

FOREWORD

It is a commonplace for courts throughout the United States to announce, “there is no right to counsel in civil cases in this state.” Yet, in truth, in every state there are at least a few categories of civil cases in which indigent litigants have a right to counsel. Indeed in some jurisdictions there are many such rights. It also is not unusual for state law to grant judges a discretionary power to appoint counsel for such litigants in still other kinds of cases, or even for all civil cases.

Recognizing the vast differences among states and the hodgepodge of rights and powers within each state, a few years ago the ABA Working Group for a Civil Right to Counsel, chaired by former ABA President Mike Greco, decided it would be a useful service to both judges and lawyers if it created an online resource of all the existing rights to counsel and discretionary powers to appoint that was presented on a state-by-state basis. Although such 50-state research already had been developed by the National Coalition for a Civil Right to Counsel, the research was in need of updating and adapting into an organized and usable format. That project required more time and effort than the Working Group had expected. Well over a hundred lawyers, professors, and law students contributed to the effort in one way or the other, contributions recognized in the “Acknowledgements” section. But the project is now completed and the result appears as this online *Directory of Law Governing Appointment of Counsel in State Civil Proceedings*. We hope it proves a valuable resource for judges when they receive requests for appointment of counsel and also for lawyers who are asked whether there is a chance counsel might be appointed in a given case. Furthermore, for those who might be interested in considering the possibility of expanding the right to counsel or discretionary powers in their own state, the *Directory* supplies valuable information about what other states already are doing. As usual, we have much to learn from each other when it comes to providing justice to our nation’s millions of poor people.

In most instances, rights to counsel in civil cases are based on specific statutes, but in some instances they rest on court decisions interpreting due process or equal protection guarantees found either in the federal or state constitutions. In addition, several states have found courts possess an inherent power to appoint counsel in certain types of cases or in some jurisdictions in any civil case where the judge deems it essential to the proper administration of justice, while courts in other states have used their rulemaking authority to guarantee counsel for a certain type of case. An examination of the individual states reveals the vast majority afford indigent litigants a right to counsel in dependency/neglect and termination of parental rights cases, as well as many civil cases where physical liberty is at stake, such as civil commitment, guardianship and conservator proceedings. Other civil case types which many jurisdictions already find to warrant a right to counsel include paternity, adult protective proceedings, judicial bypass proceedings for minors seeking an abortion, and adoption. But there are other categories where only a single state or a few have chosen to give indigents a right to counsel or empower their judges to appoint counsel under certain circumstances—including one jurisdiction that even has a right to counsel in administrative proceedings where drivers stand to lose their licenses. Moreover, while states generally have been reluctant to create rights to counsel when the stakes are strictly monetary, federal law charges state courts with the power, and in some cases the

requirement, to appoint counsel for indigent litigants seeking damages for violations of their federal civil rights and employment protections, when those litigants elect to take these claims to state rather than federal courts.

It is also true that new statutory rights continue to be enacted and constitutional decisions continue to be filed, often expanding the right to a different field of law. So this Directory will be updated periodically to reflect recent developments in the law of access to counsel. The Working Group also welcomes corrections and additions to the individual state entries from judges, lawyers, or academics, should they detect omissions or errors in the descriptions of rights and discretionary powers contained in this Directory. Please send such comments to terry.brooks@americanbar.org.

As background, the Directory also provides an “Appendix” which places America’s right to counsel and discretionary powers to appoint in an international context. As it turns out, the right to counsel in civil cases has a long history in the common law, starting with a statute the English parliament enacted in 1495, providing a right to counsel for paupers seeking to sue in King Henry VII’s courts. That statute remained in effect in the mother country when the United States won its independence and vestiges of that 1495 law can be seen in the language of some early cases and statutes found in a few states, especially the original thirteen colonies. Like England, most nations on the European continent created rights to counsel in civil cases centuries or decades ago—rights that guarantee counsel in disputes over property and monetary issues as well as when life or liberty are at stake. Moreover, in recent years the European Court on Human Rights issued opinions underpinning those statutory rights with a continent-wide guarantee of rights to counsel in civil cases based on the European Convention on Human Rights and Fundamental Freedoms. Meanwhile, the United Nations and other international bodies have published declarations of fundamental principles similar to the European Convention that would call for a right to counsel when needed for people to enjoy equality before the law or fair hearings. This is a reminder that what is considered rare and limited to special situations in our country is deemed an inherent right of citizenship in many other industrial democracies, and considered by the international community to be an essential foundation for all societies.

But the international perspective is placed in an appendix and not as part of the main body of the *Directory* for a reason. It is only background for the rest of the publication, which is intended as a practical guide for current reality in the United States. The purpose is to allow judges and lawyers to quickly identify when, under state law, indigent litigants enjoy a right to counsel or when judges possess the power to appoint counsel for those litigants if circumstances permit. The many involved in the Directory’s preparation hope it fulfills that purpose, its primary mission, thus ensuring more poor people receive the assistance of counsel current law authorizes them to receive, and fewer are mistakenly denied what the law already guarantees. We welcome input from any readers as to how this initial *Directory of Law Governing Appointment of Counsel in State Civil Proceedings* can be improved to better achieve that goal.

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