



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #8

**REQUESTED ACTION:** Approval of a report and resolution from the President's Committee on Access to Justice regarding a right to counsel in civil matters.

Attached is a July 31, 2008 report from the President's Committee on Access to Justice entitled "Toward a Right to Counsel in Civil Cases in New York State." By way of background, the report outlines the Association's past support for increased availability of counsel in civil cases, including the Association's co-sponsorship of a resolution, approved by the American Bar Association in 2006, calling for federal, state and territorial governments to provide legal counsel at public expense to low-income persons in adversarial proceedings where basic human needs are at stake: shelter, sustenance, safety, health, and child custody. This report analyzes the current scope of the right to counsel in each of these areas, together with the potential for expanding the scope and the reasons why representation by counsel is essential. Incorporated in this section is information derived from a March 2008 conference, co-sponsored by NYSBA and Touro Law School, entitled "An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State."

The Committee recognizes that fully achieving the broad goal of a civil right to counsel will take time. Accordingly, at pages 4 and 5 the report calls for three measures to expand the right to counsel that the State Legislature should adopt in the short term:

- In the area of shelter, the state should adopt legislation to provide a right to counsel for vulnerable low-income people who face eviction or foreclosure from their homes. The Committee notes that such legislation providing representation for low-income seniors has been introduced in the New York City Council, and similar state legislation is anticipated.
- In the area of sustenance, the existing right to counsel for unemployment insurance claimants should attach earlier in the appeals process and the right should be implemented in a more effective manner.
- With respect to vulnerable populations, the state should provide a right to counsel in civil proceedings for people who, because of a mental or physical disability, are unable to represent themselves, and for whom appointment of a guardian ad litem would be inappropriate.

The report then calls for the Legislature to adopt other measures discussed in the report in the longer term.

This report was circulated for comment on August 4, 2008 to the Business Law, Elder Law, Family Law, General Practice, Health Law, Labor and Employment, Municipal Law, Real Property Law, and Trusts and Estates Law Sections, as well as the Committees on Children and the Law, Civil Rights, Legal Aid, Volunteer Lawyers, and the Special Committee to Ensure Quality of Mandated Representation. The Health Law Section has indicated that it supports the proposal, and the General Practice Section has indicated that while it supports the proposal conceptually, legislation should not be enacted until there is sufficient funding to make the right a reality. The Family Law Section endorses the objectives of the report and suggests certain modifications to portions of the report relating to domestic relations matters; a memorandum outlining these recommendations from Ronnie P. Gouz, chair of the Section, is attached. The Committee on Legal Aid has indicated that it supports the proposal with one exception (it believes the discussion at pages 21-22 regarding law guardians should be updated to reflect that law guardians may no longer advocate for their own view of a child's best interests but must instead act as attorneys for the children). A letter from C. Kenneth Perri, the committee's chair, is attached for your reference. The Business Law and Trusts and Estates Law Sections have indicated that they do not wish to submit comments, and the Municipal Law Section has indicated that it would like the proposal to be deferred to allow additional time for review.

A resolution offered by the President's Committee on Access to Justice and endorsed by the Committee on Legal Aid is attached to your materials.

The report will be presented at the November 1 meeting by Hon. George H. Lowe, co-chair of the President's Committee on Access to Justice; Andrew A. Scherer, chair of the Committee's subcommittee on Civil Gideon; and committee member Laura K. Abel, principal author of the report.



# Staff Memorandum

## **HOUSE OF DELEGATES Agenda Item #8**

To supplement the materials you previously received with respect to the report of the President's Committee on Access to Justice, attached are (a) a revised page 22 of the report which takes into account comments received from the Family Law Section; (b) an October 15, 2008 letter from the Nassau County Bar Association indicating its support for the resolution offered by the committee; and (c) an October 23, 2008 letter from the Suffolk County Bar Association indicating its support for the resolution, but urging that the resolution make reference to the fiscal impact of the proposals.

**DRAFT for Approval September 29, 2008**

**TOWARD A RIGHT TO COUNSEL IN CIVIL CASES IN NEW YORK STATE**

**A report of [the President's Committee on Access to Justice of?]  
The New York State Bar Association**

Prepared for the New York State Bar Association,  
Subcommittee on the Civil Right to Counsel

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## Table of Contents

INTRODUCTION .....	1
DISCUSSION.....	6
I.    The Right to Counsel in Cases Involving Shelter.....	6
A.    Current scope of the right .....	6
B.    Potential for expansion .....	6
II.   The Right to Counsel in Cases Involving Sustenance .....	10
A.    Current scope of the right .....	10
B.    Potential for expansion .....	10
III.  The Right to Counsel in Cases Involving Child Custody and Safety.....	13
A.    Cases Involving Child Custody .....	13
1.    Current scope of the right .....	13
2.    Potential for expansion .....	15
B.    Cases Involving Safety .....	15
1.    Current scope of the right .....	15
2.    Potential for expansion .....	16
IV.   The Right to Counsel in Cases Involving Health.....	18
A.    Current scope of the right .....	18
B.    Potential for expansion .....	18
V.   The Right to Counsel in Cases Concerning Members of Special or Vulnerable Populations.....	20
A.    People With Disabilities .....	20
B.    Children.....	21
C.    Seniors.....	22

VI.	Other Categories of Cases.....	24
A.	The Right to Counsel in Cases Involving Deprivation of Physical Liberty .....	24
1.	Current scope of the right .....	24
2.	Potential for expansion .....	25
B.	The Right to Counsel in Other Types of Cases.....	26

## INTRODUCTION

A core goal of the New York State Bar Association (“NSYBA”) is to ensure that the justice system works, and that it works for all New Yorkers.<sup>1</sup> To that end, NYSBA promotes several measures aimed at ensuring that all New Yorkers, regardless of income, have access to lawyers to meet their important civil legal needs. Among other things, NYSBA works to obtain adequate federal, state and private funding for civil legal aid attorneys; fights restrictions that hamper the work of federally funded civil legal aid attorneys; promotes pro bono; and advocates for the availability of attorneys’ fee awards in appropriate cases.

However, NYSBA’s 1990 New York Legal Needs Study found, and many more recent studies have confirmed, that despite all of these efforts, the existing resources are unable to meet the vast majority of the civil legal needs of low-income people. In fact, every year, at least 80% of the civil legal needs of low-income New Yorkers go unmet. Many of the unmet legal needs concern issues of the utmost importance to people’s lives, including housing, child custody, food, shelter, employment, and health.<sup>2</sup>

This is an unacceptable state of affairs. A society is not truly democratic, and its justice system not truly just, when its poorest citizens have no access to the protection of its laws. When the result is that families are unable to meet their basic human needs, it can fairly be called an ongoing state of emergency. For this reason, the modern, industrialized nations the United States generally views as our peers in terms of governance systems provide for appointment of counsel in many categories of civil cases as a matter of right.<sup>3</sup>

Expanding the right to counsel in civil cases is an essential way to ensure that low-income people are able to access the justice system in truly important cases. Without a right to counsel, most low-income people with legal problems affecting their basic human needs will never obtain legal representation and, as a result, will not be able to receive a full and fair hearing of their case. Ironically, most Americans already believe that a right to counsel exists for these types of cases.<sup>4</sup>

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<sup>1</sup> Among NYSBA’s purposes are “to facilitate the administration of justice” and “to apply its knowledge and experience in the field of the law to promote the public good.” Bylaws of the New York State Bar Association, II (as amended 2006).

<sup>2</sup> NYSBA’s study found that among low-income people in New York State, “[n]ot more than 14% of their overall need for legal assistance was being met.” NYSBA, *The New York Legal Needs Study* (June 1990, revised and reprinted Dec. 1993), p. 159. As recently as 2005, the Legal Services Corporation, reviewing nine state legal needs studies issued since 2000, reported that 20% is the upper limit of legal needs being met, and that in most jurisdictions far fewer legal needs are being met. Legal Services Corporation, *Documenting the Justice Gap in America* (2005), p. 13.

<sup>3</sup> See Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step With the Rest of the Developed World*, 15 Temple Political & Civ. R. L. Rev. 769, 771-83, 787-88 (2006).

<sup>4</sup> Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 Cardozo Pub. L., Pol’y & Ethics J. 699, 716 (2006).

Accordingly, NYSBA is joining other bar leaders around the country to advocate for expansion of the right to counsel in civil cases. In August, 2006, the American Bar Association (“ABA”) passed the following resolution:

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>5</sup>

The report accompanying the resolution makes clear that the ABA defines the right as encompassing representation in adversarial proceedings. It therefore applies to “both judicial and some quasi-judicial tribunals, because many of the disputes involving the basic human needs . . . are, in one jurisdiction or another, allocated to administrative agencies or tribunals.”<sup>6</sup>

NYSBA and eleven other state or local bar associations were co-sponsors of the resolution. In the eighteen months since its passage, the resolution has prompted additional action by those and other bar associations:

- NYSBA Immediate Past President Kate Madigan has created a subcommittee of the President’s Committee on Access to Justice focusing on the civil right to counsel. One of the subcommittee’s projects was planning a conference titled, “An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State.” The conference, which was co-sponsored by NYSBA and the Touro Law Center, was held on March 7, 2008.
- The Minnesota State Bar Association and Boston Bar Association have likewise created task forces on the civil right to counsel.
- The California Conference of Delegates of California Bar Associations, Massachusetts Bar Association, and Pennsylvania Bar Association have all passed their own civil right to counsel resolutions.

NYSBA’s current civil right to counsel work continues the long-standing leadership role NYSBA, and New Yorkers in general, have taken on this issue. Since the early 1970’s, New York State has had the broadest right to counsel in family cases of any state. New York is the

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<sup>5</sup> See ABA, *Resolution on a Civil Right to Counsel*, 15 Temple Political & Civ. Rights L. Rev. 508 (2006).

<sup>6</sup> *Id.* at 521.



only state to provide counsel as of right for parents facing loss of custody to a private party, and for people seeking domestic violence restraining orders.<sup>7</sup>

New York law also provides judges with the discretion to appoint counsel for civil litigants who have sought leave to proceed as a poor person.<sup>8</sup> Refusal to appoint counsel in an appropriate case may constitute an abuse of discretion, particularly when the litigant is “faced with a ‘grievous forfeiture or loss of a fundamental right.’”<sup>9</sup> Courts have exercised their discretion to appoint counsel in a case concerning a large amount of money, in an eviction case where the tenant was away performing military service, and in matrimonial cases.<sup>10</sup> Unfortunately, counsel is rarely appointed under this provision, likely because there is no dedicated funding for the courts to use to pay appointed counsel,<sup>11</sup> and because the statute fails to specify any standards for courts to apply when deciding whether to appoint counsel.

Additionally, the courts in Orange, Putnam and Westchester counties, with assistance from Legal Services of the Hudson Valley and Putnam Legal Aid Society, operate an assigned counsel program in matrimonial cases. The attorneys who are assigned are not paid but can apply for a fee award if one is available.

In the 1980’s, NYSBA, the Association of the Bar of the City of New York, and the New York County Lawyers’ Association all actively supported state court litigation aimed at creating a right to counsel for tenants facing eviction in New York City.<sup>12</sup> Although the litigation ultimately failed on procedural grounds, it led the New York City Council to allocate significant funding for civil legal aid for families facing eviction.

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<sup>7</sup> See Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, Clearinghouse Review (July-Aug. 2006), pp. 252-62.

<sup>8</sup> N.Y. CPLR Art. 11.

<sup>9</sup> *Wills v. City of Troy*, 636 N.Y.S.2d 154 (App. Div. 1999) (quoting *Morgenthau v. Garcia*, 561 N.Y.S.2d 867, 868-70 (N.Y. Sup. 1990)). See also *Yearwood v. Yearwood*, 387 N.Y.S.2d 433, 434 (App. Div. 1976) (remanding for appointment of counsel); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 Cardozo Pub. L., Pol’y & Ethics J. 699, 721 (2006).

<sup>10</sup> Scherer, 3 Cardozo Pub. L., Pol’y & Ethics J. at 723; *Application of Farrell*, 486 N.Y.S. 130 (N.Y. Sup. 1985) (denying attorney’s motion to vacate appointment of counsel in a matrimonial matter).

<sup>11</sup> See, e.g., *Morgenthau v. Garcia*, 561 N.Y.S.2d 867, 868-70 (N.Y. Sup. 1990) (declining to appoint counsel under Article 11, in part because of the lack of any funding to compensate appointed counsel).

<sup>12</sup> The vision behind the lawsuit is set forth in a series of law review articles authored by Andrew Scherer, who is now Executive Director of Legal Services for New York City. See Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 Cardozo Pub. L., Pol’y & Ethics J. 699 (2006); Andrew Scherer, *Securing a Civil Right to Counsel: The Importance of Collaborating*, 30 N.Y.U. Rev. L. & Soc. Change 675 (2006); Andrew Scherer, *Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv. C.R.-C.L. L. Rev. 557 (1988).

The right to counsel in Housing Court continues to be the goal of advocacy in New York City. On November 15, 2007, New York City Council Members Rosie Mendez and Alan Gerson introduced the first piece of municipal, state or federal legislation aimed at creating a right to counsel in eviction and mortgage foreclosure cases.<sup>13</sup> The bill, which would apply to low-income seniors within New York City, has the support of a veto-proof majority of the City Council, and also of the New York County Lawyers' Association (NYCLA) and more than 90 housing, senior and other advocacy groups. In 2005, NYCLA issued a report urging New York State to recognize a right to counsel "for individuals in danger of losing their homes due to a legal or administrative proceeding."<sup>14</sup>

An early draft of the instant report was circulated to participants in the conference, called "An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State," which NYSBA and the Touro Law Center co-sponsored on March 7, 2008. At the conference, each participant attended one of five working groups, focused on the right to counsel in cases concerning: 1) shelter, 2) sustenance (including employment and government benefits), 3) health, 4) child custody and safety (including domestic violence), and 5) the legal needs of special or vulnerable populations (including seniors, people with disabilities, immigrants, youth, and prisoners). This final report incorporates feedback and suggestions from the conference.

This report describes the existing scope of the right to counsel in each of these categories of civil cases in New York State, as well as in several categories for which the conference does not have working groups (such as cases concerning physical liberty), and suggests areas for expansion of the right in each category.

The New York State Bar Association is fully committed to the goal of an expansive civil right to counsel in legal matters affecting basic human needs, as called for by the 2006 ABA resolution. We recognize however, that fully achieving that broad goal will take time. This report calls for the implementation of some immediate, relatively simple, yet enormously compelling incremental steps that New York State can and should take to move us toward a civil right to counsel in cases concerning basic human needs.

In the short term, the New York State Legislature should expand the civil right to counsel in New York by adopting the following three measures, each of which is described more fully in the body of the report:

1. **Shelter** – In the area of shelter, as a next, important step toward a meaningful right to counsel, we recommend that the state adopt legislation to provide a right to counsel for vulnerable low income people who face eviction or foreclosure from their homes. As discussed above, legislation providing this protection for low-income seniors has already been introduced in the New York City Council,

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<sup>13</sup> NYC Council, Intro. 648 of 2007.

<sup>14</sup> N.Y. County Lawyers' Ass'n, *The New York City Housing Court in the 21<sup>st</sup> Century: Can It Better Address the Problems Before It?* 30 (2005), available at [http://nycla.org/siteFiles/Publications/Publications195\\_0.pdf](http://nycla.org/siteFiles/Publications/Publications195_0.pdf).

and Senator Liz Krueger intends to introduce State legislation in 2009 that would provide this protection for low-income seniors and people with disabilities.<sup>15</sup>

2. **Sustenance** – The existing right to counsel for unemployment insurance claimants should attach earlier in the appeals process, and the right should be implemented in a more effective manner. Currently, only claimants who have received a favorable decision from the Unemployment Insurance Appeal Board and are defending that decision in an appeal to the Appellate Division or Court of Appeals brought by another party have a right to counsel. That right should be extended to claimants who have received a favorable determination from an administrative law judge are defending against an appeal before the Unemployment Insurance Appeal Board. Additionally, the existing \$500 cap on reimbursement for appointed counsel should be raised to a level high enough to ensure that attorneys will accept the cases.<sup>16</sup>
3. **Vulnerable populations** – New York State should provide a right to counsel in civil proceedings for people who, because of a mental or physical disability, are unable to represent themselves, and for whom appointment of a guardian ad litem would be inappropriate.<sup>17</sup>

In the longer term, the legislature should adopt the other measures discussed in this report, to ensure that litigants are able to fully participate in civil cases concerning their basic human needs.

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<sup>15</sup> See discussion *supra* § I.B.

<sup>16</sup> See discussion *supra* § II.B.

<sup>17</sup> See discussion *supra* § V.A.

## DISCUSSION

### **I. The Right to Counsel in Cases Involving Shelter**

#### **A. Current scope of the right**

According to the ABA, “‘Shelter’ includes a person or family’s access to or ability to remain in an apartment or house, and the habitability of that shelter.”<sup>18</sup> The only currently recognized right to counsel in civil cases involving shelter in New York is a federal right to representation by an attorney secured by the Legal Services Corporation for all people facing civil forfeiture of their primary residence.<sup>19</sup>

There are a few types of cases concerning shelter in which courts have discretion to appoint counsel.<sup>20</sup> For example, New York courts “may appoint any attorney” for members of the military facing eviction who are unable to personally appear in the eviction proceeding.<sup>21</sup> Additionally, federal law gives courts discretion to appoint counsel to “a person alleging a discriminatory housing practice or a person against whom such a practice is alleged” in state or federal court.<sup>22</sup> It appears that New York courts rarely, if ever, appoint counsel under these provisions.

Additionally, people living in mental health facilities can receive legal services as of right from the Mental Hygiene Legal Service related to their care and treatment, including some instances concerning the conditions in which they are housed.<sup>23</sup>

#### **B. Potential for expansion**

As discussed above in the Introduction, there is a bill pending in the New York City Council that, if passed, will create a right to counsel for low-income seniors facing eviction from their apartment or foreclosure on their home. The bill, titled Intro. 648 of 2007, would provide counsel to seniors 62 years old or older, whose household income is low enough to qualify for the Senior Citizens Rent Increase (SCRIE) program, and who are facing eviction from their home in a non-payment, holdover, ejection or foreclosure proceeding.

This bill resulted from a long-term consensus among advocates for low-income people in New Yorkers that there is a pressing need for expansion of the right to counsel to cases

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<sup>18</sup> ABA, *Resolution on a Civil Right to Counsel*, 15 Temple Political & Civ. Rights L. Rev. 508, 522 (2006).

<sup>19</sup> 42 U.S.C. § 2996f(a)(11).

<sup>20</sup> These categories are in addition to the discretion courts have under CPLR 11 to appoint counsel in any category of case, as discussed above.

<sup>21</sup> N.Y. Mil. Law § 303; *444 W. 54th St. Tenants Ass’n v. Costello*, 523 N.Y.S.2d 374, 378 (N.Y. Civ. Ct. 1987).

<sup>22</sup> 42 U.S.C. § 3613(b) (2007).

<sup>23</sup> N.Y. Mental Hyg. Law § 47.03(c), (e).

concerning the eviction of low-income tenants. This agreement has manifested itself in a number of ways over the years:

1) In October 2005, stakeholders in the New York City Housing Court attending a conference convened by the New York County Lawyers Association issued a report urging the State to recognize a right to counsel “for individuals in danger of losing their home due to a legal or administrative proceeding.”<sup>24</sup> Subsequently, in 2005, NYCLA passed a resolution “endorses[ing], as a matter of principle, a right to the appointment of free counsel for all tenants in Housing Court unable to afford counsel.”<sup>25</sup>

2) In the 1980’s, bar leaders, the legal services community and others engaged in a massive litigation effort to establish a right to counsel for low-income New Yorkers facing eviction.<sup>26</sup>

In recent years, the mortgage foreclosure crisis has given rise to increasing interest in establishing a right to counsel in mortgage foreclosure proceedings in which homeowners risk losing their primary residence.<sup>27</sup> For this reason, the New York City bill discussed above provides for a right to counsel in mortgage foreclosure cases as well as in eviction cases.

The reasons for providing counsel are similar in eviction cases and in foreclosure cases, and include: 1) the importance of decent housing to a family’s life (as recognized by the New York State Constitution) and the difficulty of replacing it once it is lost, 2) the adversarial nature of the proceedings, 3) the complicated nature of the substantive law and procedures, 4) the imbalance in power between landlords and lenders on the one hand, who usually have representation, and tenants and homeowner/borrowers on the other, who usually do not, and 5) the many studies showing that representation in eviction cases makes a huge difference in whether tenants are able to stay in their homes.<sup>28</sup> In mortgage foreclosure cases there are the added factors that illegal practices are increasingly common in the subprime mortgage market,<sup>29</sup> and that it can be extremely difficult to prove the fraudulent practices without the involvement of a lawyer.

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<sup>24</sup> N.Y. County Lawyers’ Ass’n, *The New York City Housing Court in the 21<sup>st</sup> Century: Can It Better Address the Problems Before It?* 30 (2005), *available at* [http://nycla.org/siteFiles/Publications/Publications195\\_0.pdf](http://nycla.org/siteFiles/Publications/Publications195_0.pdf).

<sup>25</sup> N.Y. County Lawyers’ Ass’n, *Resolution on Right to Counsel in Housing Court* (March 14, 2005), *available at* [http://www.nycla.org/siteFiles/Publications/Publications34\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications34_0.pdf).

<sup>26</sup> *See* discussion *supra* p. 3.

<sup>27</sup> *See generally* N.Y. Real Prop. Acts. §§ 1301-1309.

<sup>28</sup> *See* Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 *Cardozo Pub. L. Policy & Ethics J.* 699 (2006); Laura K. Abel, *Make “You Have a Right to a Lawyer” a Reality in Housing Court*, *Tenant/Inquilino* (March 2005), at 1; Andrew Scherer, *Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 *Harv. Civ. R.-Civ. Liberties L. Rev.* 557 (1988).

<sup>29</sup> *See* Ellen Schloemer et al., *Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners* (Center for Responsible Lending 2006), at 5.

There are many other types of proceedings involving shelter to which a right to counsel should attach. They include:

- 1) other cases in which tenants seek housing, seek improvements in their living conditions, or contest eviction, including:
  - a) any cases in which tenants seek improvement in their housing conditions;
  - b) lawsuits in which prospective tenants allege that they are being denied a lease on the basis of race or for another reason that is unlawful under federal, state or local law;<sup>30</sup>
  - c) administrative proceedings in which people denied public housing contest their denials,<sup>31</sup> or tenants residing in public housing contest the terms or termination of their leases or seek improvements in their housing conditions; and
  - d) administrative proceedings in which tenants who are denied Section 8 or other housing subsidies contest those denials, or in which the recipients of housing subsidies contest the terms or termination of their subsidies;<sup>32</sup>
- 2) cases in which a homeowner's ability to remain in his home are at stake, including:
  - a) eviction proceedings brought by low-income homeowners against tenants whose failure to pay rent is placing at risk the landlord's ability to keep his home;<sup>33</sup>

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<sup>30</sup> As noted above, New York courts have the discretion, but are not required to, appoint counsel in such cases.

<sup>31</sup> Due process does not require public and semi-public housing providers to hold a hearing for every applicant who is denied shelter. *Sumpter v. White Plains Hous. Auth.*, 278 N.E.2d 892, 894 (N.Y. 1972). However, statutes or housing authority rules may provide for hearings to be held. *See, e.g.*, 42 U.S.C. § 1437d(q)(2) (2007) (giving public housing applicants the opportunity to dispute the accuracy or relevance of criminal record used to deny housing); Frequently Asked Questions - City of Buffalo, [http://www.ci.buffalo.ny.us/Home/CityServices/Buffalo\\_Municipal\\_Housing\\_Authority/FrequentlyAskedQuestions](http://www.ci.buffalo.ny.us/Home/CityServices/Buffalo_Municipal_Housing_Authority/FrequentlyAskedQuestions) (last visited Aug. 14, 2007) (informing rejected Buffalo Municipal Housing Authority applicants of right to request an informal hearing with the Tenant Review Board).

<sup>32</sup> *See, e.g.*, New York City Hous. Auth., Section 8 Tenant Questions, [http://www.nyc.gov/html/nycha/html/section8/lh\\_ten\\_faqs.shtml](http://www.nyc.gov/html/nycha/html/section8/lh_ten_faqs.shtml) (last visited Aug. 14, 2007) (notifying Section 8 recipients of their right to a hearing if denied recertification by the housing authority).

<sup>33</sup> An assigned counsel program run by the New York City Department for the Aging provides attorneys to senior citizen landlords involved in such cases, as well as those defending against eviction. The program does not have nearly enough funding to meet the need, however, and does not provide counsel as of right.

b) proceedings to condemn a building;<sup>34</sup>

3) lawsuits or administrative proceedings in which homeless people challenge the denial of emergency shelter, seek improvement in the conditions of emergency shelter, or challenge their removal from an emergency shelter;<sup>35</sup> and

4) cases in which involuntary residents of mental institutions, drug treatment centers, prisons, juvenile detention centers, foster care facilities or other government institutions challenge the conditions in which they are housed.<sup>36</sup>

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<sup>34</sup> See generally N.Y. Pub. Hous. Law § 125.

<sup>35</sup> See, e.g., N.Y. Comp. Codes R. & Regs. tit. 18, § 397.8. See also Project FAIR, Fair Hearing Information, <http://www.projectfair.org/fairhearinginfo.html> (last visited Aug. 14, 2007) (listing as a reason to seek an administrative fair hearing in New York City “[y]ou have been denied emergency shelter”).

<sup>36</sup> As noted above, people living in mental health facilities can receive legal services related to their care and treatment from the Mental Hygiene Legal Service.

## II. The Right to Counsel in Cases Involving Sustenance

### A. Current scope of the right

According to the ABA,

“Sustenance” includes a person or family’s sources of income whether derived from employment, government monetary payments or “in kind” benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers’ wage or employment disputes where counsel is not realistically available through market forces.<sup>37</sup>

In New York State, there is a statutory right to counsel for unemployment insurance claimants who have received a favorable decision from the Unemployment Insurance Appeal Board and are defending that decision in an appeal brought by another party.<sup>38</sup> The fees in such cases, which are capped at the low rate of \$500, are paid by the state.<sup>39</sup> Despite the statutory language, it appears that few attorneys are rarely, if ever, appointed under this provision. The Department of Labor does not mention the right to counsel on its webpage.<sup>40</sup>

Respondents in child support proceedings who face incarceration for willful failure to pay are also entitled to counsel.<sup>41</sup>

### B. Potential for expansion

At the “An Obvious Truth” conference in March 2008, participants in a working group on the civil right to counsel in cases concerning sustenance identified Unemployment Insurance Appeal Board proceedings as a prime candidate for an extension of the right to counsel. In particular, they suggested that the existing right to counsel for claimants who have received a favorable decision from the Board and are defending that decision on appeal be extended to claimants who have received a favorable determination from an administrative law judge and are defending against an appeal to the Board.

Additionally, if the right to counsel in unemployment insurance appeals is to be fully effectuated, the \$500 fee cap must be raised to a level that would provide attorneys with an incentive to take the cases, and claimants must be informed of the right.

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<sup>37</sup> ABA, *Resolution on a Civil Right to Counsel*, 15 Temple Political & Civ. Rights L. Rev. 508, 522 (2006).

<sup>38</sup> N.Y. Lab. Law § 538(1)(e).

<sup>39</sup> *Id.*

<sup>40</sup> See Department of Labor, *The Hearing Process: Frequently Asked Questions*, available at <http://www.labor.state.ny.us/ui/claimantinfo/hearingfaq.shtm#25>

<sup>41</sup> N.Y. Fam. Ct. Act § 262(a)(vi).



The executive directors of three New York civil legal aid programs have identified child support proceedings as a category in need of the right to counsel. Apart from respondents in such proceedings who face potential incarceration for failure to pay, there is no right to counsel in such cases.

With respect to cases involving sustenance, the ABA Resolution pragmatically suggests focusing on a right to counsel in “low-wage workers’ wage or employment disputes where counsel is not realistically available through market forces.”<sup>42</sup> Although there has been some documentation of the difficulty low-wage workers face finding attorneys to take their employment cases,<sup>43</sup> there is a need for research regarding what these cases are in New York. Possible candidates include:

- 1) wage disputes in which the amount at issue is too low to provide an incentive for attorneys to take the cases, even though an attorneys’ fee award may be available;<sup>44</sup>
- 2) injunctive actions seeking reinstatement of an employee or a change in the terms of the employees’ job or working conditions; and
- 3) cases or administrative hearings challenge the termination or denial of unemployment insurance and workers’ compensation.

Additionally, suspension or revocation of a drivers’ license may be tantamount to loss of employment, particularly for upstate rural residents.<sup>45</sup> Suspension may occur for criminal or civil reasons, including nonpayment of child support, or an administrative determination of physical or mental disability.<sup>46</sup> There is, consequently, an argument for providing a right to

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<sup>42</sup> ABA House of Delegates, Resolution 112A (Aug. 7, 2006), *available at* <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

<sup>43</sup> *See, e.g.*, David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *Stan. L. Rev.* 1557, 1574 n.88 (2005) (noting that various “actual and potential costs should convince plaintiffs’ lawyers either to refuse to take, or not to actively pursue, cases involving low-wage earners unless the employer’s liability is so clear to the lawyer, the defense, and the court that punitive and compensatory damages are available,” and concluding that “[t]his harsh reality results in the unlikelihood of low-wage earners ever seeing the inside of a courtroom”); Sharon M. Dietrich, *When Working Isn’t Enough: Low-Wage Workers Struggle to Survive*, 6 *U. Penn. J. Lab. & Empmt. L.* 613, 623-24 (2004) (“Private attorneys seldom take the cases of low-wage workers, despite the availability of attorneys’ fees under most employment law statutes, for a host of reasons . . .”).

<sup>44</sup> *See, e.g.*, N.Y. Lab. Law §§ 663(1), 681(1) (permitting maintenance of a civil action against an employer who pays less than the statutory minimum wage, and permitting the recovery of reasonable attorney’s fees).

<sup>45</sup> Aaron J. Marcus, *Are the Roads a Safer Place Because Drug Offenders Aren’t On Them? An Analysis of Punishing Drug Offenders With License Suspension*, 13 *Kan. J. L. & Pub. Pol’y* 557, 570-73 (2004).

<sup>46</sup> N.Y. Veh. & Traffic Law §§ 510.3.b, 510.4-e.

counsel in cases threatening suspension or revocation. Indeed, in New Jersey the appointment of counsel in such cases is required under the state constitution.<sup>47</sup>

The need for sustenance is also implicated in cases and administrative hearings concerning denial, insufficiency or termination of government-funded subsistence benefits such as Food Stamps, veterans assistance, emergency assistance for families with dependent children and people with disabilities, and more.<sup>48</sup>

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<sup>47</sup> *Rodriguez v. Rosenblatt*, 58 N.J. 281 (1971).

<sup>48</sup> See N.Y. Soc. Serv. Law § 22 (providing for administrative hearings); N.Y. CPLR § 7803(4) (providing for Article 78 appeals).

### III. The Right to Counsel in Cases Involving Child Custody and Safety

#### A. Cases Involving Child Custody

##### 1. Current scope of the right

According to the ABA, “‘Child custody’ embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.”<sup>49</sup> In New York State, the right to counsel exists for individuals in the following categories of cases concerning parental rights:

1) Respondents (including parents, foster parents, or any other person having physical custody of the child) have a right to counsel in child protective and child abuse proceedings, including permanency proceedings for children placed in foster care or freed for adoption.<sup>50</sup>

2) Non-custodial parents and grandparents seeking visitation of minors in foster care have a right to counsel.<sup>51</sup>

3) Respondents have a right to counsel in cases concerning permanent termination of custody of minors.<sup>52</sup>

4) Parents, foster parents, or any other people having legal or physical custody of child have a right to counsel in proceedings concerning:

a) dependent children in foster care;<sup>53</sup>

b) guardianship and custody of children not in foster care;<sup>54</sup>

c) guardianship and custody of destitute or dependent children,<sup>55</sup> and

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<sup>49</sup> ABA, *Resolution on a Civil Right to Counsel*, 15 Temple Political & Civ. Rights L. Rev. 508, 522 (2006).

<sup>50</sup> N.Y. Fam. Ct. Act § 262(a)(i) (referring to proceedings under Articles 10 and 10-A of the Family Court Act). *See also* Indian Child Welfare Act, 25 U.S.C. § 1912.

<sup>51</sup> N.Y. Fam. Ct. Act § 262(a)(i) (referring to proceedings under part 8 of Article 10 of the Family Court Act).

<sup>52</sup> N.Y. Fam. Ct. Act § 262(a)(iii) (referring to proceedings under Article 6(3) of the Family Court Act).

<sup>53</sup> N.Y. Fam. Ct. Act § 262(a)(iv) (referring to proceedings under § 358-a of the Social Services Law).

<sup>54</sup> N.Y. Fam. Ct. Act § 262(a)(iv) (referring to proceedings under § 384 of the Social Services Law); N.Y. Surrogate’s Ct. Proc. Act § 407.1(a)(ii) (same).

<sup>55</sup> N.Y. Fam. Ct. Act § 262(a)(iv) (referring to proceedings under § 384-b of the Social Services Law).

d) foster care.<sup>56</sup>

5) Non-custodial parents or grandparents who have been granted visitation rights with a child have a right to counsel in cases where a government social services agency is assuming custody of a child, and the agency wants the ability to deny visitation to the parent or grandparent.<sup>57</sup>

6) Parents seeking child custody or contesting the infringement of their right to custody have a right to counsel.<sup>58</sup>

7) Parents opposing adoption of their child have a right to counsel.<sup>59</sup>

8) Respondents in paternity proceedings have a right to counsel.<sup>60</sup>

9) Everyone listed above has the right to counsel in an appeal of the action.<sup>61</sup>

When any of these cases is venued in Supreme Court, the parties have the same right to counsel as they would if the case were venued in Family Court.<sup>62</sup>

In some of these cases, the right to counsel stems from a constitutional obligation recognized by the courts.<sup>63</sup> In others, the right to counsel stems from the legislature's determination that providing counsel is the right thing to do as a policy matter. In explaining the motivation for legislating regarding the right to counsel in parental rights cases, the Family Court Act states:

Persons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges, and therefore have a constitutional right to counsel in such

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<sup>56</sup> N.Y. Fam. Ct. Act § 262(a)(iv) (referring to proceedings under § 392 of the Social Services Law).

<sup>57</sup> N.Y. Fam. Ct. Act § 262(a)(iv) (referring to proceedings under § 384.2(e) of the Social Services Law).

<sup>58</sup> N.Y. Fam. Ct. Act § 262(a)(v); N.Y. Surrogate's Ct. Proc. Act § 407.1(a)(iv). *See also* N.Y. Jud. Law § 35(8) (extending the right to counsel to Supreme Court cases, such as divorce matters, where Family Court might have exercised jurisdiction).

<sup>59</sup> N.Y. Fam. Ct. Act § 262(a)(vii); N.Y. Surrogate's Court Procedure Act § 407.1(a)(iii).

<sup>60</sup> N.Y. Fam. Ct. Act § 262(a)(viii).

<sup>61</sup> N.Y. Fam. Ct. Act § 1120(a); N.Y. Surrogate's Ct. Proc. Act § 407.1(a)(v) (same).

<sup>62</sup> N.Y. Jud. Law § 35(8).

<sup>63</sup> *See, e.g., In re Ella B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972) (constitutional right to counsel for indigent respondent parents in child protective proceedings); *Jennings v. Jennings*, 42 A.D.2d 568, 344 N.Y.S.2d 93 (N.Y. App. Div. 1973) (constitutional right to counsel for respondent spouses in proceeding to enforce a support order because of the possibility of incarceration).

proceedings. Counsel is often indispensable to a practical realization of due process of law and may be helpful to the court in making reasoned determinations of fact and proper orders of disposition. The purpose of this part is to provide a means for implementing the right to assigned counsel for indigent persons in proceedings under this act.<sup>64</sup>

Children have the right to a law guardian in abuse and neglect proceedings, foster care placement and review proceedings, and person in need of supervision cases.<sup>65</sup> Judges also have discretion, but not the obligation, to appoint a law guardian for children in custody, visitation, and adoption proceedings.<sup>66</sup>

Until last year, the governing statute and caselaw were unclear whether law guardians should advocate for their own view of the child's best interests, instead of acting as attorneys for the children, and law guardians generally did the former.<sup>67</sup> In October 2007, however, Judge Kaye issued a new court rule making clear that law guardians should act as an attorney for the child. The rule states: "In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child. In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position."<sup>68</sup>

## **2. Potential for expansion**

It might be appropriate to expand the mandatory right to counsel for children to cases involving custody, visitation, and adoption.

Additionally, some legal services program directors have suggested that the right to counsel in abuse and neglect cases should extend to kincare providers, such as grandparents, seeking a voice in the placement and treatment of children for whom they are caring.

### **B. Cases Involving Safety**

#### **1. Current scope of the right**

According to the ABA, "'Safety' includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened

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<sup>64</sup> N.Y. Fam. Ct. Act. § 261.

<sup>65</sup> Child Abuse Prevention & Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii); N.Y. Fam. Ct. Act § 249(a); Julia Vitullo-Martin & Brian Maxey, *New York Family Court: Court User Perspectives* 14 (2000).

<sup>66</sup> Julia Vitullo-Martin & Brian Maxey, *New York Family Court: Court User Perspectives* 14 (2000).

<sup>67</sup> N.Y. Fam. Ct. Act § 241, 1998 & 2003 practice commentaries.

<sup>68</sup> N.Y. Rules of the Chief Judge, § 7.2 (Oct. 4, 2007).

violence whether in the domestic context or otherwise.”<sup>69</sup> The right to counsel exists for individuals in New York in the following categories of cases involving safety:

- 1) Both parties have a right to counsel in proceedings in Family Court resulting from acts of domestic violence, including disorderly conduct, harassment, stalking, menacing, reckless endangerment, and assault between members of the same family or household.<sup>70</sup> The recent expansion of Family Court jurisdiction to unmarried couples without children and to same-sex couples seeking protection from domestic violence means that they will receive the benefit of the right to counsel, too.<sup>71</sup>
- 2) Children have the right to a law guardian, but not necessarily one to represent their wishes, in abuse and neglect proceedings.<sup>72</sup>
- 3) Adults who, because of mental or physical impairments, are allegedly unable to protect themselves from abuse, neglect, or other hazardous situations, have a right to counsel in any proceeding regarding involuntary protective services from the State.<sup>73</sup>
- 4) Residents of mental health facilities are entitled to representation by the Mental Hygiene Legal Service in a legal action to protect them from abuse or mistreatment.<sup>74</sup>

## **2. Potential for expansion**

By providing a right to counsel in the cases described above, New York has recognized the importance of protecting physical safety. However, even within these categories, the right is incomplete, leaving some individuals unrepresented when their personal safety is in jeopardy.

Although Mental Hygiene Legal Services provides counsel for people challenging abuse or mistreatment in mental health institutions, there is no right to counsel for people seeking protection from abuse and mistreatment in other kinds of public institutions, such as prisons, juvenile detention facilities, or homeless shelters.

While most safety issues related to immigration and deportation are handled federally, at least one state has sought to protect the safety of abused or neglected immigrant children by providing them with counsel to petition for special immigrant juvenile status.<sup>75</sup> New York could consider providing a right to counsel in these or other immigration proceedings where the safety of New York residents is endangered.

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<sup>69</sup> ABA, *Resolution on a Civil Right to Counsel*, 15 Temple Political & Civ. Rights L. Rev. 508, 522 (2006).

<sup>70</sup> N.Y. Fam. Ct. Act § 262(a)(ii) (referring to proceedings under Article 8 of the Family Court Act).

<sup>71</sup> *Governor Signs “Fair Access to Family Court” Law*, The Saratogian, July 22, 2008.

<sup>72</sup> See discussion *supra* p. 13.

<sup>73</sup> N.Y. Soc. Serv. Law §§ 473-a (5)(b).

<sup>74</sup> N.Y. Mental Hyg. Law § 47.03(c).

<sup>75</sup> Fla. Stat. Ann. § 39.5075(5) (West 2007).

Finally, a right to counsel could be made available to plaintiffs seeking injunctions to protect their safety from workplace hazards, environmental dangers, or other hazards. A wide variety of tort actions is available to people concerned with a nuisance, threat, or ongoing harm in the workplace or in their homes.<sup>76</sup> Although some of these provide for recovery of attorneys' fee awards, New York could provide a right to counsel for all cases in which counsel is not realistically available despite a potential fee award.

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<sup>76</sup> There is no statutory basis for workplace safety litigation by private parties in New York. Courts have not recognized a private right of action under either the United States Occupational Safety and Health Act (OSHA) or New York's Public Employee Safety and Health Act (PESHA). *See, e.g., American Fed'n of Gov't Employees v. Rumsfeld*, 321 F.3d 139, 143 (D.C. Cir. 2003) (finding no private cause of action under OSHA); *Hartnett v. New York City Transit Auth.*, 86 N.Y.2d 438, 443 (1995) (finding no private right of action under PESHA). Although the Department of Labor does accept employee complaints regarding workplace safety, a complaint typically results in an inspection of the workplace, not an adversarial proceeding. N.Y. Lab. Law § 27-a (5). Most New York workers whose safety is threatened must therefore rely on common law actions to protect their personal safety in the workplace.

## IV. The Right to Counsel in Cases Involving Health

### A. Current scope of the right

According to the ABA, “‘Health’ includes access to appropriate health care for treatment of significant health problems whether that health care is financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an employee benefit, through private insurance, or otherwise.”<sup>77</sup> For people living in mental health care facilities, New York’s Mental Hygiene Legal Service provides counsel in cases involving treatment and care.<sup>78</sup> There is no right to counsel for any other New York residents seeking access to healthcare or a specific medical procedure.

In describing health as an area of basic human need, the ABA resolution focuses on the rights of individuals to obtain healthcare and medical treatment.<sup>79</sup> We discuss below in section V.A the right to counsel for some individuals contesting mandatory medical treatment or facing involuntary confinement for health reasons.

### B. Potential for expansion

In New York State in 2004, approximately 2.4 million people lacked health insurance.<sup>80</sup> Individuals asserting an entitlement to health insurance coverage could benefit from a right to counsel as they seek to meet their basic human need for healthcare. For example, applicants for and recipients of veteran’s benefits, Medicaid, and Medicare have a right to a fair hearing when these benefits are denied or terminated,<sup>81</sup> and a right to appeal the hearing result in court.<sup>82</sup> New York could help qualifying individuals obtain medical coverage by providing a right to counsel in fair hearings and appeals from fair hearings these benefits. Additionally, individuals may seek to obtain or restore private health insurance benefits, such as those guaranteed under an employment contract or a private insurance contract. They may also benefit from a right to counsel when their basic human need for healthcare has been unlawfully jeopardized.

For individuals who have public or private medical insurance coverage, the right to healthcare is at stake in proceedings where payment, treatment types, or other coverage specifics

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<sup>77</sup> ABA, *Resolution on a Civil Right to Counsel*, 15 Temple Political & Civ. Rights L. Rev. 508, 522 (2006).

<sup>78</sup> N.Y. Mental Hyg. Law § 47.03(c).

<sup>79</sup> ABA, *Resolution on a Civil Right to Counsel*, 15 Temple Political & Civ. Rights L. Rev. 508, 522 (2006) (“‘Health’ includes access to appropriate health care for treatment of significant health problems.”)

<sup>80</sup> U.S. Census Bureau, Current Population Survey, Annual Social and Economic Supplement, tbl. HI06 (2005), *available at* [http://pubdb3.census.gov/macro/032005/health/h06\\_000.htm](http://pubdb3.census.gov/macro/032005/health/h06_000.htm).

<sup>81</sup> N.Y. Soc. Serv. Law § 22(3)(a).

<sup>82</sup> N.Y. CPLR § 7803(4).



are disputed.<sup>83</sup> The right to a fair hearing and appeal for people receiving veteran's, Medicare, or Medicaid benefits extends to situations where the "amount or manner of payment" is inadequate.<sup>84</sup> New York could provide a right to counsel in fair hearings where individuals seek to obtain the full amount of their medical benefits, as well as in payment and treatment disputes affecting privately insured individuals and their basic human need for healthcare. In addition, New York law provides special entitlements for people with certain medical conditions.<sup>85</sup> The State could consider providing a right to counsel for people with those conditions seeking to obtain the treatment or benefits guaranteed under law.

Finally, New York could extend the right to counsel for individuals in mental health facilities to all residents of public institutions seeking to meet their health needs. For example, prisoners in New York are entitled to free medical and dental care from the State.<sup>86</sup> There may be instances where an inmate needs representation to obtain a medical service that the correctional facility did not deem necessary. As another example, New York law currently allows for a private right to action by patients of residential healthcare facilities, including nursing homes, if they are injured as a result of being denied a right or benefit to which they were entitled under statute, code, regulation, or contract.<sup>87</sup> New York may consider providing a right to counsel in actions under this law, particularly when those actions seek injunctive or declaratory relief which would have immediate effect on a patient's basic human need for healthcare. There could also be a right to counsel for institutionalized individuals not covered by a special statute who seek to obtain medical treatment or secure the environment that best protects their health.

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<sup>83</sup> People with private health insurance have a statutory right to file an external review when their claims are denied. N.Y. Ins. Law § 4910.

<sup>84</sup> N.Y. Soc. Serv. Law § 22(5)(c).

<sup>85</sup> *See, e.g.*, N.Y. Pub. Health Law §§ 2150 (providing hospital care to some patients with typhoid fever at the expense of the State); 2161 (requiring counties, cities, and states to provide treatment to adult polio patients "who cannot otherwise be provided for"); 2202 (requiring cities and counties to provide tuberculosis care and treatment); 2204 (granting tuberculosis patients full transportation expenses to state or country of residence at commissioner's discretion).

<sup>86</sup> N.Y. Correct. Law § 500-h.

<sup>87</sup> N.Y. Pub. Health Law § 2801-d.

## V. The Right to Counsel in Cases Concerning Members of Special or Vulnerable Populations

In New York State (as in the rest of the country), there is no right to counsel across categories of cases for members of any special or vulnerable population. Nonetheless, the fact that members of certain groups may have a particular need for legal representation is well recognized, as is evident from the many civil legal aid programs dedicated to representing seniors, youths, and people with disabilities. For this reason, it is worth considering whether certain categories of litigants should have a broader right to counsel than members of the general population do. Below is a discussion of the arguments for carving out a right to counsel for some of possible categories.

### A. People With Disabilities

In New York, people with mental disabilities have a right to counsel in several categories of cases.<sup>88</sup> For example, for people living in mental health care facilities, New York's Mental Hygiene Legal Service provides counsel in cases involving treatment and care.<sup>89</sup> Individuals who are the subject of a petition to appoint a guardian for them on incapacity grounds receive representation from Mental Hygiene Legal Service.<sup>90</sup>

The U.S. Supreme Court recognizes that mental disabilities may make it impossible for a criminal defendant to represent himself, stating: “[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.”<sup>91</sup> These disabilities can make it equally impossible for a civil litigant to proceed *pro se*. Nonetheless, apart from civil proceedings concerning the treatment and care of people living in mental health facilities, or concerning guardianship, the existence of a disability precluding self representation does not give rise to the right to counsel in this state.

An article in the *Seattle Journal for Social Justice* argues that for “people whose disabilities prevent them from understanding the proceedings or vigorously participating in their cases, . . . the only reasonable accommodation under Title II of the ADA, under the Rehabilitation Act, and under state anti-discrimination statutes . . . is an attorney.”<sup>92</sup> The authors

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<sup>88</sup> In addition to the examples given here, other categories of such cases are discussed *infra* at section VI.A.1.

<sup>89</sup> See discussion *supra* p. 5.

<sup>90</sup> N.Y. Mental Hyg. Law § 81.10 (requiring appointment of counsel where alleged incapacitated person requests counsel, contests guardianship petition, requests temporary guardian, or does not consent to move or major treatment requested in the petition, or where court determines that appointment of counsel would be helpful). See also N.Y. Mental Hyg. Law § 81.09 (requiring appointment of a court evaluator in all guardianship cases).

<sup>91</sup> *Indiana v. Edwards*, 128 S. Ct. 2379, 2387 (2008) (quoting Brief for APA et al. as *Amici Curiae* at 26).

<sup>92</sup> Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 *Seattle J. Soc. Justice* 609, 611 (2004).

suggest that people with the following conditions might fall into this category: those that “prevent a person from comprehending what is happening in the courtroom or mustering a case,” for example “mental retardation, dementia, schizophrenia, and severe depression,” and also those that “sap energy or vitality to the extent that a person is unable to participate meaningfully in court,” including “[s]ome individuals with brain injuries, terminal illnesses, Parkinson's disease, multiple sclerosis, AIDS, apraxia, and end-stage alcoholism.”<sup>93</sup> Likewise, participants in a New York County Lawyers’ Association conference focusing on the New York City Housing Court concluded that a right to counsel in Housing Court “would address and resolve many of the issues and problems presented and faced by litigants with diminished capacity.”<sup>94</sup>

In September, 2007, Washington State became the first state to explicitly provide by court rule that counsel may be appointed as a reasonable accommodation for a litigant with a disability. The rule requires each court in the state to accept requests for an accommodation, to “make its decision on an individual- and case-specific basis with due regard to the nature of the applicant's disability and the feasibility of the requested accommodation,” and to consider as an accommodation “as to otherwise unrepresented parties to the proceedings, representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a qualified person with a disability.” The rule does not, however, require the court to pay for an attorney appointed pursuant to this rule.<sup>95</sup>

New York should consider adopting a version of this rule, with several modifications. First, the rule would be more effective if it were accompanied funding for appointed counsel. Second, it would make sense for New York to consider litigants with certain types of disabilities categorically eligible for the appointment of counsel. Finally, the rule should require courts to provide counsel for eligible litigants who have a disability that is so obvious that court personnel know or reasonably should know about it, even if the litigants themselves do not request the appointment of counsel as an accommodation.<sup>96</sup>

## **B. Children**

As a general matter, minors are permitted to appear in court only through a parent or other guardian. So long as a child has a guardian representing his wishes, he may not have a greater need for an attorney than any other litigant does.

However, when the child’s interests are at odds with those of the guardian, when there is no guardian, or when the guardian is not permitted to proceed pro se, there may be a need for court-appointed counsel for the child.

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<sup>93</sup> *Id.* at 610.

<sup>94</sup> *Conference Report: The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?*, 3 *Cardozo Pub. L. Pol’y & Ethics J.* 601, 638 (2006).

<sup>95</sup> Wash. R. Ct., Gen. R. 33, available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=GR&ruleid=gagr33](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr33)

<sup>96</sup> *See Brady v. Walmart*, No. 06-5486, slip op. at 13 (July 2, 2008) (holding that employers must provide accommodations for employees with a disability about which the employer knows or reasonably should know).

As discussed above, New York guarantees children the right to a law guardian in abuse and neglect proceedings, foster care placement and review proceedings, and person in need of supervision cases.<sup>97</sup> As of 2007, the law guardian must act as a zealous advocate for the child's position. However, appointment of counsel for the child in custody, visitation, and adoption proceedings is an expansion of the right to counsel worth considering.<sup>98</sup>

Public school suspension and expulsion hearings pursuant to Education Law § 3214 are another category of case in which it may be appropriate to provide a right to counsel, given the high importance the state constitution places on the right to an education.<sup>99</sup> Although there does not appear to be a right to the appointment of counsel in such cases in any other jurisdiction, in Colorado courts have the discretion to appoint counsel or a guardian ad litem for the child.<sup>100</sup>

### **C. Seniors**

As a group, seniors are more likely to have the sorts of physical and mental disabilities that make it difficult for them to represent themselves. Moreover, many are particularly vulnerable to exploitation because they live in dire financial straits; rely for financial, emotional and physical support on others; or live far from (or have no) close family. For all of these reasons, many seniors have a particularly pressing need for the appointment of counsel in categories of cases concerning their basic human needs.

The only pending response to this set of concerns is the New York City senior right to counsel bill described above, which would create a right to counsel for low-income seniors facing eviction or foreclosure. It is worth considering, however, whether there are other types of cases in which the appointment of counsel for seniors is needed.

### **D. Prisoners**

Prisoners frequently face serious violations of their civil rights, and even severe physical injury or death.<sup>101</sup> Although criminal defendants facing incarceration have a right to an attorney to defend them against the criminal charges facing them, there is no right to counsel for people in prison with serious legal needs, such as seeking protection from mistreatment. On the contrary, prisoners have less access to lawyers than do any other civil litigants. They cannot obtain representation with respect to any civil matter from any civil legal aid programs receiving Legal

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<sup>97</sup> See discussion *supra* at III.A.1.

<sup>98</sup> *Id.*

<sup>99</sup> See generally *Campaign for Fiscal Equity v. New York*, 86 N.Y.2d 307, 316 (1995).

<sup>100</sup> See, e.g., Colo. Rev. Stat. § 19-1-105 (“[I]n all proceedings under the ‘School Attendance Law of 1963,’ . . . the court may appoint counsel or a guardian ad litem for the child, unless the child is already represented by counsel.”).

<sup>101</sup> See generally Allen J. Beck et al., *Bureau of Justice Statistics Special Report: Sexual Violence Reported by Correctional Authorities, 2006* (Aug. 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf>; *Custody and Control: Conditions of Confinement in New York’s Juvenile Prisons for Girls* (Human Rights Watch & ACLU 2006), available at <http://hrw.org/reports/2006/us0906/us0906webwcover.pdf>

Services Corporation funding.<sup>102</sup> The federal Prison Litigation Reform Act of 1995 reduces the attorneys' fees that prisoners can obtain, substantially reducing the incentive for attorneys in private practice to represent prisoners in prison conditions cases.<sup>103</sup> And without a lawyer the fact of their incarceration may make it impossible for them to conduct factual investigation, discovery or legal research, or even to appear in court instead of on a video screen. There is, consequently, an argument for a right to counsel for prisoners attempting to protect themselves from mistreatment.

### **E. Immigrants**

Like prisoners, many immigrants in immigration detention have no way of participating in court proceedings in any meaningful way without a lawyer. Language barriers, and a lack of familiarity with the U.S. legal system create additional hurdles. Consequently, some advocates have argued that there should be a right to counsel for immigrants in detention, or at least for those who are children.<sup>104</sup>

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<sup>102</sup> Omnibus Consol. Rescissions & Approps. Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996); 45 C.F.R. part 1637.

<sup>103</sup> 42 U.S.C. § 1997e.

<sup>104</sup> See, e.g., Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y. L. Sch. J. H.R. 1105 (2001).

## VI. Other Categories of Cases

### A. The Right to Counsel in Cases Involving Deprivation of Physical Liberty

#### 1. Current scope of the right

In *In re Gault*, the U.S. Supreme Court held that juveniles facing juvenile detention have a right to counsel.<sup>105</sup> In *Lassiter v. Department of Social Services*, the Court intimated that the right extends to all cases in which “the defendant’s interest in personal freedom” is at stake.<sup>106</sup> Following these mandates, New York explicitly provides for a right to counsel for individuals in the following categories of proceedings which threaten an individual’s liberty:

1) Individuals have a right to counsel when facing or challenging involuntary commitment or hospitalization because of mental illness,<sup>107</sup> sex offender status,<sup>108</sup> or communicable disease,<sup>109</sup> or because they are allegedly unable to manage their own resources, carry out the activities of daily living, or protect themselves from abuse, neglect, financial exploitation, or other hazardous situations.<sup>110</sup>

2) Individuals have a right to counsel when facing mandatory outpatient treatment or programming for mental illness.<sup>111</sup>

3) People defending against an attempt to hold them in contempt of court or willful violation of a court order have a right to counsel (except in summary proceedings, i.e. those punishing contempt committed in front of a judge), and in proceedings in Supreme Court where the right to counsel would exist were the case venued in Family Court. There is, however, no right to counsel in summary contempt proceedings (i.e. those punishing contempt committed in front of a judge).<sup>112</sup>

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<sup>105</sup> 387 U.S. 1, 36-37 (1967).

<sup>106</sup> 452 U.S. 18, 25-26 (1981).

<sup>107</sup> N.Y. Mental Hyg. Law §§ 9.27(f), 939(a)(2); N.Y. Correct. Law § 402(3). *See also* *People ex rel. Rogers v. Stanley*, 17 N.Y.2d 256, 259 (N.Y. 1966) (“[A]n indigent mental patient, who is committed to an institution, is entitled, in a habeas corpus proceeding (brought to establish his sanity), to the assignment of counsel as a matter of constitutional right.”).

<sup>108</sup> N.Y. Mental Hyg. Law § 10.08(g).

<sup>109</sup> *Rapoport v. G.M.*, 657 N.Y.S.2d 748-49 (N.Y. App. Div. 1997) (“In a proceeding pursuant to Public Health Law § 2120 to involuntarily hospitalize a person [who has a communicable disease and who cannot or will not refrain from infecting others] there exists a constitutional right to counsel because the outcome of the proceeding may result in that person’s losing his or her physical liberty.”).

<sup>110</sup> N.Y. Soc. Serv. Law §§ 473-a (5)(b).

<sup>111</sup> N.Y. Mental Hyg. Law § 9.60(g) (“the subject of the petition shall have the right to be represented by the mental hygiene legal service, or privately financed counsel, at all stages of a proceeding commenced under this section”).

<sup>112</sup> N.Y. Fam. Ct. Act § 262(a)(vi); N.Y. Jud. Law § 35(8).

4) Judges in other civil courts have a constitutional obligation to appoint counsel in any civil contempt proceedings that may result in incarceration.<sup>113</sup> Pursuant to statute, judges in those courts have *discretion* to appoint counsel to people facing any other form of punishment or commitment for civil contempt.<sup>114</sup>

5) Children have the right to either self-selected counsel or a court-appointed law guardian in juvenile delinquency proceedings; this right cannot be waived.<sup>115</sup> There appears to be confusion, however, over whether a law guardian acts as an attorney for the child or advocates for the law guardian's own view of the child's best interests.<sup>116</sup>

6) An individual has a right to counsel in a state habeas corpus proceeding challenging a criminal conviction, where the petition is not neither "baseless" nor "repetitious."<sup>117</sup>

## 2. Potential for expansion

While statutory law guarantees a person counsel in all contempt proceedings (other than summary contempt) in Family Court, there is only a discretionary right to counsel under statute in civil contempt cases in other courts where incarceration is not an option.<sup>118</sup> New York could extend the right to counsel to all civil contempt proceedings in all courts.

Juvenile defendants are guaranteed only a law guardian when tried for delinquency in Family Court, whereas adults faced with the same charges and consequences would have a right to counsel. The right to a law guardian could be better explained or extended to encompass the benefits of having independent counsel when charged with juvenile delinquency.

Presently, constitutional case law exempts current prisoners from the right to counsel in cases that affect their liberty. Procedural due process doctrine distinguishes between people who have lost a right or privilege and those who did not have that right in the first place. Because people in prison are already deprived of their liberty, courts have found no constitutional right to counsel when they face additional punishment or extended imprisonment.<sup>119</sup> Under a current New York statute, for example, an inmate facing disciplinary charges can select a prison

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<sup>113</sup> See, e.g., *Ullah v. Entezari-Ullah*, 836 N.Y.S.2d 18, 22 (N.Y. App. Div. 2007); *Dep't of Hous. Pres. & Dev. of N.Y. v. Lamison*, 462 N.Y.S.2d 109, 111 (N.Y. Civ. Ct. 1983).

<sup>114</sup> N.Y. Jud. Law § 770 (“[T]he court shall inform the offender that he or she has the right to the assistance of counsel, and when it appears that the offender is financially unable to obtain counsel, the court may in its discretion assign counsel to represent him or her.”)

<sup>115</sup> N.Y. Fam. Ct. Act § 249(a); Julia Vitullo-Martin & Brian Maxey, *New York Family Court: Court User Perspectives* 14 (2000).

<sup>116</sup> N.Y. Fam. Ct. Act § 241, 1998 & 2003 practice commentaries.

<sup>117</sup> *People ex rel. Williams v. LaVallee*, 225 N.E.2d 735, 736 (N.Y. 1967).

<sup>118</sup> Compare N.Y. Fam. Ct. Act § 262(a)(vi) with N.Y. Jud. Law § 770.

<sup>119</sup> See, e.g., *Menechino v. Oswald*, 430 F.2d 403, 408 (2d Cir. 1970) (“The type of interest protected by procedural due process, however, is usually one presently enjoyed... Appellant, however, does not presently enjoy freedom of movement beyond the prison walls.”)

employee to represent him in some cases, but has no right to actual legal counsel.<sup>120</sup> Similarly, prisoners seeking parole do not have a right to counsel,<sup>121</sup> and paroled individuals have only a qualified right to counsel in a hearing to revoke parole or probation.<sup>122</sup>

## **B. The Right to Counsel in Other Types of Cases**

Although there is a right to counsel in the child custody portion of matrimonial proceedings to the extent that right would exist were the case in Family Court, there is no right to counsel in the portion of matrimonial cases adjudicating whether a couple should be divorced, or what the distribution of their assets should be. In Orange, Putnam and Westchester counties, the courts, with assistance from Legal Services of the Hudson Valley and Putnam Legal Aid Society, operate an assigned counsel program in matrimonial cases.<sup>123</sup> The attorneys who are assigned are not paid but can apply for a fee award if one is available. In response to our survey, one executive director of a civil legal aid organization identified divorce proceedings as being in need of a right to counsel.

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<sup>120</sup> See N.Y. Comp. Codes R. & Regs. tit. 7, § 251-4.1 (2007) (guaranteeing an employee assistant to inmates who are illiterate, non-English speaking, sensorially disabled, awaiting superintendent's hearing, or charged with drug use as a result of urinalysis, and providing "absolute discretion" to hearing officers to allow employee assistance for other inmates). See also *Silva v. Casey*, 992 F.2d 20, 22 (2d Cir. 1993) ("The assistant is not obliged to go beyond the specific instructions of the inmate because if he did so he would then be acting as counsel in a prison disciplinary proceeding, assistance to which a prisoner is not entitled.").

<sup>121</sup> *McCall v. Pataki*, 232 F.3d 321, 323 (2d Cir. 2000) (New York state prisoner not entitled to counsel in parole eligibility hearing).

<sup>122</sup> See *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973).

<sup>123</sup> See discussion *supra* p. 3.