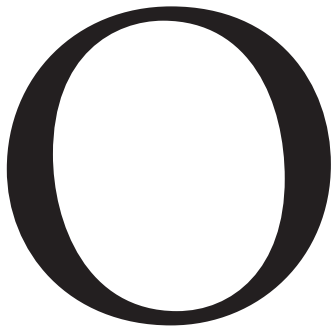


# Access to Civil Justice in North Carolina

BY GENE R. NICHOL

*The following submission is an opinion piece and the opinions expressed by the author are not necessarily those of the North Carolina State Bar. If you would like to submit an article expressing your viewpoint, please send an inquiry to the publisher.*



ne could be honestly heartened, even proud, of the North Carolina legal community's effort, over the last four years, in the cause of equal justice. I am.

Chief Justice I. Beverly Lake established the North Carolina Equal Justice Commission in December 2005. His successor, Sarah Parker, has carried the commission's work forward with enthusiasm. A report, outlining the crush of unmet need, was drafted and completed in 2008.<sup>1</sup> It included an array of thoughtful recommendations designed to narrow the gap between our aspiration and practice. The North Carolina Bar Association, responding to the passionate leadership of Janet Ward Black, established its award-winning 4ALL program, expanding the delivery of pro bono legal advice and services. The NC State Bar implemented a comprehensive mandatory IOLTA program. The General Assembly helped with modest state increases earmarked to support access to civil justice. Others steps, in the academy, the bar, and on the bench, have followed. We have not, in short, been sitting on our hands.

Still, our story remains a familiar and worrisome one. Over 80% of the legal need

of the poor and near poor in North Carolina, a cohort of at least three million Tar Heels, is unmet. Almost 15% of us live in stark poverty—a quarter of our kids. A full third of North Carolina households have combined incomes of under \$25,000 a year. Legal Aid of North Carolina turns away eight of ten actionable claims because they can't meet the demand. Many times that number never seek services in the first place. The poor are typically left unrepresented on the most compelling issues of life—divorce, child custody, domestic violence, housing, sustenance, health care, education, and subsistence services. As the ABA has documented, huge numbers of Americans "lose their families, their houses, their livelihoods, and like fundamental interests, as a result of the want of counsel."<sup>2</sup> And, of course, in the past 20 months, the harsh economic tide has hit us particularly hard. We've experienced, unsurprisingly, a crisis in home foreclosures. Our rates of unemployment and the uninsured have risen to among the highest in the

nation. Reports indicate that "growing numbers of poor people swamp legal aid offices."<sup>3</sup> We carve "equal justice under law" on our courthouse walls. But the legal system we actually operate is powerfully, diametrically, and fundamentally at odds with what we say we believe. And, all told, we are likely only losing ground.

My purpose in this brief essay is to explore one corner of our response to the embarrassment of massively unequal access to justice—the decisions and obligations of our courts. It is true, no doubt, that the effective removal of the poor and near-poor from our civil adjudication—this flight from fairness—is the concern and responsibility of many. Lawyers, bar associations, law schools, faculties, legislators, citizens, activists, governors, and more, play their parts. But judges—state and federal—shoulder a singular and defining role in creating, maintaining, and assuring open, effective, and meaningful access to the system of justice they administer. They determine, in actual and concrete ways, the measure of our constitutionally-commanded notion of fairness—the "process" "due" in a regime of equal citizenship and dignity. They put flesh on the unfolding right to participate and be heard—without which a state's binding conflict resolution processes cannot be justified. In short, it is "uniquely the province of the judicial branch"<sup>4</sup> to gauge and ensure the essential fairness and integrity of its proceedings.

On this front, the constitutional command of meaningful access, North Carolina

courts have behaved like almost all of their state and national colleagues. Sadly, that's not saying a lot. It's not saying enough. I'll try briefly to explain.

In a series of decisions from the 1950s, 60s, 70s, and early 80s, the United States Supreme Court recognized the growing tension between its burgeoning due process and equal protection mandates and the frequent *de facto* [and sometimes *de jure*] exclusion of the poor from the effective use of the civil justice system. Procedures which meant that those unable to pay various fees, or purchase transcripts, or post expensive bonds, or, occasionally, afford counsel, could not be readily reconciled with either rights of meaningful participation or the equal citizenship of the impoverished. As a result, modest steps were taken, under the due process and equal protection clauses, to assure more effective access to those unable to bear the costs of litigation.<sup>5</sup>

These developing patterns, though, were significantly curbed by the Burger Court in the mid-70s. They were then brought to an unceremonious halt a few years later in a case from North Carolina, *Lassiter v. Dept. of Social Services of Durham, NC*.<sup>6</sup> There, a closely-divided Court rejected an indigent's request for appointed counsel in an action brought by the state to terminate parental rights. Though conceding that the termination could "overwhelm an uncounseled parent," and that the private interests at stake were crucial, the Court announced the creation of a presumption against the recognition of a right to counsel if no loss of personal liberty is threatened. And *Lassiter's* presumption, in the succeeding three decades, has proven to be a potent one. Except for a small distinctive category of parental or reproductive cases, *Lassiter* deconstitutionalized the question of access to counsel in civil disputes.<sup>7</sup>

State courts, of course, have not been relegated, helplessly, to follow *Lassiter's* closed doors and knowing exclusion. *Lassiter* outlines only the floor demanded by the justices' tepid reading of the due process clause. States are free to do their own work—taking greater turns toward realism in enforcing their own constitutional provisions. If state judges are unsatisfied with standards that result in the marginalization of huge classes of litigants, they are given broader reign to actually demand meaningful access. But, broadly speaking, they have not done so.

States have, perhaps ironically, reacted strongly to the facts of *Lassiter*. A majority has moved, either by statute or state constitutional determination, to require counsel in termination or dependency and neglect proceedings<sup>8</sup>—though *Lassiter* didn't demand it. The reports are replete, as well, with cases exploring analogous parental or privacy-related interests. And decisions, unsurprisingly, give credence to actions—certain prisoner cases, contempt disputes, and civil commitment cases—that may threaten physical liberty.<sup>9</sup> What they haven't done, however, is apply searching scrutiny to the tension that occurs in the broad array of civil cases when indigents are denied meaningful access to a hearing because they can't afford a lawyer.

North Carolina's path is much the same. Though we grant counsel in a narrow array of *Lassiter*-like cases demanded by statute,<sup>10</sup> we have repeatedly denied, without serious scrutiny, claims to counsel in civil cases under the demands of due process and equal protection.<sup>11</sup> Unlike some states, we have refused to embrace a broader requirement for counsel under our own state constitution than the federal courts demand.<sup>12</sup> As a result, the "age old problem" of "providing equal justice for rich and poor, weak and powerful alike"<sup>13</sup> has been removed from our constitutional agenda.

Our passivity leads to a bevy of fundamental problems.

The first is the most obvious one—huge numbers of poor and near poor North Carolinians are, in effect, turned away from the state adjudication system designed to resolve their legal disputes. What we characterize as "equal justice under law" is riddled with a massive exception, an undermining asterisk. Litigants, or potential ones, lose their effective ability to assert or protect various legal interests. The wounds can be tragic. We literally leave millions unrepresented—recognizing that the consequences may be more far-reaching, more devastating, and more permanent, than many categories of criminal cases for which counsel is appointed. We recognize it, but then we put the lesson from our minds. We assume that near-total economic exclusion from a system of justice can be squared with fairness. It can't.

Second, in other circumstance, we've said so. As early as the 1930s, in the criminal context, the US Supreme Court declared, flatly, that "the right to be heard would be, in

many cases, of little avail, if it did not comprehend the right to be heard by counsel."<sup>14</sup> Even "the intelligent and educated layman ... lacks the knowledge" successfully to represent himself. How much "truer is that of the ignorant and the illiterate?" Anyone "haled into court who is too poor to hire a lawyer cannot be assured a fair trial unless one is provided."<sup>15</sup> This, the justices have said, seems "an obvious truth."<sup>16</sup> And "obvious" it remains—for civil as well as criminal disputes. The difference, apparently, is that in the civil justice system we are satisfied to ignore what is patently true. The inability to obtain counsel defeats, literally defeats, the constitutional call for a fair and meaningful hearing. But we choose to turn our gaze away from that irrefutable reality.

Third, other advanced western democracies—democracies that perhaps talk less about equality—far outpace us. The American Bar Association reports that "most European and Commonwealth countries have had a right to counsel in civil cases for decades." In rulings that bind over 40 nations and 400 millions people, the European Court of Human Rights has determined that, at least in complex cases, indigents "fail to receive a fair hearing" unless represented by counsel at public expense.<sup>17</sup> Great Britain spends 16 times as much per capita on legal services for the poor as we do. New Zealand spends six times as much. Canada three. We advertize our commitment to equal justice more proudly, more vocally, than any other nation. We are seemingly satisfied with mere advertising.

Fourth, we aren't mere neutral umpires here. We have created, at the hands of the state, overarching tribunals for the resolution of private and public disputes. They are, at bottom, the only effective and ultimate means of finally resolving a massive array of civil controversies. We have, in turn, assured that these fora are hugely complicated, cumbersome, mysterious, professionally technical, adversarial, and expensive. Litigants are assigned the primary and costly tasks of discovering and asserting the controlling legal standards, marshalling the relevant facts, organizing them for presentation, offering them through convoluted rules of evidence, arguing compellingly before a jury, and appealing or sustaining the judgment. Pulling off these steps requires no small measure of experience, sweat, wit, and expertise. It is as far beyond the kin of most

citizens as brain surgery is to me. That means, of course, that, without counsel, the door we have theoretically opened is in fact closed.

We could, perhaps, have done otherwise. Even now, it would be possible to dramatically simplify the rules and resolution methods for large swaths of disputes, making the use of lawyers unnecessary. Despite the challenges of access, we have chosen not to do so. Having followed this path, we can't now credibly claim that the decision to operate and subsidize a system that continually excludes so many citizens is merely neutral and unobjectionable. It is, rather, just that—a decision, a choice. One that cannot be squared with our stated constitutional aspirations.

My claim is not, inevitably, that North Carolinians enjoy the right to a lawyer in all civil cases. I call, instead, for the constitutional recognition that, in many disputes, the absence of counsel results in the effective denial of a meaningful opportunity to be heard. In the European system, for example, the provision of counsel is "determined by the particular facts and circumstances . . . the complexity of the case, and the applicant's capacity to represent himself effectively."<sup>18</sup> The focal point, though, should be whether it is realistic, or merely cynical, to assume that the judicial forum can be successfully navigated without the aid of counsel. And that determination is, at bottom, the responsibility of courts to enforce. More than any other institution, they are positioned to say that such rank exclusion cannot stand. Judges aren't immune from the huge chasm which exists between our asserted commitment to equal justice and the harsh reality of economic marginalization. Ultimately, they're responsible for it.

There would be a heartening irony were North Carolina courts to lead the nation in a quest to begin to make the promises of equal civil justice real. *Lassiter v. Department of Social Services of Durham*, the United States Supreme Court decision that did so much to remove the question of meaningful access from our constitutional agenda, was, as I mentioned, a North Carolina case. If we helped push the nation in so foundationally tragic a direction, we perhaps carry an added burden to aid in correcting the course. Our own constitution recognizes that a "frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings

of liberty."<sup>19</sup> That "recurrence" is long overdue. ■

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## Endnotes

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4. Ken Schorr and Carol Spruil, North Carolina Equal Access to Justice Commission, *The Initial Report of the North Carolina Equal Access to Justice Commission* 21 (May 2008), [www.ncbar.org/download/probono/nceatjFullSummitReport.pdf](http://www.ncbar.org/download/probono/nceatjFullSummitReport.pdf).
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7. *See, Brown v. Division of Family Services*, 803 A.2d 948 (Del. 2002).
8. *See, Sheedy v. Merrimack County Sup. Ct.*, 509 A2d 144 (NH 1986).
9. *See*, N.C. Gen. Stat. 7A - 451 (a)(parole, involuntary commitment, incompetency, parental rights, abuse, and neglect, etc.).
10. *See, Wake Cty. ex rel Carrington v. Townes*, 293 SE 2d 95 (1982); *In re HB*, 644 Se2d 22 (NC App., 2007); *State v. Adams*, 483 Se2d 156 (1997); *In re Pittman*, 561 SE2d 560 (2002); and *King v. King*, 547 SE2d 846 (NC App. 20010).
11. *See, Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Ak. 2005)(Alaska constitution more robust than federal counterpart).
12. *See, Griffin v. Illinois*, 351 U.S. 12, 19 (1956).
13. *Powell v. Alabama*, 287 U.S. 45 (1932).
14. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
15. *Id.*
16. ABA Resolution 112A, House of Delegates, Aug. 7, 2006; *See, Airey v. Ireland*, 2 Eur.Ct.H.R. (Ser.A) 305 (1979).
17. *Steel & Morris v. United Kingdom*, 41 E.H.R.R. 22 (2005).
18. NC Const. Art I, sec. 35.