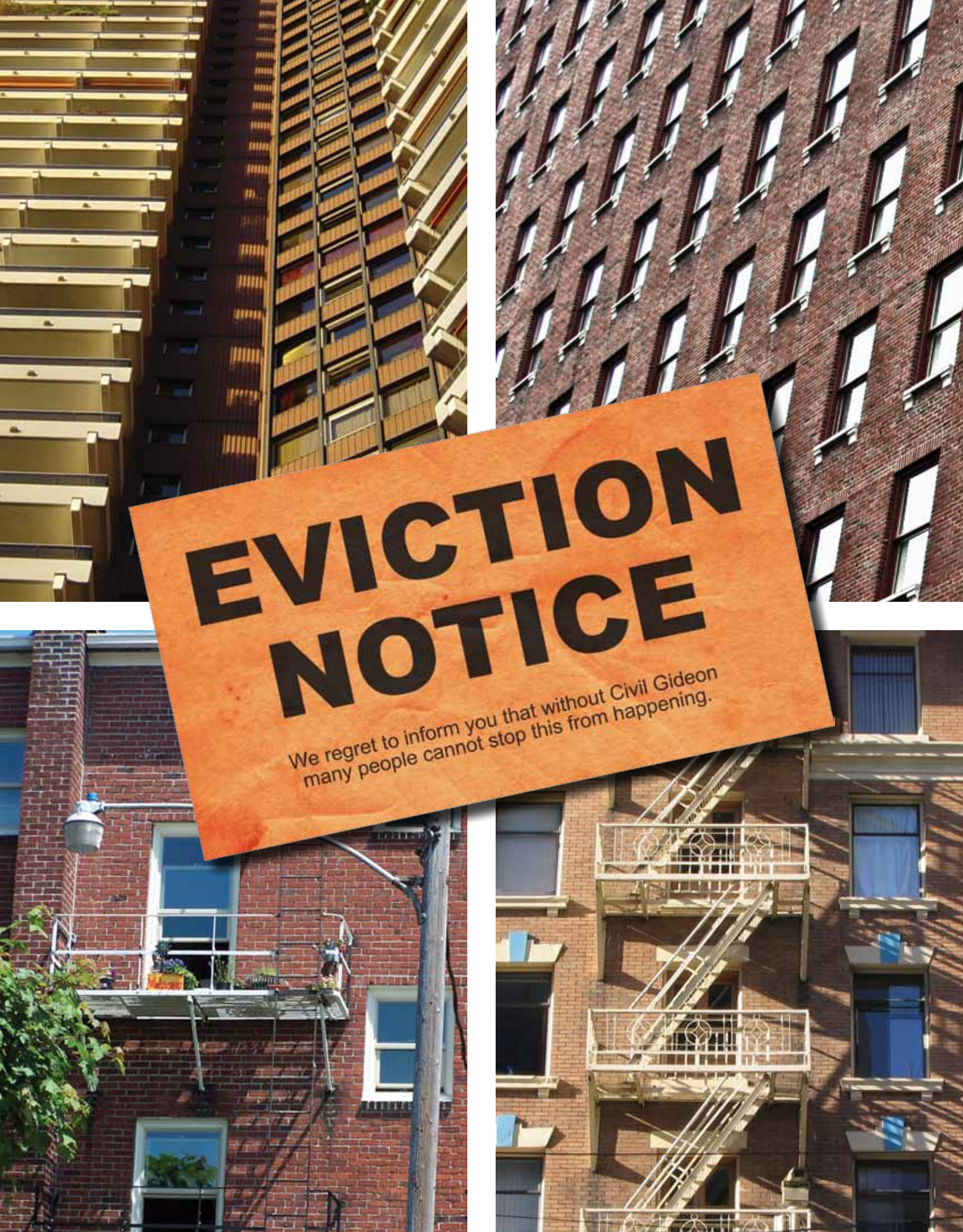
EVICTION
NOTICE
We regret to inform you that without Civil Gideon
many people cannot stop this from happening.

Filling Gideon's Empty Chair

By Michael J. Carroll and Louis S. Rulli

Think of the car repair shop, the I.T. department at your job, the tax office or any setting in which you may feel unfamiliar, even helpless. Now try to imagine yourself in that position without your professional training and experience, without your middle-class life and resources. Raise the stakes and lower your ability to help yourself.

That might help you begin to understand what it is like to be a person of modest or no means at a court hearing where there is much more at risk than your oil change, brake job, or your e-mail or tax problem. What can be at risk in a court hearing is your right to your child, the roof over your head, or your income.

Ms. Smith and Ms. Jones are not the real names but they are real people and their legal problems were all too real. They are both single parents, renters and poor. They had little heat and at times no heat for most of the winter because their landlords refused to make the essential repairs that their leases required and the law demanded.

They began their winter days dressing over glowing red coils of cheap electric space heaters before huddling with young children, eating breakfast around the hinged open oven door with sputtering blue flame peaking through rust opened holes. They ate while the stench of singed crumbs and grease wafted from the cheap old gas stove.

After numerous pleas to their respective landlords were ignored, they told them: No heat, no rent. They put some of their rent money in the bank instead of paying it to the landlord. They spent the rest on space heaters, high electric and gas bills, and kerosene, to keep from freezing.

Each of their landlords hired attorneys who brought eviction actions against them. Their stories took sharply different turns because Ms. Smith had a lawyer and Ms. Jones did not.

The lawyer helped Ms. Smith organize the legal case and present it in Housing Court. He asked the questions that helped her tell her story in a way the court found acceptable within its rules. Every word of her answers was true and she burned to tell the story that had been bottled up in her for so long. Objections and interruptions came from the landlord's attorney, but her lawyer helped her stay focused through her nervousness. Ms. Smith won her case.

The court awarded a rent reduction. She had the option of paying the reduced amount and staying or moving. After the court decision, her landlord decided to negotiate, promised to make repairs, and some financial concessions.

Ms. Jones did not fare as well. She went to court alone. She is an intelligent woman but was confused and frightened in a courtroom that was alien to her. She did not know the law or the lawyer rules. She fumbled and almost wept as she tried her best to explain herself to the judge and to answer the questions of the landlord's attorney between his stern interruptions and objections. She did not know how to organize her case or how to obtain evidence and present it in a way that the court would find "admissible." She answered the questions of the court and the landlord's lawyer as best she could. She lost.

The court granted the landlord a judgment for eviction against Ms. Jones, and a judgment for money that included all the withheld rent, plus costs, late fees and attorneys' fees. Ms. Jones could not pay the judgment with all the added costs. She had to move out quickly or be thrown out by the law. And she had to look for shelter with a substantial money judgment against her that made it difficult to rent a new place, and that can lead to seizure of her bank account or other modest assets, maybe tomorrow, next year, or 10 years down the road.

Not all eviction court cases are decided by a judge. Many end in judgments by agreements (JBAs). Agreements are fine in principle in court just as in life; in Housing Court having legal counsel or not can make all the difference between a fair agreement and a one-sided, unjust agreement. Two additional typical cases may best tell this story. Here again there is a change of names while remaining true to the facts of actual cases.

Mr. O'Donnell and Ms. Sanchez found themselves in Housing Court when they withheld rent because of serious repair problems. Mr. O'Donnell came to court with *pro bono* counsel but Ms. Sanchez did not. Both cases were "disposed of" in court parlance through judgments by agreements.

Mr. O'Donnell, a Social Security pensioner, had "habitability defenses." Simply stated, he had good reasons for withholding his rent and legal justification for a rent reduction because of the time he had lived with roof leaks, faulty electric and a host

of other problems. He also had a strong legal argument that his landlord actually owed him money because there was no municipal rental license for the apartment for several years preceding the filing of the eviction action. Mr. O'Donnell had had enough. He had found a better apartment where the new landlord made repairs and was responsible. His volunteer lawyer read the riot act (actually, the simple facts and the clear law) to the lawyer representing the landlord. The landlord's lawyer appreciated the strength of the case and agreed to drop all rent claims, past and ongoing, and to give to the tenant sufficient time to make an orderly move to a new apartment. Both sides signed a judgment by agreement making the terms legally enforceable and filed it with the court. No trial, but certainly a good and fair result.

Although the legal procedures were virtually identical, Ms. Sanchez' case was a sad contrast to Mr. O'Donnell's. She was short of retirement age, but complications from diabetes ended her work as a home health care aide and forced her onto disability. She lived on a very tight budget and it was not always easy to pay the monthly rent. She also had serious repair problems at her apartment and finally got fed up with "throwing good money after bad." She had read a tenants' rights booklet about her right to withhold rent after giving notice and bravely started the process. The eviction complaint arrived and the doubts and regrets began. Had she done the right thing? She went to court, answered when her name was called by the clerk of court, and gratefully followed the court's instruction to go to another room, try to work things out with the landlord's lawyer, and return to go before the judge if no agreement was reached.

The landlord's lawyer started out kindly, grew strict, and then turned mean. He warned her that she would do worse in front of the judge than she would by signing an agreement. She got more nervous by the minute. She certainly did not want to have a trial before the judge against this experienced, intimidating landlord lawyer. She signed a JBA. The JBA entered a money judgment against her for all of the rent the landlord demanded. No reduction for repairs, lack of rental license or anything else. The JBA also entered a judgment for "possession," a softer word for "eviction." She would have to be out in 21 days and she legally owed all the money.

The result would not have been worse for Ms. Sanchez if she had stayed home in bed.

* * *

Lawyers make a difference. They serve as gatekeepers providing citizens with access to our courts to resolve legitimate disputes. They marshal facts, research governing law, navigate tricky evidentiary issues, and use sharp questioning techniques to bring out critical facts in the courtroom. Lawyers bring needed expertise to develop all sides of a controversy which helps litigants reach fair out-of-court agreements and which gives judges the means to make informed decisions inside the courtroom when agreements are not possible.

Our justice system is strongly premised upon the belief that the adversary system, though not perfect, is able to get at the truth when each part of the system faithfully fulfills its role. A lawyer sleeping during court testimony does not meet this standard. An empty chair where a lawyer would normally sit if an indigent litigant could afford legal help undermines our promise of equal justice under law.

Clarence Gideon pressed this very point when he petitioned the Supreme Court almost 50 years ago, claiming that his constitutional rights were violated when a Florida trial court denied him a lawyer to defend against burglary charges. The Supreme Court agreed to hear Gideon's plea for help and immediately appointed a lawyer to represent him before the high court. The Supreme Court recognized that Gideon needed a lawyer to advocate whether he was entitled to a lawyer when his liberty was at risk. Up until that point, Gideon answered criminal charges with only an empty chair next to him as he tried to advocate for himself before Florida trial and appellate courts.

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The Supreme Court chose Abe Fortas, an experienced lawyer, to fill this role. Not surprisingly, Fortas brought impressive legal skills and ample resources to bear in briefing and arguing Gideon's federal constitutional claims before the court. A unanimous Supreme Court overruled longstanding precedent established in *Betts v. Brady* and held that the Sixth Amendment's guarantee of counsel was a fundamental right that was applicable to the states through the Due Process Clause of the 14th Amendment. Justice Black called it an *obvious truth* that a fair trial for a poor defendant could not be guaranteed without the assistance of counsel.

On remand to the Florida state court, Gideon received a new hearing with the legal help of an experienced trial lawyer who used his training and skills to cross-examine suspect eyewitness testimony and introduce compelling new evidence that directly contradicted the government's version of the crime. This time, with a lawyer at his side, Gideon was found not guilty by a jury that needed only one hour to deliberate and render a verdict.

Lawyers are hardly surprised by this turnaround in results. In both courts and administrative agencies, litigants have a significantly greater chance of success when they are represented by counsel. Unfortunately, indigent litigants sitting next to an empty chair too often forfeit basic rights – not because of the facts or the law – but simply due to the absence of counsel.

This is why the Supreme Court's landmark decision in *Gideon v. Wainwright* prompted many to question whether a civil trial could really be fair if an indigent person did not

have the assistance of a lawyer. One year after *Gideon*, Attorney General Robert F. Kennedy asked in a famous Law Day address whether poor people didn't also need free counsel when they faced evictions, wage attachments, repossession of their goods or loss of welfare benefits? Perhaps even more importantly, many wondered about the fairness of a civil justice system that did not even provide legal help to an indigent mother who faced the permanent loss of her child to the state in a termination of parental rights case.

Eighteen years after *Gideon*, this question came before the Supreme Court in *Lassiter v. Department of Social Services of Durham County*. There, North Carolina authorities accused Abby Gail Lassiter of not providing proper medical care to her young son. The local family court found the boy to be a neglected child and transferred his custody from Lassiter to the county department of social services. Three years later, the county department petitioned the court to terminate Lassiter's parental rights alleging that she had no contact with her son for an extended period of time. (Lassiter had been in prison during part of this time).

Lassiter was brought from prison to a family court hearing to answer charges that her parental rights to her son should be terminated. Lassiter asked for a postponement of the hearing in order to obtain counsel, but the trial court refused. Despite Lassiter's poverty and incarceration, the judge concluded that she had been given ample opportunity to obtain counsel.

Without counsel, Lassiter tried in vain to cross-examine witnesses against her. During the hearing, the presiding judge admonished her several times that she could only ask questions, and that her attempted questions were disallowed because they were arguments, and not really questions. Without legal training, Lassiter was wholly unsuccessful in the art of cross-examination and the government's contentions went largely unchallenged. Lassiter's parental rights were terminated.

On appeal, the Supreme Court rejected Lassiter's constitutional claim that she was entitled to counsel at her parental rights termination hearing. The court reasoned that an individual's right to appointed counsel diminishes as liberty interests diminish. In a due process challenge, the court held that the factors previously set forth in *Matthews v. Eldridge* must be balanced against each other and weighed against a presumption that there is no right to counsel without a potential deprivation of physical liberty. In Lassiter's case, this meant that the constitution did not grant her a lawyer even though the permanent loss of her child hung in the balance. The *Lassiter* decision struck a major blow against expanding the right to counsel to civil cases.

Since the *Lassiter* decision, most states have recognized that an indigent parent should have the assistance of counsel when the government seeks to permanently sever the parent-child relationship. Over time, the nation has largely embraced a societal norm that the parent-child relationship is too important and the consequences of parental termination too severe to decide such a case without providing counsel to an indigent parent. Relying upon state statutes, court rules or judicial interpretations, most states now agree that a parent should not be deprived of her child by the government, or a child of his parent, without the safeguard of legal assistance. A modern notion of civil justice requires no less.

Still, in most other civil matters, poor people have no claim to counsel even when fundamental interests such as housing, income or safety are at stake. As a result, the need for legal help by the poor goes mostly unmet, with studies demonstrating that, at best, only 20 percent of those in need of a lawyer can be served with present resources. In 2006, the American Bar Association's House of Delegates rekindled the civil right to counsel movement when it adopted Resolution 112A calling upon federal and state jurisdictions to provide counsel as a matter of right at public expense to low income persons in adversarial proceedings

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

1. Publication title: THE PHILADELPHIA LAWYER
2. Publication number: 025-241
3. Filing Date: September 23, 2010
4. Issue frequency: Quarterly
5. Number of issues published annually: 4
6. Annual subscription price (if any): $45
7. Complete mailing address of known office of publication: Philadelphia Bar Association 1101 Market St., 11th Floor, Philadelphia, PA 19107-2955
8. Complete mailing address of headquarters or general business office of publisher: Philadelphia Bar Association 1101 Market St., 11th Floor, Philadelphia, PA 19107-2955
9. Full names and complete mailing addresses of publisher, editor and managing editor. Publisher: Philadelphia Bar Association, 1101 Market St., 11th Floor, Philadelphia, PA 19107-2955. Editor: Kim Jessum, Philadelphia Bar Association, 1101 Market St., 11th Floor, Philadelphia, PA 19107-2955 Managing Editor: Jeff Lyons, Philadelphia Bar Association, 1101 Market St., 11th Floor, Philadelphia, PA 19107-2955
10. Owner: Philadelphia Bar Association 1101 Market St., 11th Floor, Philadelphia, PA 19107-2955
11. Known bondholders: none
12. Tax status: has not changed during preceding 12 months
13. Publication title: THE PHILADELPHIA LAWYER
14. Issue date for circulation data below: Fall 2010
15. **Extent and nature of circulation:**

		Average no. copies each issue during preceding 12 months
A.	Total number of copies	10,711
B.	Legitimate paid and/or requested distribution	
	(1.) Outside-county paid/requested mail subscriptions stated on PS Form 3451:	10, 138
	(2.) In-county paid/requested mail subscriptions stated on PS Form 3541:	0
	(3.) Sales through dealers and carriers, street vendors, counter sales, and other paid or requested distribution outside USPS:	0
	(4.) Requested copies distributed by other mail classes through the USPS:	0
C.	Total paid and/or requested circulation:	10, 138
D.	Nonrequested distribution	
	(1.) Outside-county nonrequested copies stated on PS Form 3541:	n/a
	(2.) In-county nonrequested copies stated on PS Form 3541:	n/a
	(3.) Nonrequested copies distributed through the USPS by other classes of mail:	n/a
	(4.) Nonrequested copies distributed outside the mail:	400
E.	Total nonrequested distribution	400
F.	Total distribution	10,538
G.	Copies not distributed	173
H.	Total	10,711
I.	Percent paid and/or requested circulation:	96%

		No. copies of single issue published nearest to filing date
A.	Total number of copies	9,798
B.	Legitimate paid and/or requested distribution	
	(1.) Outside-county paid/requested mail subscriptions stated on PS Form 3451:	9,278
	(2.) In-county paid/requested mail subscriptions stated on PS Form 3541:	0
	(3.) Sales through dealers and carriers, street vendors, counter sales, and other paid or requested distribution outside USPS:	0
	(4.) Requested copies distributed by other mail classes through the USPS:	0
C.	Total paid and/or requested circulation:	9,278
D.	Nonrequested distribution	
	(1.) Outside-county nonrequested copies stated on PS Form 3541:	n/a
	(2.) In-county nonrequested copies stated on PS Form 3541:	n/a
	(3.) Nonrequested copies distributed through the USPS by other classes of mail:	n/a
	(4.) Nonrequested copies distributed outside the mail:	400
E.	Total nonrequested distribution	0
F.	Total distribution	9,678
G.	Copies not distributed	120
H.	Total	9,798
I.	Percent paid and/or requested circulation:	96%

16. Publication of statement of ownership for a requester publication is required and will be printed in the Winter 2010/2011 issue.
17. Signature and title of editor, publisher, business mgr or owner Kenneth Shear, *executive director*

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involving "basic human needs," such as those involving "shelter, sustenance, safety, health or child custody." Proudly, the Philadelphia Bar Association was a co-sponsor of this resolution.

Since 2006, there has been an active resurgence of efforts to ensure that low-income persons have a lawyer by their side when it matters most. Some states, such as California, have enacted legislation that will fund pilot programs to test how best to provide counsel as a matter of right. State and local bar associations across the country have adopted resolutions urging increased access to justice through the establishment of a right to counsel, and they have formed task forces that are initiating pilot projects and sponsoring educational forums. There is a National Coalition for a Civil Right to Counsel that maintains a website at www.civilrighttocounsel.org and provides valuable assistance to local efforts. In 2010, the American Bar Association adopted a Model Access Act for states to use in their local right to counsel efforts.

The Philadelphia Bar Association is at the forefront of these efforts. There is a Civil Gideon Task Force in place that has been studying this issue and that has formed working groups to undertake pilot projects to examine the efficacy and potential cost savings of providing counsel in housing and family law cases. The Task Force held a standing-room-only Chancellor's Forum in 2010 that drew high praise from the judiciary and the bar in examining some of the issues involved in providing counsel as a matter of right.

The struggle to give the poor access to legal help when it matters most is a long and difficult one. Admittedly, lawyers are not the panacea for all problems of inequality in the courts and a proposed civil right to counsel raises hard questions that defy easy answers. How will an expanded right to counsel be funded, especially in difficult economic times? How will a civil right to counsel integrate with the current legal services delivery system? How will we assure that legal assistance is of high quality and not delivered in name only?

These difficult questions are unlikely to be answered any day soon. But if we are to draw closer to achieving the nation's promise of equal justice under law, as inscribed over the entrance to the Supreme Court building, the legal profession must not shy away from these questions. Visit the Philadelphia Bar Association's *Civil Gideon Corner* website at www.philadelphiabar.org/page/CivilGideon to learn more about these ongoing efforts and to get involved in one of the most important issues of our time.

Our society will be more just when we fill that empty chair. ■

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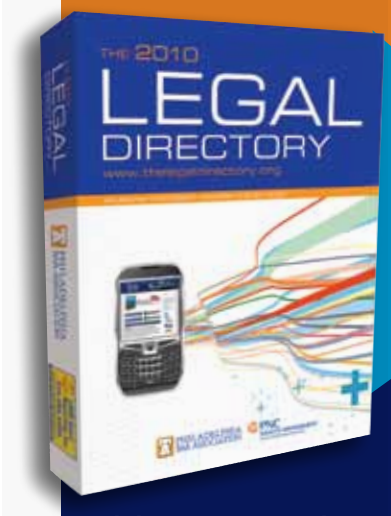

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