

AMERICAN BAR ASSOCIATION
Directory of Law Governing Appointment of
Counsel in State Civil Proceedings



Standing Committee on Legal Aid and Indigent Defendants
2014

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Directory of Law Governing Appointment of Counsel in State Civil Proceedings

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Working Group on Civil Right to Counsel**

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Introduction

The *ABA Directory of Law Governing Appointment of Counsel in State Civil Proceedings* (Directory) is a thorough compilation of existing statutory provisions, case law, and court rules requiring or permitting judges to appoint counsel for litigants in state civil proceedings. The Directory consists of fifty-one detailed research reports—one for each state plus the District of Columbia—that are further subdivided into categories relating to specific types of civil proceedings. This Introduction, which should be read prior to delving into any particular state¹ report, discusses: (1) the reasons behind the American Bar Association’s development of the Directory; (2) the sources of authority from which judicial powers to appoint counsel in civil proceedings may derive; (3) the structure used to organize information within each of the state reports; and (4) important caveats regarding this Directory.

I. PURPOSE OF THE DIRECTORY

It is well documented that the civil legal needs of indigent persons in this country are largely unmet. National and state studies conducted since 2000 consistently reveal that over 80 percent of low-income individuals do not receive the assistance they require to effectively navigate complex legal proceedings involving such fundamental human needs as: securing or retaining custody of their children, maintaining safe and habitable housing, obtaining protection from abusive relationships, securing access to critical health care, and receiving disability payments.² Moreover, judges across the country have reported that the resulting rise in self-representation, especially with respect to proceedings involving housing, domestic relations, and consumer issues, has led to negative outcomes, not only for pro se litigants (in terms of their failure to present necessary evidence, commission of procedural errors, ineffective witness examination, failure to properly object to evidence, and ineffective arguments), but for the courts as well (in the form of slower court procedures, inefficient court operations, overuse of staff time, the lack of fair presentation of relevant facts, and ethical dilemmas for judges who may compromise their impartiality to avoid injustice).³

To address the “justice gap” between the legal needs of the poor and the assistance they receive, the American Bar Association (ABA) has supported expanding

¹ Any reference to “state report” in this Introduction includes the report on the District of Columbia.

² See Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, at 1 (September 2009).

³ See ABA Coalition for Justice, *Report of the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts*, at 1-4 (July 12, 2010); Madelynn Herman, National Center for State Courts, *Self Representation Pro Se Statistics Memorandum* (September 25, 2006). See also Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 *Fordham L. Rev.* 2705 (2014).

the right to counsel for indigent civil litigants when necessary to ensure meaningful access to the courts. In 2006, the ABA House of Delegates adopted a landmark resolution stating the following:

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.

American Bar Association, Recommendation 112A, (Aug. 7, 2006). In 2010, the ABA House of Delegates adopted as policy the “ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings” and the “ABA Model Access Act,” which provide model legislation and guiding principles for jurisdictions interested in establishing new rights to counsel in civil proceedings.

In 2008, at the suggestion of member Justice Earl Johnson, Jr. (a former Associate Justice of the California Court of Appeal), the ABA’s Standing Committee on Legal Aid and Indigent Defendants (SCLAID) turned its attention to the “other side of the coin”: increasing the implementation of *existing* rights to counsel and discretionary powers to appoint counsel, as a complementary, and equally crucial, strategy for securing greater access to justice. A substantial body of law that already requires or authorizes appointed counsel in various types of civil matters may be unknown to, and therefore under-utilized by, trial judges—simply due to the obscurity and sheer number of the relevant cases, court rules, or statutory provisions.

Hence, in close collaboration with the National Coalition for a Civil Right to Counsel, ABA SCLAID produced this Directory with the goal of providing a much-needed resource for informing and educating judges and other interested parties regarding existing judicial powers to appoint counsel for indigent persons in state civil proceedings. The next section in this Introduction provides users with important background regarding the various sources of authority for such powers of appointment, which will further aid in understanding the organizational structure of the state reports.

II. SOURCES OF AUTHORITY FOR JUDICIAL POWERS OF APPOINTMENT

A. State Statutes

State legislatures have enacted a significant number of laws either mandating or authorizing (at the court’s discretion) the appointment of counsel in civil cases. In some states, discretionary statutes (such as *in forma pauperis* statutes) apply across the board to all civil proceedings. Usually, however, statutes provide for either a right to appointed counsel or a discretionary power to appoint counsel that applies to a specific category or categories of proceedings.

B. Federal Statutes

The following federal statutes require or permit state court judges to appoint counsel in specific types of civil proceedings: (1) Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination); (2) Title VIII of the Civil Rights Act of 1968 (Fair Housing Act); (3) the Indian Child Welfare Act (ICWA); (4) the Child Abuse Prevention and Treatment Act (CAPTA); and (5) the Servicemembers Civil Relief Act (SCRA).

C. State Court Rules

In some states, the state's highest court has promulgated rules that require or permit the judge to appoint counsel in civil proceedings generally or in specified types of civil proceedings. Sometimes these rules parallel an existing statute or implement a prior constitutional decision of the court, but in other cases they stand as the sole authority for appointment of counsel.

D. State Court Decisions

State courts may hold that a civil right to appointed counsel, or discretionary power to appoint counsel, exists independently of any authorizing statute or court rule, based on: (1) federal constitutional grounds and/or (2) state constitutional grounds. Such grounds can include: (a) due process or equal protection, (b) a state constitution's open courts provision, (c) the inherent authority of the court, (d) the court's rulemaking authority, or (e) the state constitution's incorporation of English common law and statutes.

In analyzing whether a right to counsel or discretionary power to appoint exists based on federal constitutional grounds, state courts must first consider the seminal U.S. Supreme Court decision in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). In that case, the Court held that there is no categorical due process right to counsel for an indigent parent facing termination of parental rights in a state-initiated proceeding; rather, there is a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27. Otherwise, whether a due process right to counsel exists depends on a balancing of the factors articulated by the Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), namely: the private interest at stake, the government's interests, and the risk of erroneous decision in the absence of the desired safeguard. *Id.*

With regard to cases in which a civil litigant's physical liberty is at stake, state courts must take into account the U.S. Supreme Court's decision in *Turner v. Rogers*, 131 S.Ct. 2507 (2011), in which an indigent father who was incarcerated for civil contempt for failure to comply with a child support order claimed he was denied his right to counsel at the civil contempt hearing. The Court held that the Fourteenth Amendment's

Due Process Clause does not automatically require the appointment of counsel in a civil contempt proceeding to an indigent, noncustodial parent who is subject to a child support order, even if the parent faces incarceration, “where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and dispute, relevant information, and court findings).” *Id.* at 2520. The Court indicated, however, that its holding did not apply with regard to “civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody,” nor did it apply to “an unusually complex case where a defendant ‘can fairly be represented only by a trained advocate.’” *Id.*

III. ORGANIZATIONAL STRUCTURE FOR RESEARCH REPORTS

A “Table of Contents” precedes every state report and includes a list of all of the main headings and subheadings that appear in the report. This Table of Contents includes hyperlinks that allow for easy navigation within the document.

The reports are divided into two main sections; the first section is devoted to law that is limited to specific types of civil proceedings, while the second section includes law that applies generally to civil proceedings.

A. Law Addressing Authorization or Requirement to Appoint Counsel in Specific Types of Civil Proceedings

With regard to the “specific types of proceedings” section, information is further sub-divided into five main Parts, with headings that correspond to the five “basic human need” categories articulated in ABA Resolution 112A (discussed *supra*). These five headings are entitled: (1) Shelter; (2) Sustenance (which can include benefits cases as well as employment income cases); (3) Safety and/or Health; (4) Child Custody (which includes both child welfare and private custody cases); and (5) Miscellaneous (a catch-all category). In each state report, three of these Parts (i.e., Safety and/or Health, Child Custody, and Miscellaneous) contain further Sub-Parts that correspond to certain types of proceedings. **Figure 1** below illustrates this structure and further outlines what types of cases fit into each of these categories:

FIGURE 1: Structure of “Law Addressing Authorization or Requirement to Appoint Counsel in Specific Types of Civil Proceedings” Section

<ol style="list-style-type: none">1. Shelter2. Sustenance3. Safety and/or Health<ol style="list-style-type: none">a. Domestic Violence Protection Order Proceedingsb. Conservatorship, Adult Guardianship, or Adult Protective Proceedingsc. Civil Commitment or Involuntary Mental Health Treatment Proceedingsd. Sex Offender Proceedingse. Involuntary Quarantine, Inoculation, or Sterilization Proceedings4. Child Custody<ol style="list-style-type: none">a. Appointment of Counsel for Parent—State-Initiated Proceedingsb. Appointment of Counsel for Parent—Privately Initiated Proceedingsc. Appointment of Counsel for Child—State-Initiated Proceedingsd. Appointment of Counsel for Child—Privately Initiated Proceedings5. Miscellaneous*<ol style="list-style-type: none">a. Civil Contempt Proceedingsb. Paternity Proceedingsc. Judicial Bypass of Parental Consent for a Minor to Obtain an Abortion <p>*NOTE: Additional Sub-Parts may appear within the “Miscellaneous” Part of any given report if there is existing law in that state that relates to a type of proceeding that does not neatly fit into the above-listed categories.</p>

Next, the textual discussions of judicial powers of appointment that appear within any Part or Sub-Part are organized according to the relevant source of authority from which such powers of appointment originate. **Figure 2** below provides a complete list of the various sources of authority that may be included:

Figure 2: List of Possible Sources of Authority for Judicial Powers of Appointment

<ul style="list-style-type: none">• State Statutes and Court Decisions Interpreting Statutes• Federal Statutes and Court Decisions Interpreting Statutes• State Court Rules and Court Decisions Interpreting Court Rules• State Court Decisions Addressing Constitutional Due Process or Equal Protection• Federal Court Decisions Addressing Constitutional Due Process or Equal Protection• State Court Decisions Addressing State Constitution’s Open Courts Provision (or State Court Decisions Addressing Principle of Open Access to Courts)• State Court Decisions Addressing Court’s Inherent Authority• State Court Decisions Addressing Court’s Rulemaking Authority

- State Court Decisions Addressing Incorporation of English Common Law and Statutes

B. Law Addressing Authorization of Requirement to Appoint Counsel in Civil Proceedings Generally

Information within a given report’s second main section—which relates to law that applies generally to civil proceedings—is organized solely by source of authority for the judicial powers of appointment discussed. The various sources of authority that may appear in this section are listed in **Figure 2** above.

IV. CAVEATS REGARDING USE OF THIS DIRECTORY

“Terms of Use/Disclaimers” are included in each state report in this Directory, providing important caveats.

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Please direct any questions or concerns regarding the use of this Directory to: Terry Brooks, Counsel to SCLAID, at Terry.Brooks@americanbar.org.