented landlord against an unrepresented tenant. The demographics of the tenants reveal a vulnerable group of litigants, typically poor, often women, disproportionately racial and ethnic minorities.

While the details of eviction procedures vary, the common outcome measurements include possession, rent, abatement and repairs. Regardless of whether tenants appear or default, settle or go to trial, raise defenses or do not, the result invariably is a judgment for the landlord. The results typically are unaffected by whether the landlord is represented by counsel. The unrepresented tenant not only faces eviction, but does so swiftly, and with minimal judicial involvement.

One variable that often can halt the swift judgment for the landlord is representation for the tenant, with the likelihood of eviction dropping precipitously. Some reports discuss winning generally, showing tenants three, six, ten or even nineteen times as likely to win if they are represented by counsel, in comparison to unrepresented tenants. Others talk in terms of represented tenants faring better “by every measure”



or more generally in avoiding having judgments entered against them. Studies providing specific data show that represented tenants default less often, obtain better settlements, or win more often at trial.

<sup>25</sup> Jennifer Greenwood, et al, *Tenancy at Risk: Leveling the Playing Field*, Northeastern University School of Law Legal Skills in Social Context Community Lawyering Program, 5, 14, 16, 47 (May 2008).

<sup>26</sup> The ATJ Commission cited eviction proceedings as an area in which a right to counsel was needed. See ATJ Report 6-9.

<sup>27</sup> The Tenancy Preservation Project helps preserve the tenancies of persons with disabilities.

<sup>28</sup> The survey responses provided important insight that guided the proposal. The initial survey was framed in terms of an open-ended question inviting opinions on the types of eviction cases where counsel is most needed for a just outcome. Some judges and advocates expressed a preference for representation for all tenants, while acknowledging that result was unlikely to occur. Others focused on tenants in public and subsidized housing, but also recognized that those cases represent an enormous percentage of the docket. Some responders focused on particularly vulnerable litigants, such as those with disabilities. Others focused on scenarios in which the power lined up against the unrepresented litigant was overwhelming, such as those involving evictions related to criminal conduct or other scenarios in which governmental agencies were involved in the eviction. The survey is attached as Appendix 5A.

<sup>29</sup> Although not specifically a part of the proposed Pilot Projects, in order to reach all eligible litigants seeking assistance, the Committee recommended that implementation of its proposals be supplemented with the expansion of assistance programs for both tenants and landlords in all housing and district courts.

<sup>30</sup> See Appendix 5B.

<sup>31</sup> The exact language of the Committee's proposal may be found in Appendix 5C.

<sup>32</sup> Massachusetts FY08 budget allocates \$35.94 million to individual homelessness services (line item 4406-3000) and \$83.12 million to family services for a total of \$119.06 m. The FY08 budget is Ch 61 of the Acts of 2007.

<sup>33</sup> New York City Department of Social Services, *The Homelessness Prevention Program: Outcome and Effectiveness 2* (1990), at 14 (cited in Legal Services Project, *Funding Legal Services for the Poor: Report to the Chief Judge* (1998)).

<sup>34</sup> *Id.* at 23.

<sup>35</sup> Martinek, Paul J., *Family Law not for Amateurs*, BOSTON HERALD, Mar. 5, 2007, at 19.

<sup>36</sup> The Task Force does not believe that these are the only areas in which indigent pro se litigants would benefit from counsel, but given the limited resources at hand, these are critical areas in which we believe counsel would have the greatest impact. See generally, Section IX, Next Steps in Expanding the Civil Right to Counsel

<sup>37</sup> *In re Hilary*, *supra* note 17.

<sup>38</sup> ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 108-13, 300 (Harvard Univ. Press 1992). The authors studied approximately 1,100 California families as they made post-separation arrangements for their children in cases filed between September 1984 and April 1985. Where both parents were represented by counsel, the parties reached agreements for joint custody in 92% of the cases; when the mother alone was represented, joint custody agreements were reached in 73% of the cases; when the father alone was represented, joint custody agreements were reached in 88% of the cases; and when neither party was represented, joint custody agreements were reached in only 51% of the cases. While the authors found that mothers nearly always requested physical custody regardless of whether they were represented by counsel, the same was not true with fathers: only 21% of unrepresented father sought physical

custody, compared to 80% of represented fathers. *See also*, Robert Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?*, in *DIVORCE REFORM AT THE CROSSROADS* 61-65 (S. Sugarman & H. Kay eds., Yale Univ. Press, 1990).

<sup>39</sup> Jane Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 114, 132 (1990) (studying 1988 data from Washington State). Ellis found that in 91% of the cases, parents were more likely to elect some form of shared decision-making when both parties were represented by counsel as compared to 70% where one party was represented and 77% when neither party was represented.

<sup>40</sup> *Id.* at 132-33. The mean number of total visits was 120 per year where both parents had counsel, compared to 88 where only one side had counsel and 97 where neither party was represented.

<sup>41</sup> *See also Families in Transition: A Follow-up Study Exploring Family Law Issues in Maryland*, The Women's Law Center of Maryland, Inc. (December 2006) (available online at [www.wlcmd.org](http://www.wlcmd.org).) (Joint legal custody with physical custody to the mother was the most common result when both parties were represented, while joint legal custody with physical custody to the father rarely occurred unless the father alone was represented. Joint legal custody with physical custody to the mother resulted in 44.7% of the cases when both parties were represented, compared to 26.8% of the cases in which the mother alone was represented, 29.6% of the cases when the father alone was represented and 25.6% of the cases when neither party was represented; Regarding joint legal custody and physical custody to the father, that result occurred in 15.5% of the cases when only the father was represented, compared to 7.3% when both parties were represented, 5.7% when neither party was represented and 2% when only the mother was represented. Custody regression results correlating favorable outcomes for sole custody with representation. Sole custody was awarded to the mother in 54.8% of the cases in which only the mother was represented, compared to 13.4% of the cases in which only the father was represented; the father won sole custody in 16.2% of the cases in which only the father was represented, compared to 7.1% of the cases where neither party was represented. Sole custody was also awarded to the mother in 17.8% of the cases in which both parties were represented and 41% of the cases in which neither side was represented. Sole custody was also awarded to the father in 4.4% of the cases where both parties were represented and 0 cases in which only the mother was represented.)

<sup>42</sup> *In re the Marriage of King v. King*, 174 P.3d 659 (2007). This is the case in which the Washington State Supreme Court held that a parent in a marital dissolution custody case has no right to counsel.

<sup>43</sup> Brief of Appellant at 6-10, *In re the Marriage of King v. King*, 174 P.3d 659 (Wash. Ct. App. 2007) (No. 57831-6-1).

<sup>44</sup> While the Task Force acknowledges that guardianship of children is an important issue which needs addressing, the Task Force proposes that this issue be addressed at a later point in time.

<sup>45</sup> *See* Jeff Kelly et al., *Courts Strip Elders of Their Independence*, BOSTON GLOBE, Jan. 13, 2008, at A1; *see also* Jeff Kelly, *Chief Justice of Probate Presses for an Overhaul*, BOSTON GLOBE, Jan. 13, 2008, at B4.

<sup>46</sup> Founded by retired Probate and Family Court Judge Edward Ginsburg, Senior Partners for Justice is a group of senior lawyers who volunteer pro bono legal services.

<sup>47</sup> *See Pro bono GAL [guardian ad litem] program grows*, MASS. LAWYERS WEEKLY, Jul. 21, 2008.

<sup>48</sup> The Litigation and Research Committee researched legal precedent on right to counsel in civil contempt proceedings, and its findings can be found at Appendix 6A. While the issue invites litigation, the Task Force believes that a pilot project that answers questions such as how much it will cost if there is a right to counsel in civil contempt proceedings is important, is the best use of its resources, and will provide valuable information no matter how a right to counsel may be established in the future.

<sup>49</sup> *See* ATJ Report, 6-9.

<sup>50</sup> *See* Appendix 6C for a copy of the survey.

<sup>51</sup> A more detailed explanation of the Proposal for Pilot Project regarding the Guardianship of Adults may be found in Appendix 6D; this includes a copy of the Proposed Article V of the UPC, Section

5-106 of which deals with appointment of counsel.

<sup>52</sup> In some instances, there may be no risk of incarceration. For example, if the defendant shows documentation of disability benefits based on economic hardship (Emergency Aid to Elderly Disabled and Children, Supplemental Security Income), a judge may make an initial determination that he or she is prima facie unable to make previously assessed payments and not subject to incarceration. In such cases, an attorney need not be appointed. This may later be revisited, in light of new evidence. In such cases, the defendant in a contempt action does not face the loss of liberty and does not require counsel. The determination would be similar to the ones district court judges sometimes make at arraignments in smaller criminal matters.

<sup>53</sup> The Department of Revenue (DOR) helps custodial parents get child support. Anyone is entitled to DOR's child support services. In a memorandum to the Task Force from the Family Law Committee dated February 4, 2008, the number of civil contempt actions filed statewide in FY 06 is cited as more than 13,000. Less than a third, about 4,000 of the plaintiffs are unrepresented. It is estimated that the DOR was involved in approximately 5,000 of those cases.

<sup>54</sup> In FY 07, of the 11,814 divorce actions filed that were not joint petitions, the estimated outside number where counsel might be appointed would be 2,761. Of the 2,761 divorce complaints involving children where the plaintiff was pro se, not all involve a contested custody contest. Further, not all adversarial divorce cases involving children with pro se plaintiffs have pro se defendants. The outside number of cases where counsel will be appointed for the plaintiff will be reduced by those where the defendant is likewise unrepresented and by those where custody is not contested.

In FY 07, of the 20,147 paternity complaints filed, the estimated outside number of cases where counsel would be appointed is 7,411. All paternity complaints involve children, but they do not all involve custody contests. The outside number would be reduced by the number of cases where there is no custody contest. On the other hand, it is estimated that in 2,761 cases the plaintiff was represented; the number of unrepresented indigent defendants is not known; they would be entitled to counsel in the pilot.

<sup>55</sup> MassCourts is the computerized information system for the Massachusetts trial court.

<sup>56</sup> See Jeff Kelly et al., *Courts Strip Elders of Their Independence*, BOSTON GLOBE, Jan. 13, 2008, at A1.

<sup>57</sup> *Roper v. Simmons*, 543 U.S. 551, 569-71 (2005).

<sup>58</sup> Recent studies of the human brain using magnetic resonance imaging confirm that youths' behavioral immaturity mirrors the anatomical immaturity of their brains. Their judgment, thought patterns and emotions differ from adults because their brains are physiologically underdeveloped in the areas that control impulses, foresee consequences and temper emotions. For example, when processing information, children and adolescents rely on the amygdala, the area of the brain associated with primitive impulses such as aggression and fear. In contrast, adults process similar information through the pre-frontal cortex, an area of the brain associated with reasoned judgment and decision-making. Significantly, the pre-frontal cortex is the last area of the brain to develop, typically reaching mature functioning when an individual is in his or her mid-twenties.

<sup>59</sup> *In re Gault*, 387 U.S. 1, 36 (1967).

<sup>60</sup> See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them.”); *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (“There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults.”); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (“[E]ven the normal 16-year-old customarily lacks the maturity of an adult.”).

<sup>61</sup> Leading up to this final report, the Juvenile Committee had advanced a third proposal, Access to Counsel for Youth in the Custody of DYS (or “Conditions of Confinement”), to the Task Force for consideration. For various reasons the committee has decided to table that request at this time and will accordingly not include it in this report.

<sup>62</sup> G.L.c.119, §58.

<sup>63</sup> Juveniles adjudicated delinquent may be committed to age eighteen; juveniles indicted and adjudicated youthful offenders may be committed to the DYS to age 21. G.L. c. 119, §58.

<sup>64</sup> CPCS recently amended its standards of practice mandating that appointed counsel attend the initial staffing, that is the meeting in which the DYS invites input from the youth and his or her family regarding how much time the youth will spend in secure confinement.

<sup>65</sup> Whereas 26% of the Massachusetts youth population are minorities, the DYS committed population (1,995 youths as of Jan. 1, 2008, see DYS reports at [www.mass.gov](http://www.mass.gov)) is 58% minority youth. According to DYS' estimates, at least 45% of committed youth have been identified as special needs students by their local school systems and another 25% are most likely unidentified special needs students. A significant percentage suffers from substance abuse and has mental health disorders.

<sup>66</sup> This data, provided by the DYS, represents the number of revocations through November 2007. Twenty-seven percent were resolved through administrative review (i.e. no hearing – confinement for 1-7 days); 61% through revocation review (parolee stipulates to violation – review consists of disposition decision that may result in confinement up to four months); 11% resulted in a revocation hearing in which the parolee refused to stipulate to the violation. At this time, we have no data regarding the prevailing party in contested hearings or the number of appeals filed and their outcomes.

<sup>67</sup> Supreme Court precedent suggests there should be a constitutional right to counsel in these cases. In 1972, the Supreme Court held that a parolee's liberty falls within the ambit of the Fourteenth Amendment and termination of that liberty requires a due process hearing. *Morrissey v. Brewer*, 408 U.S. 471 (1972). One year later, in *Gagnon v. Scarpelli*, the Supreme Court acknowledged that the effectiveness of the rights guaranteed by *Morrissey* may depend on the use of skills which the [adult] parolee is unlikely to possess. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (“Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting complex documentary evidence.”). Although the Court did not require the appointment of counsel in all cases when an adult faced revocation of liberty, the Court noted “there will remain certain cases in which fundamental fairness - the touchstone of due process - will require that the state provide at its expense counsel for indigent probationers or parolees.” *Id.* at 790. California recently determined that all juvenile cases qualify under this standard. *L.H. v. Schwarzenegger*, No. Civ. S-06-2042 LKK/GGH (E.D. Cal. Jan. 29, 2008), 2008 WL 268983.

<sup>68</sup> *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*, THE CIVIL RIGHTS PROJECT (2000), Harvard Univ., 13-19.

<sup>69</sup> *The Social Costs of Inadequate Education*, National Access Network (2007). URL: <http://www.schoolfunding.info/issues/socialcosts.pdf>.

<sup>70</sup> Andrew Sum et al, *An assessment of the Labor Market, Income, Health, Social, Civic and Fiscal Consequences of Dropping Out of High School: Findings for Massachusetts Adults in the 21<sup>st</sup> Century*, NORTHEASTERN UNIV. CENTER FOR LABOR MARKET STUDIES, 31, 92, May 2007. For the full report, see [http://www.bostonpic.org/files/resources/dropout\\_social\\_cost\\_1-07.pdf](http://www.bostonpic.org/files/resources/dropout_social_cost_1-07.pdf).

<sup>71</sup> It should be noted that this is one of the areas in which the ATJ Commission also recommended that there be a civil right to counsel.

<sup>72</sup> Almost a quarter of the total suspensions statewide originated from just three districts: Boston, Springfield and Worcester. In Boston, the EdLaw Project, a collaboration of the Children's Law Center and the Youth Advocacy Program of the CPCS, was designed to provide low income students with counsel in education-related matters, including school exclusion. Neither Springfield nor Worcester has a similar program and as a result, the Task Force recommends that the pilot be implemented in those two districts.

<sup>73</sup> In 2003 the U.S. Congress authorized funding for the Department of Justice to provide Legal Orientation Programs (“LOPs”) to non-citizens detained by ICE, to improve the efficiency of the immigration court system and the access to legal services by the tens of thousands of immigration



detainees. This program is currently administered by the Vera Institute in New York, and funds programs at 15 sites throughout the country to provide workshops on immigration law and procedure, conduct individual orientations for detainees, distribute written self-help materials and refer cases to volunteer attorneys. There are no subcontractors in Massachusetts for this work. The LOP funding does not, however, fund legal representation.

<sup>74</sup> The numbers of detainees continues to grow. Nationally and in Boston, ICE is increasing the number of people it detains. The national daily detained population grew from 18,500 in FY 2005 to 27,500 in FY 2007. By FY 2008 ICE will be funded for 32,000 daily bed spaces – a 73% increase over FY 2005. DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *Semi-Annual Report on compliance with ICE National Detention Standards*, at 5 (May 2008). Reflecting a similar trend, in 2007, the Boston District of ICE detained 1,211 people each day. *Summary of Meeting with ICE-Boston Office of Detention & Removal and NGO Representatives* (Sept. 2007). In 2006, it detained 759 each day. ICE/DHS, *Number of Detainees by Field Office-daily averages for week ending Sept. 30, 2006*. The 2007 numbers mark a 58% increase over the previous year. The Boston District of ICE relies primarily on the following jails to detain non-citizens: Bristol County House of Corrections, Plymouth County House of Corrections, Norfolk County House of Corrections and Suffolk County House of Corrections, and also uses facilities at Barnstable, Devens, and Franklin to a lesser degree.

<sup>75</sup> Only the Political Asylum/Immigration Representation Project (“PAIR”) and the Boston College Immigration and Asylum Project have detention staff attorneys dedicated to representing immigration detainees, and their combined staff time is the equivalent of 1.3 people (the PAIR Detention Attorney works 80% and the Boston College Detention Fellow works 50%). These two detention attorneys provide a regular presence in immigration detention centers, which are mostly county jails located throughout the state, give *Know Your Rights* presentations in detention, advise immigration detainees and represent some small percentage of those detained. PAIR has prepared a detailed Self-Help Manual for Immigration Detainees, as well as numerous other materials and screening forms. In addition, in 2007 PAIR began a collaborative project with the New England Chapter of the American Immigration Lawyers Association and the Boston Immigration Court to provide additional *Know Your Rights* presentations to immigration detainees at the Suffolk County House of Corrections, and to represent detainees pro bono in bond proceedings for those eligible for release on bond. This collaboration does not, however, provide pro bono representation for the case in chief.

<sup>76</sup> During FY 2007, only 42% of individuals nationwide who completed their immigration cases were represented by counsel. DEPT. OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR), *FY 2007 Statistical Year Book*, at G1 (April 2008) (115,900 out of 272,879).

<sup>77</sup> 8 USC 1101 (a)(48)(A); INA§101 (a)48(A).

<sup>78</sup> Query whether the deprivation of counsel constitutes ineffective assistance of counsel. A developing body of law and policy around the country suggests that failing to advise or misadvising a client about immigration consequences prior to resolution of a criminal case is ineffective assistance of counsel. “[T]he American Bar Association’s Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel ‘should fully advise the defendant of these consequences.’ ABA Standards for Criminal Justice, 14—3.2 Comment, 75 (2d ed. 1982).” *INS v. St. Cyr*, 533 U.S. 289, n.48 (2001). The Supreme Court stated in *Strickland v. Washington*, 466 U.S. 688, 688 (1984), that the ABA Standards are relevant factors in determining ineffective assistance of counsel. The Supreme Court of New Mexico held in 2004 that failure to advise a criminal defendant as to the immigration consequences of his plea constituted ineffective assistance of counsel. *State v. Paredes*, 136 N.M. 533 (2004). Similarly, in *U.S. v. Khalaf*, 166 F.Supp.2d 210 (D. Mass. 1999), the United States Court of Appeals for the First Circuit held that an attorney’s mistaken advice to a client regarding immigration consequences of his plea constituted ineffective assistance of counsel. See also *Utah v. Rojas-Martinez*, 73 P.3d 967, 969-70 (Utah Ct. App. 2003); *Ghanavati v. State*, 820 So. 2d 989 (Fla. Dist. Ct. App. 2002). Although the appellate courts in Massachusetts have traditionally found that failure to advise a criminal defendant about collateral consequences, such as immigration consequences, is not ineffective assistance of counsel, see *Commonwealth v. Montiero*, 56 Mass.App.Ct. 913 (2002), the Supreme Judicial Court suggested in *Commonwealth v. Villalobos*, 437



Mass. 797 (2002), that false or misleading information about immigration consequences could affect the voluntariness of a plea.

<sup>79</sup> The Unit runs training programs throughout Massachusetts and distributes written training materials, sample post-conviction motions and updates regarding developments in relevant immigration law. Attorneys within the Unit collaborate with immigration advocacy groups on amicus briefs in federal cases involving the impact of criminal cases on immigration status, on proposed state legislation and on state agency and court policies that impact indigent non-citizen criminal defendants. The Director of the Unit is also an *ex officio* member of the Governor's Advisory Council for Refugees and Immigrants.

<sup>80</sup> 2008 Report to the Legislature on the Committee for Public Counsel Services.

<sup>81</sup> Asylum, withholding of removal and relief under the Convention Against Torture are three forms of relief from removal based on an individuals' fear of persecution, harm, or torture in their native country.

<sup>82</sup> Historically, only six organizations in Massachusetts have had a limited number of staff available to provide representation in immigration matters on a pro bono basis. A portion of this time is dedicated to representation of asylum seekers, and a smaller portion available to those asylum seekers presenting their cases in removal proceedings. The need for representation far exceeds available resources, and individuals with asylum claims are turned away on a regular basis. The availability of free legal services in this area is crucial, as the consequences for denial are extremely grave, and asylum seekers, by statute, are ineligible for employment authorization based on their status until their claims have been pending for at least 180 days. This is compounded by the fact that, because the laws around asylum are complex, legal representation at an early stage of the proceeding is important to a determination of whether a potential asylum claim exists. Without legal representation, many meritorious claims are not even identified.

<sup>83</sup> The grant rate for unrepresented applicants nationwide was only 7%, compared to 36% if represented. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY (2006) (study examining 297,240 asylum cases from 1994-2005, based on data from the Department of Justice).

<sup>84</sup> Suffolk County House of Corrections ("HOC") is one of the three largest immigration detention centers in this region. It was selected due to its proximity to the Boston Immigration Court and the ability to collaborate with another program advising immigration detainees at that location by the American Immigration Lawyers Association and PAIR, who could assist in identifying potential clients. To achieve manageable numbers, the pilot will provide representation to one-third of the estimated number of unrepresented detainees at the Suffolk County HOC.

<sup>85</sup> The Attorney of the Day will be responsible for one of the immigration judge's courtrooms and will attend all of that judge's master calendar hearings for non-detained clients over a one-year period. Each judge has two master calendar hearings/week, with approximately 35 people at each one, for a total of 70 people/week. About 50% of the litigants are represented, leaving approximately 35 people/week needing representation. The Attorney of the Day would make a brief presentation at the beginning of the master calendar hearings along with interpreters speaking Spanish, Portuguese and Haitian-Creole. The presentation would explain that people fearing return to their home countries could ask the Immigration Judge for a continuance to meet with a legal services agency to see if they have a basis for asylum, or withholding of removal or relief under the Convention Against Torture. The presentation would give examples of cases that qualify for asylum, which people might not normally know about, as well as examples of the more typical types of cases. The Immigration Judge will give each respondent the list of free legal services at the end of the master calendar hearing, and presumably will give each respondent a continuance of several weeks.

<sup>86</sup> For five years (from 1987 to 1991), the Commonwealth of Massachusetts funded asylum work through a disbursement to MLAC, in the range of \$250,000/year to \$300,000/year, which MLAC awarded to several non-profit organizations representing asylum-seekers.

<sup>87</sup> See Adam Liptak, *The Verge of Expulsion, The Fringe of Justice*, N.Y. TIMES, Apr. 15, 2008, at A12 (asylee fleeing persecution likely can't afford representation, much less competent representation); *Death by*

*Detention*, N.Y. TIMES, May 6, 2008, at A26 (editorial decrying the conditions of those in detention and the fact that many are unrepresented).

<sup>88</sup> While the Committee strongly supports the asylum proposal, it would rank it third in terms of prioritization, since existing legal services and pro bono panels are assisting many asylees with their cases. In addition, many of the clients in proposal one (the detention clients) are asylees, so that population would be covered through that proposal.

<sup>89</sup> See, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, FORDHAM URB. L.J. (forthcoming 2009).

<sup>90</sup> See data submitted by Allan Rodgers to the BBA Task Force, 7/1/08, at Appendix 8, Statistical Appendix to Report to Boston Bar Association Task Force on Expansion of the Civil Right to Counsel, on Legal Representation in Public Benefits Agency Hearings, Draft, 7/1/08.

<sup>91</sup> *Id.*, Appendix 8, at 2.

<sup>92</sup> See, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, FORDHAM URB. L.J. (forthcoming 2009).

<sup>93</sup> See “Statistics for Carryover and New Assignments and Services” (“NACS Spreadsheets”), 2006. The average costs for selected civil matters in the 2006 calendar year, along with average hours billed per case, was as follows: civil appeals, \$2,484.31 (49.78 hours); probate and housing contempt, \$395.00 (7.95 hours); Rogers hearings \$416.38 (8.34 hours), CHINS, \$392.20 (7.87 hours); and civil commitment, \$321.72 (6.47 hours).

<sup>94</sup> NACS Spreadsheets, 2007. The average costs for selected civil matters in the 2007 calendar year, along with average hours billed per case, was as follows: civil appeals, \$2,670.64 (53.47 hours), probate and housing contempt, \$612.75 (12.30 hours); Rogers hearings, \$401.88 (8.05 hours); CHINS, \$410.42 (8.25 hours); and civil commitment \$330.76 (6.65 hours). NACS Spreadsheets, 2007.

<sup>95</sup> *Id.*

<sup>96</sup> Mark D. Mason, *Re-thinking pro bono*, 14 MASS. B. ASS'N LAWYERS J., Dec. 2006. URL: <http://www.massbar.org/for-attorneys/publications/lawyers-journal/2006/december/re-thinking-pro-bono>.

<sup>97</sup> *In re Hillary*, *supra* note 17.