

# RIGHT TO COUNSEL

## Discussed at the Access to Justice Conference

by Mel Masuda

Unlike the right to counsel in criminal cases guaranteed to defendants under the *Gideon v. Wainwright*<sup>1</sup> decision, there is no such equivalent in civil cases, as pointed out by Hawaii Supreme Court Justice Simeon Acoba (ret.) who led a panel discussion at the recent Access to Justice Conference. The topic was “Right to Counsel in Civil Cases—Where Are We?” with the following panelists: State Public Defender John Tonaki; William Hoshijo, Executive Director of the Hawaii Civil Rights Commission; Mary Anne Magnier, supervising deputy attorney general; Russ Awakuni, supervising attorney, Waianae Office of the Legal Aid Society of Hawaii; and Patricia McManaman, Director of the State Department of Human Services. The panelists were selected on the basis of their expertise in the five areas articulated in the “ABA Toolkit for a Right to Counsel in Civil Proceedings (2010)” — shelter, sustenance, safety, health, and child custody.<sup>2</sup> In addition, Justice Acoba asked District Court Judge Michael Tanigawa, who was in the audience, to comment on the representation needs of indigent individuals seeking temporary restraining orders. Justice Acoba circulated to the audience a memorandum prepared by Jessica Freedman and Merissa Velez, which memorandum provided an overview of the cases decided under the United States (“U.S.”) Constitution and separately under the Hawaii Constitution; expanding the right to counsel under the Hawaii Constitution; and pertinent law review articles.

At the start of the panel discussion, it was noted that the last clause of the Sixth Amendment to the U.S. Constitution, as interpreted by the U.S. Supreme Court, has made the right to counsel mandatory in all criminal cases. There is, however, no such clause in the Constitution that explicitly requires a mandatory right to counsel for indigents in civil cases. The due process clause has been cited by the U.S. Supreme Court as being the source of authority for raising the issue of requiring counsel for indigents in non-criminal cases, as indicated in the discussion below of the U.S. Supreme Court decision in *Lassiter v. Dept. of Social Service of Durham County*.<sup>3</sup>

Justice Acoba pointed out that a required right to counsel for indigents in civil cases is a case-by-case approach by the U.S. Supreme Court in very specific and very much limited areas of the law, namely parental termination hearings in cases of child custody and civil contempt. For example, in the *Lassiter* case involving termination of parental rights, the court set out a three-pronged test to determine whether counsel was required to be appointed to represent an indigent parent. The court started with the premise, borrowed from *Gideon* and progeny and applying it to a civil case situation, that “an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty” under the due process clause of the Fifth Amendment (in federal cases) and of the 14th Amendment (in state cases). *Id.* at 26-27. Next, the court extended the due process concept of “physical liberty” in a criminal case to a civil termination of parental rights

case because “a parent’s desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection....” *Id.* at 27. However, the court refused to extend a required right to counsel for indigents in all parental termination proceedings. *Id.* at 31. Instead, the court directed the trial courts to evaluate three elements to decide whether counsel is required to be provided for indigents in such hearings—“the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” *Id.* at 27.

In dissent, Justice Blackmun asserted that counsel for indigents should be automatically required in parental termination proceedings “where, as here, the threatened loss of liberty is severe and absolute, the State’s role is so clearly adversarial and punitive, and the cost involved is relatively slight...[T]here is no sound basis for refusing to recognize the right to counsel as a requisite of due process in a proceeding initiated by the State to terminate parental rights.” *Id.* at 48.

Justice Acoba noted that, in the recent case of *In re T.M.* (January 6, 2014), the Hawaii Supreme Court, interpreting the State of Hawaii Constitution rather than the U.S. Constitution, held that indigent parents are guaranteed the right to court-appointed counsel in parental rights termination proceedings. 131 Haw. at 421, 319 P.3d at 340. The court “recognize[d] that parents have a substantive liberty interest in the care,

custody, and control of their children that is protected by the due process clause of article I, section 5 of the Hawaii Constitution.” Thus, the court held that, in Hawaii, “parents have a constitutional right to counsel under article I, section 5, in parental termination proceedings and...from and after the filing date of this opinion, courts must appoint counsel for indigent parents once the [Department of Human Services (DHS)] files a petition to assert foster custody over a child.”

The decision of the Hawaii Supreme Court—which goes beyond the U.S. Supreme Court by requiring counsel for an indigent parent in a termination case—is so recent that statistics have just started to be kept for this calendar year at the Department of Human Services.

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<sup>1</sup> 372 U.S. 335 (1963).

<sup>2</sup> [www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/civil\\_right\\_to\\_counsel.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/civil_right_to_counsel.html). ABA Model Access Act provides for a civil right to counsel to protect “basic human needs” in five areas: shelter, sustenance, safety, health, and child custody. Shelter means “a person’s or family’s access to or ability to remain in a dwelling, and the habitability of that dwelling.” Sustenance means “a person’s or family’s ability to preserve and maintain assets, income or financial support.” Safety means “a person’s ability to obtain legal remedies affording protection from the threat of serious bodily injury or harm.” Health means “access to health care for treatment of significant health problems.” Child custody means “proceedings in which the parental rights of a party are at risk of being terminated; a parent’s right to residential custody or visitation rights are at risk of being terminated, severely limited, or subject to a supervision requirement; or a party seeks sole legal authority to make major decisions affecting the child.” See further details in the “ABA Toolkit for a Right to Counsel in Civil Proceedings.”

<sup>3</sup> 425 U.S. 18 (1981).

## ODC Ethics Opinions

By Charlene M. Norris

Do you have questions about your duty to a former client or a prospective client? Are you unsure about how to handle a request for a full accounting of your client’s funds? Not certain whether you have a conflict of interest? Not sure how to handle a flat fee retainer? This is the time to call the Office of Disciplinary Counsel (“ODC”) Hotline and request an ethics opinion, and the sooner the better.

One of the primary Disciplinary Board-mandated functions of the ODC is to provide ethical guidance to active members of the bar, including *pro hac vice* counsel, regarding their own prospective conduct. This educational function is both a service to the bar and beneficial to the public in assisting attorneys to avoid ethical problems before they may arise.

### Formal Opinions

Hawai‘i bar members are encouraged to visit the Disciplinary Board’s website: [odchawaii.com](http://odchawaii.com), where the full text of all current “Formal Opinions” may be found. As explained on the website, formal written opinions are issued only by the Disciplinary Board and are limited to questions of broad interest and applicability to the bar. The Disciplinary Board does not issue Formal Opinions covering individual scenarios and circumstances. Formal Opinions (“FOs”) are generally suggested by the Hawai‘i Supreme Court, the Disciplinary Board, ODC and the bar, on topics ranging from sharing office space (FO 22), to retaining liens (FO 28), email security (FO 40), attorney web sites (FO 41), “of counsel” attorneys (FO 43), handling credit card payments (FO 45), and referral fees (FO 46). Formal Opinions are binding on all bar members and each attorney should be familiar with the text of each FO, as failure to comply with a Formal Opinion may be the basis for a disciplinary proceeding and sanction.

### Informal Opinions

Informal Opinions are generally provided orally by ODC Hotline attorneys to Hawai‘i licensed attorneys and address specific factual situations and the

prospective conduct of the individual attorney requesting an opinion. ODC attorneys are assigned to return Hotline calls each week on a rotating basis, and each attorney spends literally hundreds of hours every year in responding to opinion requests from Hawai‘i attorneys. ODC does not respond to opinion requests from the public or persons not licensed to practice law in this jurisdiction. ODC does not opine to one attorney on the conduct of other attorneys or provide legal advice. Advice is limited to ethical issues and the application of the Hawai‘i Rules of Professional Conduct (“HRPC”).

In limited, complex circumstances, a written opinion request will be entertained and addressed by ODC. Each written opinion is reviewed and approved by a member of the Disciplinary Board’s Opinion Committee.

For the most part, oral opinions are sought by attorneys in time-sensitive situations and the inquiry is relatively simple. Informal Opinions, whether oral or written, are provided with reference to specific HRPC Rules and Comments, and are based solely upon the facts provided by the inquiring attorney. An attorney may be referred to the ABA/BNA Lawyers’ Manual on Professional Conduct (2009), the ABA Annotated Model Rules (7<sup>th</sup> Ed. 2011), and Bar Journal articles or Formal Opinions appearing on the website [odchawaii.com](http://odchawaii.com), as well.

A record of each Informal Opinion is confidentially maintained by the ODC in an attorney database tracking system. If you need an oral Informal Opinion, the ODC and Disciplinary Board suggest that you first check the new Hawai‘i Rules of Professional Conduct (effective January 1, 2014), then call the ODC Hotline at 521-4591, choose Option 2 and leave a message with a short description of the facts and your specific question(s). An ODC attorney will try to return your call the same day, but will return the call no later than two business days after the call is received. ODC appreciates the opportunity to serve the bar in this manner.

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