



The Fight for Legal Aid Funding and Right to Counsel Advocacy: An Incremental Approach and an Overarching Message

By Steve Eppler-Epstein, Executive Director¹
Connecticut Legal Services

Across the country, low-income litigants have a right to counsel in only an uneven and limited set of circumstances. Most broadly, low-income criminal



defendants charged with serious crimes have the now-iconic *Gideon v. Wainwright* right to counsel, once they have been presented to the court.² Similarly, *In Re Gault* established that in quasi-criminal juvenile settings, youth have a right to counsel.³ Beyond the criminal setting, the right to

counsel becomes thin indeed; it is limited to state-by-state establishment of rights that may include (as local examples) the appointment of counsel in child protection/termination of parental rights proceedings; defense of paternity cases; or (for children) complex custody matters. In example after example of cases that have huge impact on poor people's lives — whether a family becomes homeless, whether parents lose custody of their child, whether people are deported from the country, whether children are allowed to stay in school, whether completely destitute people qualify for subsistence benefits — low income people generally have no right to get help from a lawyer, and must rely on the very scarce assistance provided by the legal aid and pro bono networks. There is no dearth of data on how inadequate these non-profit and charitable resources are to meet the enormous volume of need.⁴ There is no doubt that the “justice gap” is in fact a vast chasm between the legal representation that poor people need, and what they can in fact get.

Much of the lawyering community has taken this challenge seriously. The American Bar Association has passed a resolution supporting a right to counsel in

civil cases, there have been some litigated expansions of the appointment of counsel in cases impacting parental rights, and situations involving loss of physical liberty, and there are pilots and other efforts state by state to expand a right to counsel. But successes are few and far between; and in the meantime IOLTA has collapsed, and federal and state funding for legal aid are under terrible pressure. Given our understanding of the seriousness and enormity of the justice gap, why aren't we making greater progress?

Despite our sometimes-emphasis on winning (or failing to win) civil right to counsel cases in court, the problem does not lie there. More substantially, the lack of broader civil access to lawyers results from the fact that not enough non-lawyers see things the way we do. Too many people think lawyers are a problem, not the answer. While the U.S. Supreme Court has denied claims for a civil right to counsel, these denials are rooted in broader social views, and in any case would not matter if there were legislative decisions to fund a broader right to counsel.

If the target is legislatures, not courts, the advocacy challenges to increasing support for a civil right to counsel can be put into five categories. For us to make significant progress towards a civil right to counsel, we need to develop a compelling vision that simultaneously addresses all of these challenges and can provide an answer in a succinct compelling message. Given the size and range of our challenges, I believe that this message must be applicable towards local and incremental efforts — selling affordable, achievable projects that will have measurable results and be seen as constructive in the broad (non-lawyer) community.

First, when looking at the challenges we face, we have to face an unpleasant reality: most people don't

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believe that lawyers make a positive difference in our society. Put more simply, a lot of people don't like lawyers.

The difficulties of protecting and improving legal aid funding are not only because opponents don't like our accomplishments or our clients. In even the most hostile environments, at least some of our efforts for some of our clients are widely appreciated. A bigger problem is that a broad segment of our society doesn't trust lawyers. For example, a 2011 Gallup poll found that only 17% of Americans think lawyers have high or very high ethical standards.⁵ Dislike for lawyers fuels the spread of large numbers of lawyer jokes. "How can you tell when a lawyer is lying?" (His lips are moving.) "What's the difference between a lawyer and a catfish?" (One is a scum-sucking bottom feeder and the other is a fish.) And, most telling, "What's the definition of mixed emotions?" (Watching your attorney drive over a cliff in your new car.) Even your own attorney is someone to hate.

The divide between the general population's view of lawyers and our own view of the importance of lawyering is exacerbated by a fundamental values difference. Legal aid lawyers (and lawyers generally) tend to believe that everyone should have a lawyer. We believe that justice cannot be achieved unless both sides in a matter are represented by counsel, so that all relevant facts and legal arguments can be exposed to the light of day and decided by a judge. Members of the broader public also believe in justice, but they may believe that having lawyers on the "wrong side" results in the miscarriage of justice. Those of us focusing on access to justice may talk about a "merits test" — prioritizing free legal help for those cases in which a low-income litigant is likely to win — as a necessary evil given the reality of limited resources. But non-lawyers often think that lawyers perform a disservice, winning cases that their client should have lost. In this view, a broader right to counsel is a terrible way to promote justice.

Second, even if people believe that lawyers promote justice, and that more people need lawyers, they may not feel that we have offered fair mechanisms to expand access to counsel. Both the legal aid funding argument and the civil right to counsel movement are focused on people who are very very poor — near or below the horrendously-low federal poverty Level. But the cost of private lawyers (except in contingency

fee cases) is prohibitively high. The legal aid movement generally argues that in a world of limited resources, it makes sense to start with the people in the greatest need. But we have allowed our statutory definitions of program eligibility, and our ties to 1960s-era welfare programs, to shield us from a question of fundamental fairness: If we believe that everyone should have a lawyer, why is it acceptable that people earning 250% or 300% of the poverty level don't have access to a lawyer? They can't possibly afford the cost of a complicated custody battle, or the defense of a foreclosure action. And many of these people are not going to be very competent at being "their own lawyer."

But even though it seems unfair to say that only impoverished people get a lawyer, and that we will not help *almost*-low-income people who can't afford a lawyer, it is not easy to come up with a coherent proposal that will improve popular support. Free lawyers for people above the poverty line make private lawyers nervous; are lawyers going to lose business to government-funded non-profits? And the more people are getting legal help, the more the proposed solution will cost.

Third, the development of apparent cheaper alternatives may diminish support for legal aid funding and the broadening of right to counsel (or at least provide an excuse for the underfunding of legal aid). One development is the tendency in Congress and locally to suggest that pro bono legal help from private lawyers should make up for legal aid funding shortfalls.⁶ In response, legal aid, bar and judicial groups work virtuously to expand pro bono assistance. The pro bono effort is important to our clients. When pro bono is well-targeted and well-planned, and when it has good support from the legal aid infrastructure, it can expand the reach and impact of our services. But pro bono legal help makes up a tiny fraction of the number of cases handled each year for poor people. Even if we could double pro bono services, while the individuals who get a lawyer would benefit, the increase would make only a small dent in the justice gap.

The other development, which is having an even greater impact on our environment, is the rapid expansion of pro se assistance. Courts and court systems all over the country are building websites, developing pro se materials, establishing court service centers and creating "lawyer of the day" programs. Legal aid providers have joined in these efforts and established new ones of our own. It is completely appropriate and probably very helpful to litigants that legal aid, the bar, and the courts are investing in pro se help, given the

tidal wave of unrepresented litigants sweeping through our courts. The problem is that the expansion of pro se resources can appear to be a valid alternative to legal aid funding or other right to counsel efforts. The U.S. Supreme Court's decision in *Turner v. Rogers* has, in fact, been seen in this light ("*Turner* dealt a death blow to hopes for a federal civil *Gideon*." "...all nine Justices rejected the claimed right to counsel, but the five-Justice majority required courts to help pro se litigants navigate the process themselves.")⁷ The trend towards pro se assistance could be understood as an attempt to provide less-intensive resources to those more able to help themselves, as suggested in the "service pyramid" structure described by Richard Zorza and Jeanne Charn.⁸ But there is a danger that pro se assistance will be understood as a complete, low-cost replacement for a lawyer.

Fourth, the lack of clarity about the end state we imagine — the "vision" in strategic planning terms — hampers our ability to create a coherent strategy or compelling message around an expansion of access to civil counsel. We are struggling with myriad issues regarding the scope of the imagined right. To be fair, these are tough issues to figure out. But we need agreement on what a right to counsel means — or what an "appropriate" level of legal aid to the poor would be — if we are to work together to convey a persuasive vision to the broader public. Some of the "scope" questions include:

- Is there a right to counsel (or, in a discussion of expanded legal aid, is the expense warranted) for all cases without regard to merit (a notion that is popular among lawyers but less popular elsewhere)? If merit is relevant, does this mean we must winnow out frivolous claims, or do we have to go further and determine whether claims are likely meritorious? If a case is not found to be complicated or meritorious enough to appoint counsel, what happens later if facts emerge that suggest the case is in fact meritorious? And who is to make all these determinations?
- What about cases that have merit, but the client is likely to win the case with or without a lawyer (in other words, cases in which a lawyer is not likely to make a difference)?
- In what areas of law will people have a right to counsel or expanded legal assistance? The ABA resolution focuses on "adversarial proceedings where basic human needs—such as shelter, sustenance, safety, health, or child custody—are at stake."⁹ California's draft Equal Justice Act would go

further, providing counsel "when required for the proper preparation of significant legal documents in undisputed matters" (e.g. health directives).¹⁰

- When will counsel be available before an action is filed (either to a plaintiff who cannot bring a case without assistance, or to a defendant who might avoid litigation with good legal help) ?
- When should "full representation" be provided, and when should assistance be more limited?
- And to the extent some evaluation is required to apply the standards arrived at, who will be responsible (and provided resources) to make those decisions?

Fifth, finally, and most obviously, a huge barrier to right to counsel or expanded legal aid is cost. We can easily imagine a delivery system that would require four times, or even ten times the amount of funding for civil legal services that is currently available. There is no need to belabor this point; a big price tag tends to make people say "no."

We already have some good answers to these five challenges — evidence of which is seen in our success in preserving much of the current legal aid network in the face of persistent funding challenges. But to strengthen funding for legal aid and enact a standard for a civil right to counsel, we must both come to agreement on a clear long-term vision, and make some incremental progress that creates positive momentum towards access to justice.

1. In everything we do we should seek to deliver a consistent *and insistent* message about why our work makes the world a better place. We make our communities fairer; we help people deserving of sympathy; and (at least some of the time) our work brings federal money into a local community or saves state money. We tell these stories when we are asking for donations, applying for a grant or advocating for government funding. But these messages must be woven into our work, and *never* taken for granted, so that they are part of every staff member, board member, and supporter's understanding of what each case is about. For example, when we talk about our client assistance websites or our pro se clinics, we should always explain which clients can be helped in these ways, and which cannot. When we talk about people we have represented, we should make clear why these clients could not have received justice had they not been represented by a lawyer.
2. Our outreach efforts and client service plans

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should be framed as reaching a portion of a fully-described set of client legal needs. Rather than simply list “this is what we do,” legal aid programs should create strategic documents that describe all the legal needs that are within our mission, describe which of these needs we will focus on, what resources and strategies we will use to address them, and what logic (and evidence) underlie these decisions. With our current funding, we are making “scope of service” decisions all the time, even while we are reluctant to limit the scope of service that would be guaranteed by a broader right to counsel. The only way to make these two strains of thought consistent is to admit that while resources for civil lawyering must be expanded, there always will at some point be a limit. To make more adequate funding a compelling vision we must provide a much clearer description of what services are currently being provided, why they have been prioritized, and *what is left undone*.

3. Our priority decisions should be increasingly informed by good data and clear thinking about impact. We need to know when it is that the assignment of lawyers to help poor people results in improved chance of keeping custody of a child, or reduced homelessness. We need to have better data about the savings in governmental costs when legal aid lawyering keeps crises at bay. There are the beginnings of good studies to identify when lawyers make a difference — in which cases, with which advocacy strategies, for which clients.¹¹ Not all of us are convinced that such data will necessarily attract support or funding; but it will make our organizations more effective and will give greater shape and strength to our vision of legal aid, and those improvements *will* attract support.
4. We must create discrete, replicable projects that expand access to counsel. We must document these projects and the ways in which they represent progress in the great morass of unaddressed legal needs. And then we should make the most successful of those projects the subject of funding or even legal strategies, arguing that given the demonstrated impact on delivery of justice, it is essential that the project be replicated everywhere. These projects could take on many forms, such as:
 - » Service of a population previously receiving

only limited help (what would happen if we represented *every* low-income victim of domestic violence in a particular region?);

- » Projects that focus on clients who are most severely challenged (there are theories of social assistance that argue that the greatest social impact can be achieved by helping the very small number of people who are in the greatest need);
- » Projects that break through the “eligibility line” to reach for broader fairness in the distribution of free legal help (for example, a sliding scale voucher system that provides more legal aid dollars to the poorer people, but does not leave the almost-poor with no legal help at all).

These are just a few ideas; in a community as experienced and creative as ours, more and better ideas will abound. But no matter what the specific approaches, the legal aid community must reach agreement on an overall vision and a consistent message describing expansion towards a right to counsel, and then take concrete smaller steps to demonstrate why that vision is compelling and a vision that can be shared by in every state and by every citizen.

1 Steve Eppler-Epstein is the Executive Director of Connecticut Legal Services. Steve may be reached at SEppler-Epstein@connlegalservices.org.

2 372 U.S. 335 (1963).

3 387 U.S. 1 (1967).

4 See, for example, Legal Services Corporation report, “Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans” (2009) and numerous comparable state studies.

5 <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx>.

6 See ABA Journal, “Lawyers May Need to Increase Pro Bono Work to Make Up for Legal Aid Cuts, Congressman Says,” April 6, 2011. http://www.abajournal.com/news/article/lawyers_may_need_to_increase_pro_bono_work_to_make_up_for_legal_aid_cuts_co/.

7 Benjamin H. Barton & Stephanos Bibas, “Triaging Appointed-Counsel Funding and Pro Se Access to Justice,” Public Law and Legal Theory Research Paper Series, Research Paper No. #11-36, The University of Tennessee Knoxville College of Law (September 2011), <http://ssrn.com/abstract=1919534>.

8 Jeanne Charn and Richard Zorza, “Civil Legal Assistance For All Americans,” Bellow-Sacks Access to Civil Legal

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- the 2006 recipient of the NLADA Denison Ray Award. She received her J.D. magna cum laude from the University of Pennsylvania Law School, where she was an editor of the *Law Review* and her B.A. cum laude from Yale University. Cathy may be reached at ccarr@clsphila.org.
- 2 Debra Gardner and John Pollock's leadership in pulling together a conference in December 2011 on right to counsel was extremely helpful to me, as were conversations with at least a dozen other thought leaders in our community who put up with my questions. Thank you all; you know who you are.
- 3 For a more scholarly and comprehensive discussion of some of the issues I address in this article, see Udell and Abel, "Information for Civil Justice Systems About Civil Right to Counsel Initiatives", June 9, 2009 available at <http://www.civilrighttocounsel.org/pdfs/NCCRC%20Informational%20Memo.pdf>.
- 4 Making "Protect our funding" into Question Number One reminds me of a visit to court as a law student when a private attorney stood up in a criminal case and told the judge he needed a postponement because there was a "Rule Number One" violation. My attorney supervisor quietly explained that, of course, Rule Number One of professional conduct is that the attorney gets paid. Somehow I thought I was avoiding that issue by going into legal services, only to end up spending most of my time worrying about how attorneys get paid.
- 5 If some of the cases we in legal services do now become subject to a right to counsel, we may choose to stop doing them and leave that work to other counsel, funded with the right to counsel funds. We could then use the freed up resources on other work. But that would be our choice.
- 6 For a discussion of this issue and its tensions, see Catherine C. Carr, "Legal Services and an Anti-Poverty Agenda: A Conflict of Visions and the Need for their Reconciliation", 14 *University of Pennsylvania Journal of Law and Social Change* 352 (2011).
- 7 I have heard some fears that a right to counsel will mean that "deadbeat" fathers trying to avoid child support or abusers seeking to defend themselves from domestic violence will be provided representation, and this will in turn reduce representation to more "deserving" mothers or domestic violence victims. Once we get beyond the assumption that funding for the right to counsel somehow must come from existing pots of funds for legal services, and instead assume that this movement can expand the resource pie, these fears disappear. Yes, these defendants will have counsel, but so will their opponents in a system where all litigants get the representation they need. I think our years of struggling for insufficient resources have limited our ability to envision a world of increased access where everyone can get the assistance they need, and where new assistance can be provided without affecting our current work. I am now ready to embrace that more optimistic long term vision.
- 8 For a perspective on how limited representation, right to counsel and judicial/court assistance can fit together as part of a broad movement for access to justice, see Russell Engler, "Towards a Context-Based Civil Gideon Through Access to Justice Initiatives", 40 *Clearinghouse Review* 196 (2006).

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- Services Project, Harvard Law School (2005).
- 9 ABA Resolution 105 (Revised), "ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings" (August 2010).
- 10 Earl Johnson Jr., "Equality Before The Law," 37 *Fordham Urban Law Journal* 157 (2010).
- 11 See, for example, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 88 (2010); D. James Greiner & Cassandra W. Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation Make?*, 121 *YALE L.J.* (forthcoming 2012), available at <http://ssrn.com/abstract=1708664>; D. James Greiner, Cassandra W. Pattanayak & Jonathan Hennessey, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future* (working paper, available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948286 (draft of October 23, 2011)); D. James Greiner, Cassandra W. Pattanayak & Jonathan Hennessey, *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* (working paper, available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078 (draft of October 24, 2011)).