

# Pennsylvania Bar Association Civil & Equal Rights Committee E-Newsletter



Spring 2013



*By John G. Bergdoll IV, CERC chair*

Welcome to our first newsletter! CERC has an ongoing tradition of educating our committee and fellow bar members and the population on current issues relevant to our civil and equal rights. This newsletter is in the spirit of that tradition and I look forward to continued participation and interest in the newsletter as a means to educate CERC members and our broader audience of CERC's activities and topics of interest.

CERC is also known for its tradition of making recommendations and resolutions which become the position of our Pennsylvania Bar Association for the good and benefit of the civil and equal rights of Pennsylvanians, individuals around the country and those across the globe. These resolutions range from our resolution passed by the PBA at last year's annual meeting supporting U.S. Ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, to our language access resolutions and recommendations, facilitating improved access to the courts for non-English proficient Pennsylvanians, to our proposed PBA resolution to support an effective mediation procedure for instances of alleged police abuse against individuals.

These resolutions we author, co-author, support and present to the PBA are a key function of CERC. That is why it is so important for our members to stay involved and aware of the relevant issues and legislation facing the commonwealth, nation, and world because it is so important for us to be on the front lines of protecting civil rights and monitoring our equal protection under law. The more our diverse membership shares and discusses ongoing issues related to their interests or practice areas, the more active CERC can be in taking the appropriate action in protecting civil and equal rights. Meeting attendance and discussion of issues by a broad range of our members is fundamental.

We have established a Liaison Committee of CERC members to update us on actions and activities of our neighbor committees and Sections. This is helpful in spotting PBA activity outside of CERC that we should support or cooperate with or comment on so that we share our voice with other committees and the PBA governing body. CERC is ever



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improving our awareness of the Committee and Section activities around the PBA by bringing these discussions to the table at our monthly meetings.

Also, Vice-chair Beth Lyon developed our Essay Contest Subcommittee aimed at drawing interest to law and undergraduate students to the civil and equal rights practice areas of the legal field. Once the contest is in full swing, we look forward to drawing a broad and diverse student population into the legal field and specifically CERC's areas of interest.

Finally, our CLE has been a great success in the past and we are looking forward to an informative CLE in the near future, collaborating with fellow committees to educate us and discuss issues and law overlapping in our mission and goals.

This is a small sample of CERC activities and none of this is possible without active member participation. I look forward to your participation at our monthly conference calls and our in-person meetings several times a year at PBA meetings and events. Participation by our members is our greatest asset. We are excited about our accomplishments but there is much on the horizon for CERC to accomplish.

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## Ensuring Access to Justice When It Really Counts

Based on Article [II](#) by Thomas G. Wilkinson Jr.  
Modified by Kathryn J. Imler

March 18, 2013, marked the 50<sup>th</sup> anniversary of *Gideon v. Wainwright*, the Supreme Court's landmark ruling extending the Sixth Amendment right to counsel for indigent criminal defendants in cases where liberty is at stake. Despite this ruling, the civil justice gap remains wide open. Indigents in civil cases do not have such access to legal counsel even though they face legal proceedings that will greatly impact upon their lives, such as losing a home or losing custody of a child. These citizens are just as much in need of counsel to guide them through the legal system as criminal indigents who are granted counsel as of right.

The civil justice gap has been at the center of discussion at the local, state and national bar levels for some time. A number of innovative ideas have been put forward to grant access to legal services for those in need. New York's highest court recently enacted a controversial requirement that all new lawyers provide 50 hours of pro bono service before being admitted to the bar. Other states have taken steps to expand practical-skills training through clinical and legal aid programs at law schools. One initiative in particular, called "Civil Gideon," has garnered much statewide attention. Civil Gideon is an effort to provide free representation to the indigent who are facing crisis situations in their lives, such as the loss of housing or custody of a child, similar to counsel afforded to criminal indigents.

The proponents of Civil Gideon argue that, like in *Gideon*, the Due Process Clause of the Constitution also grants a right to appointed counsel where basic human needs are at stake, such as shelter, sustenance, safety, health or child custody. Further, if no such right is

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guaranteed, state legislatures can grant such a right. In *Turner v. Rogers* the Supreme Court held that there is no automatic right to counsel under the Fourteenth Amendment Due Process Clause where procedural safeguards are in place, yet the court gave no definitive answer as to whether counsel must be provided since the Sixth Amendment grants indigents in criminal cases the right to counsel. 131 S. Ct. 2507 (Docket No. 10-10) (2011) (dissenting in the 5-4 decision, Justice Thomas noted that there is no right to counsel under the Fourteenth Amendment Due Process Clause or the Sixth Amendment, but that states may pass legislation requiring such counsel in civil cases. However, the state at issue did not have such laws in place, thus no counsel should be appointed). The 50<sup>th</sup> anniversary of *Gideon* is a good milestone for the legal profession, judiciary, and other stakeholders to focus on what steps can and should be taken to close the civil justice gap for those facing legal proceedings that will have a momentous impact on their lives yet are unable to afford counsel to guide them.

To read the full article, [click here](#).

[i] *Original Article Published in The Pennsylvania Lawyer March/April 2013: Side Bar (p.2)*



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## **Freedom of Religion and the Affordable Care Act**

*By Randall Wenger Esq.*

Nearly 50 years ago in rural Lancaster County, Norman Hahn, a plain Mennonite, started a woodworking business. Because it was small, Norman and his wife Elizabeth wore all kinds of hats to keep the business, Conestoga Wood Specialties, running. Over the years Conestoga grew, and so did the Hahn family. Now the next generation, Lamar, Anthony, and Kevin, are co-owners with their parents, and they employ nearly 1,000. But some things about the business have not changed. Conestoga, like many small and mid-sized businesses throughout the country still reflects the personality and values of its owners.



It's true that the Hahns want to earn a living with Conestoga — which sometimes is profitable and sometimes is not. But their core values consist of more than profit. Instead, they want to serve their employees and customers in a way that honors God because their devotion to and love for God isn't just a slice of their life but the most fundamental part of who they are.

One small way that they've sought to serve their employees is by caring for their health through preventative care — long before it was mandated. It would have seemed, then, that their healthcare initiatives would have dovetailed nicely with the new requirements under the Affordable Care Act to provide preventative care services.

To read the full article, [click here](#).



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## **Social Services and Constitutional Rights, a Balancing Act**

*By Benjamin R. Picker, Esq. and Jonathan C. Dunsmoor, Esq.*

Social service workers have a difficult job. They must weigh their duty to protect children who are in danger of abuse or neglect against their legal obligation not to violate the civil rights of those same children and their parents. In this article, we examine this fragile balance against the background of the constitutional rights of families faced with a social services investigation.

### The Fact Pattern

Imagine the following scenario. You get a call from your spouse to come home immediately because a county social service worker and police officer are standing outside of your home demanding to come inside and speak to your three-year-old son. You arrive home a short time later and are told that social services received an anonymous report three days earlier stating that your son is being abused, and they suspect the abuse is by one of his parents. Social services has since discovered who made the anonymous report but refuses to tell you who the person is because such information is confidential. You deny that any abuse has occurred.

The social worker demands entry into your home to interview and take photos of your son. The social worker also states that your son must reside outside of your home with family or friends while the investigation continues. You initially refuse to permit the social worker into your home and you protest the removal of your son from your home. The social worker then states that if you do not cooperate, he will have no choice but to take your child and place him in foster care while the investigation continues. Based on this threat, you reluctantly agree. Your sister could care for your son on a temporary basis. The social worker then

interviews your child outside of your presence, and your child denies ever being abused. The social worker also inspects and takes photographs of your child's body, but sees no suspicious bruises or injuries. Nonetheless, you are told that your son must stay with your sister for a few weeks, perhaps longer, until the investigation is complete. Furthermore, you are advised that you may not have any contact with your son until the investigation is complete because you could taint the investigation.

To read the full article, [click here](#).



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## Recent Pennsylvania Civil Rights Decision Spotlight

*By Jeremy Samek, Esq.*

### **3<sup>rd</sup>Circuit Rules in Favor of Pennsylvania 5<sup>th</sup>Grade Student prohibited by Pocono Mountain School District from Handing out Christmas Party Fliers**

On March 12, 2013, the U.S. Court of Appeals for the 3<sup>rd</sup>Circuit, in *K.A. v. Pocono Mountain School District*, 2013 U.S. App. Lexis 4877 (3<sup>rd</sup> Cir. 2013), unanimously affirmed a Middle District of Pennsylvania Court's order that found two policies at a Pennsylvania school district unconstitutional after they were used to prevent a 5<sup>th</sup> grade student from distributing invitations to a Christmas party at her church. The court noted the policies were a "clear suppression of her expression."

The Pocono Mountain School District relied on two literature distribution policies to justify the ban on the student's fliers. The 3<sup>rd</sup>Circuit noted that the original and revised policies 220 and 913, in essence, provided: "only literature and materials directly related to school district activities or that contribute significantly to district instructional programs may be disseminated to or through students and staff members." These

restrictions, the Court held, "are broader than what is allowed under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and its progeny, which state that student expression can be regulated only if it causes disruption or interferes with the rights of others, or if it falls into one of the narrow exceptions to this rule (i.e., it is lewd, it promotes illegal drug use, or it is school-sponsored)."

In *Tinker*, the leading case in the student-speech context, the Supreme Court affirmed that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. In applying *Tinker*, the 3<sup>rd</sup>Circuit noted the test is whether the School District's decision was justified by "a specific and significant fear of disruption, not just some remote apprehension of disturbance." The 3<sup>rd</sup>Circuit held there was no evidence that distribution of flyers during non-instructional time would disrupt the school environment or that there could be a misperception that the school was sponsoring a religious themed gathering of students.

To read the full article, [click here](#).



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