The Relationship of the Right to Counsel and Self-Represented Litigant Movements

By Richard Zorza, Esq.[1]

I. Introduction

The time has come to transcend the differences in perspective between those who focus their efforts for access to justice on establishing a right to counsel (Civil Gideon) and those who focus their efforts on improving services for the self-represented.

It is certainly true that advocates for a civil right to counsel recognize that appointed counsel is not appropriate in every case and that there are some matters in which supported self-help or limited scope representation is appropriate. And it is certainly equally true that advocates for self-represented services would never claim that there are no cases in which counsel are critical. Thus to assert an unbridgeable gap between the perspectives of civil right to counsel advocates and those of self-represented innovation is to oversimplify.

Nevertheless, there remains a perception of a fundamental inconsistency between the strategies of those who place a priority on civil right to counsel and those who place a priority on increased support for self-help. To some degree, differences in strategic emphasis can be associated with differing institutional points of view.

Yet an exploration of these supposedly differing perspectives makes it clear that there are far more points of agreement than there are differences, that both are part of a broader access to justice movement, and that recognition of these commonalities can help us take steps to help ensure that both sets of strategies contribute to the broader access to justice agenda.

II. Commonality of Analysis/Vision

At this point in the emerging access to justice story, I think it is fair to say that the following points are agreed by both the vast majority of Right to Counsel/Civil Gideon advocates[2] and those who focus on self-represented innovation (indeed, often the same people or organizations play roles in both):[3]

1. That access to justice for all is a critical component of a democratic society, and that justice institutions have a responsibility for guaranteeing such access.
2. That there are cases in which it is critical for people to have a lawyer in order to obtain such access to justice.
3. That there are cases in which, regardless of the ultimate desirability of people having a lawyer (a matter on which there might be disagreement), it is far less critical for them to have a lawyer.
4. That, in any event, it is not financially realistic in the near future to provide full service representation for all, even in areas of substantive law listed in the ABA Resolution.
5. That there is need for some criteria or process for deciding who needs and gets whatever service is needed to ensure access, including possibly a lawyer.
6. That among the issues that appear to make a difference in whether a lawyer is most critical are potential disparities of power, the complexity of the case, and the importance of the issue at stake.
7. That research is important in moving forward an access agenda.
8. That law reform (including access to justice reform) requires the involvement of legal aid and access to justice non-profits.
9. That access to justice is advanced by close collaborations between a variety of partners, including bench, bar, and legal aid.

The Relationship of the Right to Counsel
Continued from page 47

III. Differences in Analysis and Possible Transcending Approach

However, underneath these commonalities are a number of differences in analysis (although of course, within each group there are significant variations, which result in a significant overlap in views.) For each difference, I suggest a way of transcending the difference.)

1. **Skepticism about Fairness of Outcomes Without Counsel**
   Right to counsel advocates are much more skeptical of the practical ability of self-represented litigants to obtain fair outcomes — thus their willingness to consider triage is focused more on the importance of the stake, than other factors such as capacity of the parties.

   Those who work in the self-represented area certainly acknowledge that such litigants are at the mercy of the court process, which must be monitored and improved. Right to counsel advocates might be cautious not to make policy from anecdote, assuming that the worst court environments are inevitable or typical.

2. **Optimism About Court Accessibly**
   Self-represented innovation advocates are more optimistic about the extent to which courts can be made accessible, in part by judicial education, plain language forms, online legal information, self-help services, etc. Thus their perspective on triage is focused somewhat more on the complexity of the issue and the capacity the litigant to handle the particular demands of the case.

   Self-represented advocates have much to learn about the limits of this approach — for example, the online Turner Symposium included well-considered cautions about the risks of bad forms. Right to counsel advocates might consider bringing their perspectives on the difficulties of such an approach to the design table, helping ensure that the forms, services, and judicial education are as effective as possible.

3. **Skepticism About Judicial Commitment**
   Some right to counsel advocates are often much more skeptical about the commitment of the judiciary to access, thus leading to a reluctance to rely on the judiciary to make decisions about who should have counsel, and to a tendency to support systems of clear categorical eligibility, rather than systems of judicial discretion.

   Right to counsel advocates might sometimes be more effective with judges if they urged a range of innovations, rather than just the "more lawyer" argument, which can seem self-serving. Self-represented advocates need to be sensitive to the need to be honest about the impact that insensitive judges can have on the overall access experience.

4. **Differences in Perception of the Value of Empowerment**
   While theories of the empowering value of self-representation are common to some in both groups, there is perhaps a greater focus on this among self-represented innovation advocates, and greater doubt among right to counsel folks.

   It is not so hard for both groups simultaneously to recognize the general value of the idea, while being realistic about such empowerment not being a substitute for effective protection of legal rights.

5. **Differences in Perceived Value of Self-Representation**
   There are those (including judges) who believe that there are cases (particularly standard high volume cases) in which self-representation makes case handling simpler and no less accurate. This view is rare in the right to counsel movement.

   This difference in perspective might be resolved by some analysis of when it might be more or less true, leading potentially to much better triage.

6. **Perceptions of Role of Research**
   While both groups have a complex relationship to research, right to counsel folks focus more on its potential to show a large impact on outcomes from the provision of counsel. Self-represented innovation advocates on the other hand focus more on the capacity of research to show the potential sufficiency of alternatives to full representation in some situations. In other words, while each accepts the general value of research, the two tend to hope for something somewhat different from it. Perhaps the key question is willingness of both groups to accept

results not in accordance with their worldview, and to engage in a dialog with each other and with those who bring the research perspective. There is a strong common interest in a research basis for generalizations about what factors have the greatest impact on the need for counsel.

Ultimately both groups have an interest in making sure that the questions asked are appropriate and the methodology used to answer them is the best it can be. Beyond that, both do need to recognize that this is not about making the case, it is about making the system as good as it can be, given limited resources.

IV. How these Differences have Played Out so Far — Two Examples

How these agreements and differences play out is beautifully played out in reactions to perhaps the two most important access headlines of 2011: the *Turner v. Rogers* decision, and the publication of offers of representation research by Professor Jim Greiner of Harvard and others.

In the case of *Turner*, the right to counsel folks were understandably worried by what they saw as an incomprehensible failure to recognize the need for a lawyer on the facts of that case, and by an apparent retreat from what had been hoped to be the view that incarceration always triggered counsel. They found encouragement in the Court's reserving for another day right to counsel claims in which the opponent is represented by counsel, or is the state itself.

Self-represented advocates, on the other hand, focused on the Court's endorsement of forms, judicial engagement, and more implicitly, triage. They pointed to the universality of the due process analysis for all self-represented cases, including the rights of both sides, and found encouragement in the lack of cost analysis in the decision. They urged the use of the decision for states to "self-audit" for the sufficiency of their self-represented and triage for the need for counsel procedures. A wide range of such responses from both groups can be seen in the Concurring Opinions Symposium at *http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers*. It is important to recognize that these two views are far from inconsistent — many of us hold both of them, and they point together to a common agenda — see below. The response to the fully randomized research on offers of counsel was equally interesting. In gross summary, the three pieces of research reported:

1. A lack of improvement in outcomes from offers of representation by Harvard Law students, perhaps explained by the accessibility of the underlying system, by quirks of the pool and process, by the issue that was studied, which is not the provision of representation itself, but rather the offer of representation, or other reasons;
2. Very dramatic improvements in outcomes in cases offered full representation by a legal aid program after random selection from a pool selected from the provider as likely to benefit from that representation, compared to brief attorney-of-the-day assistance, excluding in the courtroom, possibly explained by the zealousness of the provider, the court environment, or the wisdom of the provider in its selection processes of the pool.
3. Lack of improvement in outcomes from offers of full representation compared to brief services in a Housing Court in the same state as #2, possibly explained by the nature of the full representation, by the court environment (which included aggressive result-oriented mediation), or other factors.

While there has as yet been relatively little public discussion on the second and third of these studies (the first is extensively analyzed in another Concurring Opinions Symposium at *http://www.concurringopinions.com/archives/category/representation-symposium*), I think it is generally fair to say that self-represented litigants have focused on the fact that at least in some environments brief services are sufficient, while right to counsel advocates have emphasized the dramatic results in the second listed study. (The implications of the studies are summarized in my blog at *http://accesstojustice.net/2011/10/24/more-greiner-et-al-offers-of-counsel-studies-–-the-debate-continues-–-newsmaker-interview-planned/*, and addressed by Jim Greiner in a NewsMaker Interview in the blog at *http://accesstojustice.net/2011/11/07/newsmaker-interview-prof-jim-greiner-on-the-latest-offer-outcomes-research-and-its-implications/*. The good news is that there seems to be general agreement that we need much more of this research, particularly if it is to help us make choices about where to focus counsel resources – again showing agreement rather than conflict.

V. Roots of the Differences and the Risks They Bring

So, why these differences, and are they even real? Many, I think are more institutional or experience-based than ideological. Legal aid lawyers tend to have first hand exposure to what they perceive as the injustices perpetrated by courts – indeed the advocacy

The Relationship of the Right to Counsel
Continued from page 49

role, in which one sometimes loses, almost inevitably produces this perspective. They tend to believe that their cause is righteous and almost have to feel that way to do their job. Court staff and judges, on the other hand, almost have to feel that their system functions, at least when given the information with which to do so.

Put another way, the differences reflect the culture of institutions. Litigating lawyers are advocates, and believe that their cause is right. Court staff and judges believe that their institutions attempt to "do the right thing" and need adequate information to make an appropriate decision. Courts are neutral institutions, while legal aid organizations are advocacy organizations. Given respect for each others' experiences and perspectives, and given recognition that both groups bring value from their experiences and institutional cultures, it should not be so hard to find common ground and common paths. Indeed, experience with many access to justice commissions has shown just such a potential to build a stronger path from an interaction of perspectives.

Such a path is critical if access is not to come to grief on the shoals of the Money Question. There is a real risk that legal aid programs will perceive themselves as in a competition for money with access-oriented programs operated by the courts themselves. It is perhaps no surprise that when those programs are operated by legal aid under contract to the courts, some of the opposition disappears. It is also no surprise that if courts operate the programs, the funds for those programs increase as the court sees the benefit and is not in a position of funding an outside agency. In general, those programs developed by courts do not use funds that would be gone to legal aid, and have, in fact, created significant new funding streams for low-income persons. (As a general matter, the perception of funding competition is probably much smaller on the courts side, if only because court budgets are much bigger than legal aid budgets, so the percentage at stake is relatively smaller.)

The right to counsel folks are much more rights-oriented, while the self-represented litigant people tend to focus on concrete improvements in access. *Turner* may somewhat reduce that difference, although court participants are going to be at least initially nervous about additional obligations imposed on them as a matter of law. (Just look at how the ABA Language Access Standards issue has played out recently.)

The impact of any such differences will vary greatly depending on local legal and court cultures. In those states in which courts have been major advocates for access funding, made major efforts to provide access services and/or changed their processes in the interests of access, the differences in perspective will be much smaller. In contrast, states in which there is no history of working together in the interests of access, the differences in perspective will be far greater. The price, of those differences, of course, will be paid less by those institutions than by the litigants.

Below are discussed some general strategies for transcending these differences. Such strategies will reduce the risk that people perceive right to counsel and self-represented litigant strategies as competing, or that the two groups start creating narratives that undercut each other: "self-help services do not help"; "lawyers clog up the system, and are not really needed." Most worrying would be if these potentially competing narratives resulted in a bare knuckle fight for resources — perhaps more likely in tough times.

VI. Strategies to Focus on Common Access Interests

In formulating those strategies, it must always be remembered that the courts and legal aid are different institutions, and their different needs for neutrality and for the freedom to advocate cannot be ignored. Thus the courts cannot commit to Civil Gideon as constitutional right, except through appropriate procedure, and legal aid cannot compromise its freedom to advocate for Civil Gideon in the courts if it chooses.

Common Set of Principles

While I am far from sure that it would be practical to draft and/or ratify such a document, it is at least worth thinking about a common set of access principles that might resonate with participants in both groups. Such a statement might have elements similar to those listed in Part II, above. Such a statement might help keep both groups focused on innovations and research that would fit within common parameters, rather than pulling against each other.

Continuum of Services

Implicit in the idea of a common approach is the idea of an integrated system of access in which a continuum of services is available, depending on need and circumstances. This is the foundation of getting away from an either/or view to a more subtle evidence-based set of solutions, and requires each side to think

flexibly about how its services fit into the overall system.

Triage and Assignment

There needs to be a focus on experiments which attempt to test different ways of allocating scarce resources to those most in need, and most likely to benefit from them. The two groups may have interest in testing different approaches — legal aid groups, for example, might have stronger interest in showing the value of triage by legal aid, while court-based self-represented programs might want to test whether a neutral triage methodology can be established to identify needs that litigants have beyond self-help and develop a streamlined system with legal aid to minimize litigants getting inappropriate referrals.. However, both have a strong common interest in developing and demonstrating a system that works and is efficient.

Research Agenda

This suggests the potential for a common research agenda. Both groups, for example, need to know what factors should be considered in deciding who needs what service, even if they may have somewhat different perspectives in deciding how such services are provided. Neither group wants to spend money on resources that are not needed, and both want to get needed and sufficient services to as many people in need as possible. Moreover, both have an interest in seeing all services delivered as efficiency and effectively as possible.

Self-Audit Approach

After *Turner v. Rogers*, there is some force to the argument that states should be self-assessing their procedures for the self-represented for general compliance with that cases requirements of sufficiency of procedures to provide the fairness and accuracy appropriate to the matter at stake – including potentially whether there are sufficient procedures to identify if there is need for counsel. (It is interesting that at the December 2011 NLADA Annual Conference, Justice Breyer, the author of *Turner*, encouraged debate on the possible need for triage.) Such self-audit seems fully consistent with both perspectives.

Simplification Approach

As courts, legal aid, and the bar all struggle with declining financial resources, there is really only one way to manage budgets while increasing access and that is to make each case cheaper for all the players to handle. That makes it easier to fund counsel, when needed, and easier for the court, legal aid or other bar organizations to provide alternative services when those can be sufficient.

Thus both groups might be able to make common cause in the interests of simplification of rules, forms and procedures, particularly in those areas in which a high percentage of the cases involve low-income people.

Maintaining Communication

Finally, and obviously, we need to find better ways to maintain communication between those working in both areas, while recognizing that respectful creative tension can be highly productive.

VII. Conclusion

It may be that the emerging maturity of the right to counsel and self-represented movements, combined with the catalysts of *Turner,* the financial crisis, and the new national focus on rigorous research, will together enable a much more common focus than has been possible before. If so, that can only serve the interests of access to justice.

1 Richard Zorza is the Coordinator of the Self-Represented Litigation Network. Opinions expressed are his and his alone. They do not represent those of the Network or its participants, or other organizations with which he is associated. This article is inspired by the work of those who are already working to advance both types of access agenda at the same time. Particular thanks go to Bonne Hough and Associate Justice Laurie Zelon for their assistance in thinking these matters through. The faults and inadequacies are the author's and the author's alone, and reveal only his failure to take wise advice. Richard may be reached at *richard@zorza.net*.

2 It should be noted that not all the right to counsel and legal aid communities are necessarily identical in their approaches to these issues. A number of legal aid programs operate self-help services, even as they advocate for additional resources for counsel. Moreover, some legal aid programs are anxious that a successful right to counsel campaign would result in a lessening of legal aid autonomy, or additional competition for resources.

3 Most of these are stated or implied in the Shriver statute, in the ABA Model Statute, and in self-represented litigant documents such as the Self-Represented Litigation Network's *Best Practices.*