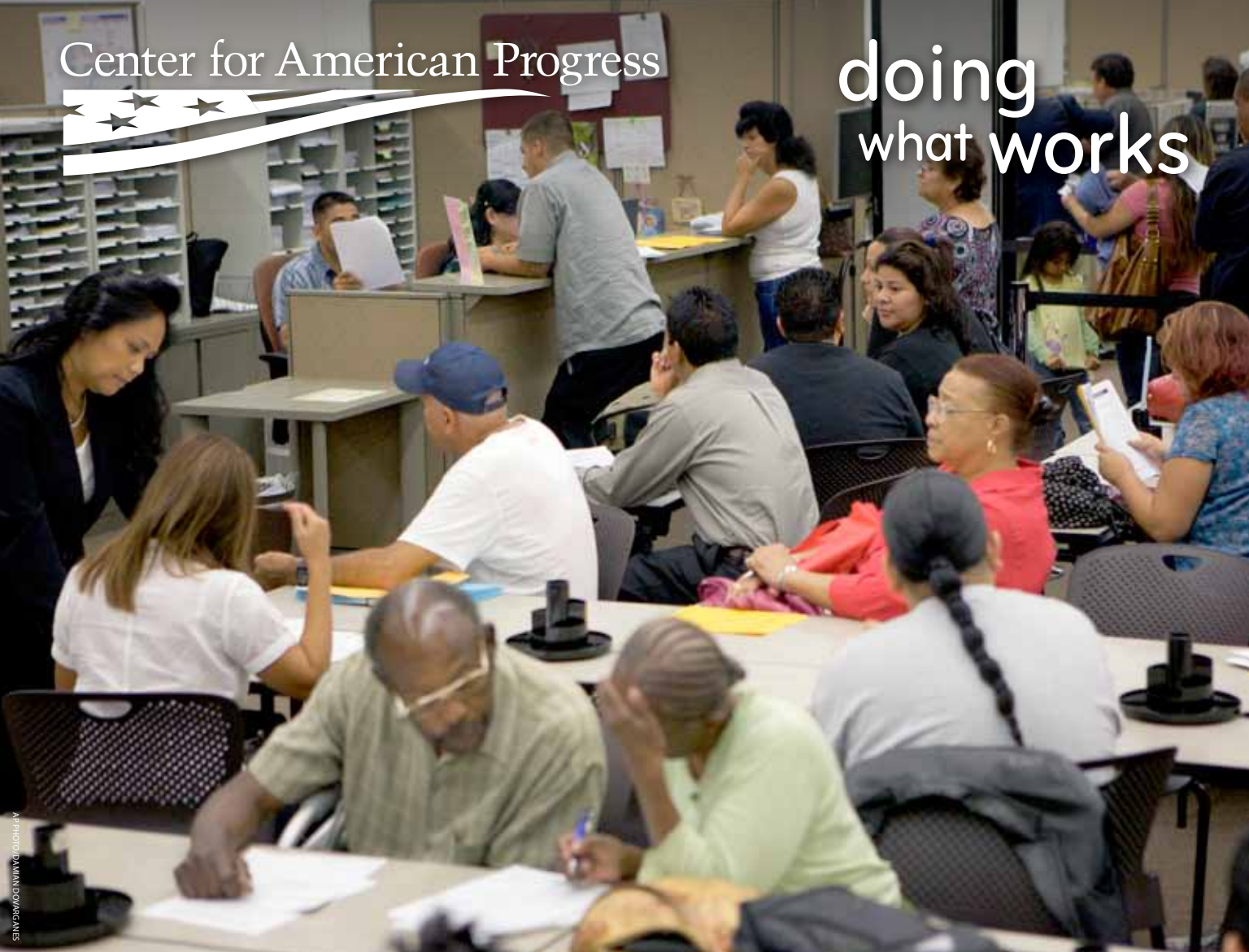


Center for American Progress

doing
what works



Closing the Justice Gap

How innovation and evidence can bring legal services
to more Americans

June 2011

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doing
what works

CAP's Doing What Works project promotes government reform to efficiently allocate scarce resources and achieve greater results for the American people. This project specifically has three key objectives:

- Eliminating or redesigning misguided spending programs and tax expenditures, focused on priority areas such as health care, energy, and education
- Boosting government productivity by streamlining management and strengthening operations in the areas of human resources, information technology, and procurement
- Building a foundation for smarter decision-making by enhancing transparency and performance measurement and evaluation

Front cover: People gather at the Los Angeles County Superior Court's Resource Center for Self-represented Litigants at the Stanley Mosk Courthouse in Los Angeles. More people are opting to represent themselves in civil court matters because they don't have the money to afford an attorney.

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Introduction to the series

These papers were commissioned by the Doing What Works project to explore the persistent gap between the legal needs of low-income people and capacity of the civil legal assistance system to meet those needs. Studies indicate that less than 20 percent of poor Americans' legal needs are being met, requiring unrepresented litigants to navigate complex and often unfriendly court systems. There's also severe inequality among states in legal aid funding. Our country's "pro se crisis" comes at a time when the need for civil legal assistance—to help people facing foreclosures, evictions, wrongful terminations, child custody, and other challenges—has never been higher.

Grounds for Objection

Causes and Consequences of America's Pro Se Crisis and
How to Solve the Problem of Unrepresented Litigants

Joy Moses June 2011

Introduction

The number of low and moderate-income litigants representing themselves in civil matters has increased in recent decades. These pro se litigants have been the subject of much discussion, but have not been sufficiently researched.

There’s no nationwide snapshot of the problem. We don’t know precisely how many people represent themselves in civil legal matters in the United States, and we can’t make year-over-year comparisons. Still, 60 percent of judges in a 2009 study reported increases in self-represented litigants as a result of the economic crisis.¹ Some reported seeing many more middle class litigants coming to court without lawyers.

Types of cases

Pro se representation is particularly prevalent in family law cases such as divorce, custody, child support, and paternity. The trend is likely tied to increased divorce, out-of-wedlock births, and increased investments in federal child support enforcement. Other types of cases also associated with self-representation include protection orders, landlord-tenant disputes, and probate matters. Consider the pro se data from a sampling of states, in Figure 1:²

FIGURE 1
A snapshot of the pro se crisis across the country

Case type	State	Percentage of pro se litigants
Family law	Wisconsin	70 percent of cases in some counties
	Connecticut	69 percent of plaintiffs 43 percent of defendants
Probate	New Hampshire	38 percent of cases both sides unrepresented
	District of Columbia	44 percent of plaintiffs
Protection orders	Utah	59 percent of petitioners 82 percent of respondents
Landlord-tenant	Boston	50 percent of landlords 92 percent of tenants
	Utah	97 percent of tenants
Bankruptcy	California (Eastern District)	15 percent to 17 percent of filings

Source: See endnote #2 for sources

This phenomenon gets exacerbated during times of national and personal economic stress, like the recent financial crisis; debt and bankruptcy go hand in hand with not being able to afford an attorney.

Reasons for self-representation

A significant number of people represent themselves because they think their legal matters are simple enough to handle on their own. But a commonly reported reason for self-representation is that litigants are unable to afford legal assistance.

Attorneys' fees are often out of reach for many low- and moderate-income people. In 2009, the national average billing rate for attorneys was \$284 an hour. Clients are also charged for items like court costs and paralegal time.³ Unfortunately, we have no national-level data on the number of people who are priced out of hiring an attorney. But 65 percent of pro se litigants in Florida and 50 percent in the district court of Utah reported that the costs of hiring legal assistance were prohibitive.⁴

In the following pages, I explore why this phenomenon is a serious problem for both litigants and courts, and then close with a discussion of potential solutions. The solutions mentioned here are explored in greater detail in three papers published contemporaneously with this one: "When Second Best Is the Best We Can Do: Improving the Odds for Pro Se Civil Litigants," by Peter Edelman; "Access to Evidence: How an Evidence-Based Delivery System Can Improve Legal Aid for Low and Moderate-Income Americans," by Jeffrey Selbin, Jeanne Charn, and Josh Rosenthal; and "The Justice Gap: Civil Legal Assistance Today and Tomorrow," by Alan Houseman.

Concerns for litigants

Our society relies on courts to peacefully and fairly resolve civil disputes among citizens. When the court system fails, people get hurt.

Going it alone is difficult

Among the challenges facing a pro se litigant is knowing whether she has a valid case, and what the best arguments are in her favor. This entails not only a understanding of the law but of the history of judicial decisions interpreting the law—and that requires legal research. Pro se litigants are also often required to navigate a maze of procedural rules that govern paperwork, as well as rules of courtroom etiquette. Successful ones must understand legal terminology and have the communication skills to effectively write and speak on their own behalf.

The above requirements would be daunting even for the most educated members of society. A doctor, for example, might be a brilliant diagnostician with great bedside manner, but less skilled at persuasive writing or verbal debate. Even lawyers rarely represent themselves on matters in which they do not specialize. The challenge is particularly acute for those low- and moderate-income individuals with limited education or time to attend to their legal worries.

To be sure, many pro se litigants do achieve successful outcomes. The pro se trend has encouraged many courts to make their processes easier to navigate for nonlawyers. Courts sometimes offer trained personnel to provide information and assistance to pro se litigants.⁵ Some have simplified forms and publish helpful information in print and online. And judges are often understanding when litigants don't behave as a lawyer would.⁶ Despite these positive factors, there remain significant hurdles to ensuring that all people have access to justice.

We need more data to evaluate which of these reforms works best for low- and moderate-income people, so we can identify and replicate best practices.⁷ Self-help services likely work best for people whose issues are easiest to resolve. A childless couple with no property would likely find it easier to self-represent in a divorce while attorney representation may be more appropriate for a couple dealing with complex and/or multiple issues, such as allegations of child abuse and the hiding of assets.

And even the best designed self-help services may not help everyone. People with extraordinarily limited literacy skills, or those who suffer from mental illness, dementia, or substance abuse are more likely to need representation.

Going it alone often means going without

The legal needs of people who can't afford lawyers may simply go unmet. They may become frustrated with the process and abandon their pro se effort. They may be too intimidated or busy with family, work, and other demands to even begin trying.

There are indications that low- and moderate-income families have significant unmet legal needs. The American Bar Association in a 1993 study found that 71 percent of the legal needs of low-income households do not end up in the court system. The number for moderate-income households was 61 percent.⁸ Individuals were able to resolve some issues on their own but many simply remained unaddressed, the study found.

A major contributor to unmet legal needs is limited funding, which requires legal aid providers to engage in a form of triage, targeting resources to those cases that reflect the most dire of needs. Legal services providers who get federal funding turn away nearly 1 million cases a year because of insufficient resources.⁹ There is only one free legal services attorney for every 6,415 low-income people, according to the Legal Services Corp.¹⁰

Going it alone has consequences

So what are the consequences of being unable to afford a lawyer? In the 2009 CAP report, "Parenting with a Plan," we noted that estranged higher-income couples are more likely to divorce than are low-income couples—who are more likely to stay legally married while separated. Our hypothesis was that low- and

moderate-income families may suffer from more unnecessary strife because they cannot afford counsel or successfully self-represent in disputes over custody, visitation, and support.¹¹

Unaddressed legal needs threaten commonly shared notions that America is a place where anyone can get justice. Courts should be places where even the little guy can take on the powerful. That ideal falls apart when low- and moderate-income people are shut out of the courts.

Consider that tenants and consumers are far more likely to be unrepresented than are landlords and creditors, many jurisdictions report. The potential for injustice is great when a novice goes up against experienced attorneys and the consequences are losing a home, having to continue living in unsafe or unhealthy housing, or having to pay an avoidable debt.

Something else important is also lost when people lose access to justice. Courts were developed as a way to peacefully resolve disputes. When courts are bypassed, we risk unnecessary conflicts that lead to avoidable negative results.

For example, the children of disputing couples who can't afford legal assistance or who are delayed by navigating the court system alone may bear the brunt—witnessing unnecessary arguments, being denied interaction with one of the parents, or suffering from a lack of child-support payments.

Concerns for courts

In addition to causing problems for pro se litigants, significant numbers of self-represented people can raise concerns for courts, including challenges for court docket-management, judicial impartiality, and increased costs.

Some pro se cases are time-consuming

The presence of pro se litigants can cause the court to spend up to four times as much time on a case, research suggests.¹² This is a problem for courts that often have a long backlog of cases.

Court personnel say pro se litigants who don't understand standard procedures and paperwork requirements take up more courtroom time than litigants with lawyers. Judges may have to spend more time on the bench explaining information that is commonly understood by lawyers, or verbally soliciting facts that should have been presented. Likewise, court clerks may have to answer more questions and provide more than the usual amount of assistance. And participants may require repeated visits to the courtroom, because they didn't know to bring material the first time around.

To be sure, there are some categories of cases—such as family law and small claims—that may move more quickly when pro se participants are involved, according to one study.¹³ This phenomenon may be because pro se litigants have simpler cases, or because lawyers deploy more time-consuming tactics that may help their clients get better outcomes. And of course, some lawyers may make some issues more contentious and complicated than necessary.

Pro se cases raise impartiality concerns

In additions to concerns about the extra time pro se litigants require, judges worry that assisting unrepresented litigants from the bench will be viewed as preferential treatment.¹⁴ And clerks and other court personnel wonder whether helping these people is tantamount to practicing law without a license. These concerns underscore the need to remain vigilant about not crossing the line.

Pro se cases are expensive

Courts can and do reduce some of the burdens associated with pro se litigants by providing them with support such as pro se assistance centers, simplified forms, and quality informational materials. But it costs money to develop and maintain quality pro se assistance programs in courthouses and to provide necessary professional development for judges and other staff. Many courts are facing budgetary woes that have worsened since the recession. Similar funding concerns are plaguing free legal services organizations that provide both pro se assistance and direct representation to those who really shouldn't go it alone.

Taken together, these challenges hinder a courts' primary mission of dispensing justice. When pro se litigants take up more time and hinder the ability to get through backlogged court dockets, all members of society are at risk of not obtaining timely resolutions to their disputes. Any risk to judicial integrity (although certainly small in these cases) could damage a court reputation as impartial arbitrator.

Solutions

Improving access to justice for low- and moderate-income people unable to afford legal assistance will require both expanded access to lawyers and nonlawyer professionals.

Civil Gideon

There is a national movement underway to guarantee a right to counsel in civil legal cases. Modeled after the U.S. Supreme Court case of *Gideon v. Wainwright*, which guaranteed a right to counsel in criminal cases, the effort is being pursued along multiple fronts. The American Bar Association in 2006 adopted a resolution urging governments to provide a right to counsel for low-income people in cases where basic human needs—shelter, sustenance, safety, health, or child custody—are at stake.¹⁵ California has been the first in the nation to adopt related legislation, creating a series of pilot programs.¹⁶

Litigation has also played a role in furthering this debate. The U.S. Supreme Court recently heard arguments in *Turner v. Rogers* over whether someone has a right to counsel when there is a risk of being sent to jail for contempt in a civil trial.¹⁷ The Court recently ruled that, in general, no such right exists but could possibly apply in some circumstances.¹⁸

Despite the great need for more attorney assistance, the movement is often hindered by jurisdictional concerns about the costs involved with paying more attorneys to ensure that everyone is represented.

Innovative delivery methods

Beyond guaranteeing a right to counsel, there are other ways to ensure that low- and moderate- income people get greater access to attorneys. Peter Edelman's companion paper, "When Second Best Is the Best We Can Do," details innova-

tions such as “unbundling,” creating pro se resource centers, simplifying court processes, and using technology to dispense legal services more efficiently.

Increased funding

Organizations that provide free legal services have a special role to play in solving the pro se crisis. Not only do they increase access to justice for their client, they can help reduce some of the burdens that pro se litigants place on courts. They ensure that a certain percentage of cases are handled properly and efficiently, inform potential clients when they don’t have a valid case, and often resolve disputes without litigation.

These organizations need more federal money to continue their important work, even as the current budget climate threatens all federally funded programs. The Legal Services Corporation has had its budget cut in more budget cycles since 1976.¹⁹ Alan Houseman’s companion paper, “The Justice Gap,” stresses the need to eliminate restrictions on the use of federal funds and to address the disparities amongst states. These steps must be a part of coordinated funding efforts amongst federal, state, and other funders, as Houseman urges.

Evidence-based approaches

And of course, solutions to the pro se crisis should be guided by evidence-based approaches as described in another companion report to this one, “Access to Evidence,” by Jeffrey Selbin, Jeanne Charn, and Josh Rosenthal. We must direct money to what works. That will increase the return on investment of limited funding and could encourage funders to invest more in effective services.

More nonlawyers

The solution must also include the increased participation of nonlawyers. Alternative dispute resolution methods administered by lawyers and nonlawyers alike can help people avoid court altogether. Mediation is often considered particularly useful in family law cases where it can promote cooperation in parents who must remain significantly involved with one another after their case is resolved. And courthouse-based pro se assistance programs need not be primarily administered by lawyers.

That said, the value of lawyers must not be underestimated. For some litigants, alternatives to the traditional client-attorney relationship will not work. They may be unable to resolve their disputes in mediation, their case may be too complicated, or they may face personal issues such as mental health problems that make both ADR and self-representation poor options.

Conclusion

The ability to hire an attorney has become increasingly out of reach for both low- and moderate-income Americans. That has contributed to a dramatic expansion in recent decades in the number of people representing themselves in court. The rise of pro se litigants threatens both their access to justice and the proper functioning of courts.

We have significant work to do in expanding research and evaluation on unmet legal needs, as well as on the effectiveness of pro se assistance programs, alternative dispute resolution methods, pro bono programs, and free legal services providers. Such efforts will help to improve services and spread information about best practices. Meanwhile, advocates for justice must push for continued government funding.

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About the author

Joy Moses is a Senior Policy Analyst with the Poverty and Prosperity program at American Progress. Prior to joining American Progress, she was a Children and Youth Staff Attorney at the National Law Center on Homelessness & Poverty. The majority of her practice focused on the education rights of homeless students, including ensuring school enrollments and participation in such services as the National School Lunch Program, special education, and preschool education. Her efforts involved producing informational publications; presenting at workshops focused on explaining relevant laws and best practices; administrative and legislative advocacy; litigation; and providing technical assistance to state and local school officials, legal advocates for children, service providers, and families.

She began her career as an Equal Justice Works fellow at the NAACP Legal Defense Fund where she worked on policy and litigation activities related to high stakes testing, school desegregation, and access to the courts for civil rights plaintiffs. These efforts led Joy to become a co-editor and chapter author for a book entitled *Awakening From the Dream: Civil Rights Under Siege and the New Struggle for Equal Justice* as well as steering committee member for the National Campaign to Restore Civil Rights. She has also sought to be involved in the D.C. legal community, having served as a president of the Washington Council of Lawyers, an organization promoting pro bono and public interest advocacy as a means of ensuring equal justice for low income residents of the District of Columbia.

Joy received her J.D. from Georgetown University Law Center and a B.A. from Stanford University.

The Justice Gap

Civil Legal Assistance Today and Tomorrow

Alan Houseman June 2011

Introduction and summary

There's a huge gap today between the legal needs of low-income people and the capacity of the civil legal assistance system to meet those needs. There's also severe inequality in funding among states. This "justice gap" was most recently demonstrated by a 2009 Legal Services Corporation report, "Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans." Among the report's key findings:

- For every recipient of LSC-funded legal aid, one eligible applicant was turned away.
- Less than 20 percent of low-income Americans' legal needs were being met.

Without the services of a lawyer, low-income people with civil legal problems may have no practical way of protecting their rights and advancing their interests. As Congress declared when creating an independent organization to fund civil legal assistance in the Legal Services Corporation Act of 1974: "Providing legal assistance to those who face an economic barrier to adequate legal counsel will serve the best ends of justice and assist in improving opportunities for low-income persons" and will "reaffirm faith in our government of laws."¹

Civil legal aid providers help low-income people and supportive groups navigate various civil matters like housing evictions, home foreclosures, predatory lending, child support, custody, and domestic violence. They also help people access government benefits like Social Security, disability, unemployment insurance, food stamps, and health insurance.

Between 1965 and 1985 civil legal assistance was funded primarily by the Legal Services Corporation and other federal funding sources. The LSC is a private nonprofit corporation funded by Congress to provide grants to civil legal aid programs. Over the last two decades, states have increased their funding and involvement in the overall operation of the civil legal aid system. Since 1996 LSC and state funders have been moving from a locally based legal services delivery system toward a more comprehensive, coordinated, and integrated statewide system for getting civil legal aid to low-income people.

The current civil legal assistance system is a locally based system of independent staff-based service providers, supplemented by private attorney volunteer (pro bono) programs, law school clinical programs, and self-help programs. Providers are funded from a variety of places, of which less than a third today are federal sources and more than a third are state sources.

This report describes the state of civil legal services today and how we got here. It makes the following recommendations:

More funding

Congress should increase funding for the Legal Services Corporation to \$600 million within four years. The Obama administration should try to get federal agencies to increase their own funding for civil legal aid. And state advocates should seek to increase state funding through higher filing fees and general revenue dedicated to civil legal aid.

Better service delivery

We also need to improve the effectiveness and efficiency of the current system:

- Congress should eliminate unnecessary LSC restrictions on what programs can do.
- The LSC and state entities should develop concrete action plans to ensure training of and support for legal aid attorneys and managers.
- The LSC, Justice Department, American Bar Association, and state advocates should promote an increase in the number of private attorneys engaged in civil legal aid representation, and more effectively coordinate their time.
- The LSC and other funders should require legal aid programs to conduct ongoing self-evaluations and to use performance measures, and funders should likewise evaluate grantees for quality and effectiveness.
- The LSC and state funders should encourage innovative approaches to legal services and then help effective innovations replicate and scale up across the country.
- The LSC and the Justice Department should develop and institutionalize a research capacity within the legal aid system to study what works.
- Public and private supporters of civil legal aid should work to increase the number of access-to-justice commissions around the country.

A comprehensive reform agenda of the kind we recommend will require a coordinated and comprehensive effort among federal and state funders, the judiciary, the bar, and other stakeholders. Getting so many diverse stakeholders to work together will require leadership on the local, state, and federal levels and buy-in from the legal aid providers and pro bono networks.

Background: Causes of the justice gap

Civil legal aid in the United States is provided primarily by approximately 500 independent, staff-based service providers, including 136 programs funded by the Legal Services Corporation. These programs are nonprofit entities that deliver civil legal aid by mostly full-time attorneys and paralegals who provide a variety of legal and related services including advice, brief service, court and hearing representation, community legal education, economic and community development, and policy advocacy.

While funders do make some restrictions, the legal aid programs themselves generally make key decisions about the area and client base they will serve, the mix of staff they employ, and the scope and type of services they will provide.

These core providers are supplemented by approximately 900 pro bono programs not funded by the Legal Services Corporation, most of them affiliated with state and local bar associations. More than 200 law school clinical programs and several hundred self-help programs also supplement the staff-based delivery system. In addition, approximately 20 state support organizations provide training and technical support to local legal aid advocates on key substantive issues. They also advocate before state legislative and administrative bodies on policy issues affecting low-income people.

A history of funding cuts and innovation growth

The civil legal aid system has evolved over time from a few urban programs to a complex but decentralized system that now covers all states and other U.S. territories. While there have been significant variations in Legal Services Corporation funding since it was established in 1975, it was cut by 25 percent in 1981 and by another third in 1996. That year, Congress imposed new and unprecedented restrictions on LSC grantees, beginning an unsuccessful effort by congressional critics to completely eliminate the nonprofit's funding over three years.

In response to that effort, some LSC-funded providers gave up their LSC funds or spun off non-LSC-funded affiliates. Many state-support entities were eliminated entirely. To survive, the 15 national support entities that had lost their LSC funds had to raise private money, often from major national foundations.

The legal services community has responded to funding challenges with innovative new delivery systems, such as technology-reliant hotlines. Courts and many civil legal aid programs developed ways to help self-represented (pro se) litigants understand the law, the filing process, and court procedures. Legal education for pro se litigants and advocates alike is published on local and statewide websites. A system of free electronic tax filing systems was developed to help low-income workers apply for the earned income tax credit. Several states began using video conferencing to connect clients in remote locations with local courthouses and legal services attorneys.

Another significant development was the formation of so-called access-to-justice commissions, typically panels that are established by state Supreme Courts and that coordinate delivery of legal services in partnership with the private bar, judicial and political leadership, and civil legal aid organizations. As of 2011, these commissions operate in 24 states and the District of Columbia. They have focused their efforts on increasing funding, expanding pro bono and self-help representation services, and ensuring people's right to counsel. The American Bar Association in 2006 adopted formal principles to guide the work of the commissions.

The state of funding for civil legal services

As of 2010 the country's civil legal assistance system was funded at \$1.5 billion:

- \$450 million to \$500 million was from the Legal Services Corporation and other federal sources.
- \$525 million was from state funding and state-sponsored Interest on Lawyer Trust Account programs. (see below)
- \$100 million was from local governmental sources.
- \$300 million to \$400 million was from private foundations, corporations, bar associations, individual and law firm contributions, and other private sources.

Interest on Lawyer Trust Accounts

State and local funding of civil legal services has increased from a few million dollars in the early 1980s to more than \$500 million in 2010. This increase has until recently come from Interest on Lawyer Trust Account, or IOLTA, programs. These programs, which now exist in every state, distribute the pooled interest of client trust funds to civil legal aid programs and other access-to-justice initiatives. Client trust funds contain short-term deposits of clients held by lawyers in interest-bearing accounts, which are used to pay court fees, settlement payments, and similar client needs.

In the last decade, substantial new state funding has also come from general state governmental appropriations, as well as filing fee surcharges, state abandoned property funds, and other governmental initiatives. The level of such state and IOLTA funding varies from year to year depending on interest rates and on state fiscal conditions and policies. Low interest rates and a weak economy sharply lowered IOLTA funds between 2008 and 2010, and funding in 2011 will likely be lower than 2010. State appropriations for legal services may also be reduced, given significant deficits in many state budgets.

IOLTA programs have developed a number of strategies to increase funding:

- Forty-four states are no longer permitting lawyers to opt out of IOLTA programs.
- Thirty-two states have adopted “comparability” provisions which require that financial institutions pay IOLTA accounts no less than the interest rate generally available to non-IOLTA depositors at the same institution.
- Some states have restricted financial institutions to levy only “reasonable fees” to IOLTA accounts, forbidding fees that should be paid by the lawyer or law firm maintaining the account.
- Some states prohibit “negative netting,” or using earnings from one IOLTA account to pay fees on another.
- Some states formally recognize banks that agree to pay a higher rate on IOLTA accounts.

Wide variety among states

While the various funding sources described above produce approximately \$1.5 billion a year in overall funding, there is enormous variation among the states. Legal Services Corporation funds are distributed according to census poverty data, but other funding sources are not distributed equally among states:

- Ten states have funding of more than \$50 per low-income person.
- Fourteen states have funding between \$30 and \$49 per low-income person.
- Seventeen states have funding between \$20 and \$29 per low-income person.
- Nine states have funding of less than \$20 per low-income person.

The lowest-funded states are in the South and Rocky Mountain states while the highest-funded states are in the Northeast, Mid-Atlantic, Midwest, and West.

Political barriers

There are significant political barriers to expanded federal funding of civil legal assistance. Although the supportive Obama administration has sought increased funding for the Legal Services Corporation, Congress remains divided about its support.

During the recent debate over the 2011 spending plan, the House defeated an amendment that would have eliminated all funding for LSC grantees. Congress ultimately reduced the program's funding by only \$15.8 million, down from the \$70 million agreed to in the House.

We're likely to see similar efforts to completely eliminate LSC funding again during consideration of the fiscal year 2012 budget. While it's likely that the president and the Senate will protect the program from being eliminated, funding could be severely reduced. And the LSC could well face a genuine existential threat depending on the outcome of the 2012 election. Conservative think tanks such as the Heritage Foundation have long called for the elimination of the LSC, and the Bipartisan Policy Center's deficit-reduction report included it in a list of programs that could be terminated.

Recommendations

While innovations in legal services delivery have improved the civil legal aid system and increased access to the courts, there remains a huge gap between the actual legal needs of low-income people and the capacity of the civil legal assistance system to meet those needs. Addressing this justice gap will require significant additional funding for civil legal aid programs and more effective use of resources.

This section spells out eight recommendations for policymakers and lawmakers who care about ensuring all Americans have access to justice.

Increase resources

Future funding for civil legal assistance will come from five sources:

- Federal government funds
- State and local governmental funds
- IOLTA funds
- Private bar contributions through lawyer giving campaigns and bar dues
- Other sources, such as class action residual funds and United Way campaigns

While the president has proposed increases in Legal Services Corporation funding for the last two years, they do not meet the basic justice gap between clients seeking assistance and those who need it. To return the LSC to 1980 levels would mean funding it at \$800 million a year. While that's the ultimate goal, the non-profit and the White House should set out a plan to increase LSC funding to \$600 million within four years.

Increased federal funding will remain essential for two reasons. First, support for civil legal services is a federal responsibility, and LSC continues to be the largest single funder and standard setter for the legal aid system. Second, as noted above, there are many parts of the country that have not yet developed sufficient non-LSC resources to operate their civil legal assistance program without federal support.

The Justice Department and LSC should work with the administration to find new funding streams and expand existing funding to civil legal aid from other federal departments, such as the health and housing agencies.

The remarkable expansion of state funding through increases in filing fees and general revenue appropriations must continue. This won't be easy because of the dire fiscal situation facing many states. Access-to-justice commissions, state bar associations, state funders, and justice leaders at the state level, however, must continue to make state funding for legal services a high priority, and push to expand filing fee surcharges and general revenue support. This is not an impossible task. For example, in 2010 the Wyoming legislature approved a \$10 surcharge on each filing in civil and criminal court that will create a \$1 million to \$1.5 million annual fund for indigent legal services. The Florida legislature appropriated an additional \$1 million, increasing state funding for civil legal aid to \$2 million.

Expanding IOLTA funding will largely depend on increasing interest rates. Still, state advocates should continue to pursue mandatory IOLTA contributions in the six states now without it. They should also push for "comparability provisions" in the 18 states that do not have them now, as well as the use of "reasonable fees," the elimination of "negative netting," and the developing of "honor roll" programs that recognize banks that pay high IOLTA interest rates.

Eliminate restrictions on civil legal aid

While lack of adequate funding is the most significant contributor to the justice gap, many low-income people don't have equal access to justice because legal aid attorneys are not permitted to provide the full range of services clients need, and are not permitted to serve large groups of low-income people. Congress should remove restrictions on representing aliens and prisoners. And it should allow LSC-funded recipients to bring class actions and engage fully in legislative and regulatory advocacy. Congressional restrictions that apply to non-LSC funding should be eliminated.

Boost training of legal aid attorneys and managers

The civil legal aid system must offer lawyers and paralegals the advocacy skills training, substantive knowledge, and professional development opportunities they need. Executive directors and managers must also have access to management and

administrative training. The Legal Services Corporation and state access-to-justice commissions should jointly examine training resources in place and develop an action plan to ensure adequate training and support is available in every state.

The training provided today varies greatly in quality and quantity, depending on a program's state and region. A few states such as New Jersey, Massachusetts, Ohio, Michigan, and California have a robust training system. But in many states there is no formal training system and little training of advocates or managers.

Each state should have a comprehensive system to monitor, analyze, and distribute information to all legal services stakeholders about relevant legal developments, such as new case law, court rules, and regulatory and legislative news. Attorneys, paralegals, and lay advocates working within each state's civil legal assistance system should have a forum to discuss common issues, emerging client problems, new substantive issues, client constituencies, advocacy techniques, and strategies to make the most effective and efficient use of resources.

Increase involvement of private attorneys

The demand for civil legal assistance cannot be met without the services of more private attorneys, both pro bono and paid. The Legal Services Corporation, Justice Department, and state access-to-justice commissions should join forces to increase the number of private attorneys engaged in civil legal aid representation, better deploy their talents, and more effectively coordinate with them.

LSC's new Pro Bono Task Force will be an important catalyst for this effort, which will entail more than tapping individual attorneys for work on a particular case, although in many parts of the country, that will remain a real challenge. The task force should also systematically gauge where private bar involvement can be most effectively utilized.

Improve evaluation and accountability

We need better ways to ensure legal aid programs use tested performance measures and engage in ongoing self-evaluation. We must also encourage funders to conduct evaluations for quality and effectiveness.

The Legal Services Corporation has a comprehensive performance-based evaluation system that incorporates standards developed by the American Bar Association. LSC periodically evaluates each of its 136 grantees using on-site review teams. These performance criteria are also used in all LSC funding decisions and are integrated into the funding application process. Many state funders—including Ohio, Michigan, Florida, New Jersey, Massachusetts, Virginia, and Maryland—use these or other performance criteria to evaluate the programs they fund.

Better evaluation systems

More needs to be done. All major funders should institute a formal peer review evaluation system that uses peer colleagues from other legal services programs, law schools, the evaluation community, and the private bar to systematically review the work of each program over a three-to-five-year cycle. Legal services providers should also get technical assistance to troubleshoot specific problem areas and conduct overall program reviews. Providers should implement “program-owned evaluations,” or rigorous internal evaluations, to determine whether they’re accomplishing client goals.

Likewise, LSC and other major funders should encourage or even require programs to establish outcome-measurement systems keyed to program objectives. The funders should develop templates and tools to assist grantees to set goals and measure outcomes. This approach would encourage programs to be deliberate about what they are trying to achieve, give funders return-on-investment data, and provide them with a laboratory to discover what works.

Better data

Better data are needed to make the case for increased funding and to ensure accountability to Congress and other government sources. The current data collected by LSC and most other funders are insufficient to either explain the breadth of services provided or to review their quality, efficiency, and effectiveness.

In developing any new data system, however, it’s important to recognize that civil legal aid providers differ from one another in what they do and how they do it. Data should not be used to narrow the type of activities that legal aid providers perform, and should not highlight case outcomes to the exclusion of other desir-

able outcomes achieved by a program. Data systems must also take into account the burdens of collecting, verifying, and storing information. Finally, any new data system should recognize that program effectiveness information may be viewed differently by federal and local officials, and so must be designed carefully to prevent its being used to narrow the activities of civil legal aid programs.

Encourage and stimulate innovation

The Legal Services Corporation, state funders, and access-to-justice commissions should encourage programs to take greater risks in developing innovative approaches to problem solving. Funders should then evaluate innovations, with an eye to replicating and scaling the ones that work.

The information technology revolution of the late 1990s and the subsequent LSC funding through its Technology Information Grants led to a number of new delivery approaches that are now widely used throughout the civil legal aid community, including hotlines, statewide websites, social networks for pro bono lawyers, computerized case management systems, and the HotDocs document assembly application.

Funders should be building on this success to encourage other innovations such as medical-legal partnerships. This innovation integrates lawyers into the health care setting to help patients navigate the complex legal systems for social interventions that improve health, such as utility shutoff protection in winter and mold removal from the homes of asthmatics.

Research effective delivery methods

The Justice Department or Legal Services Corporation should house a permanent research unit to study and pilot innovations for improving delivery of civil legal aid. One model is the Project for the Future of Equal Justice, a joint effort of the Center for Law and Social Policy and the National Legal Aid & Defender Association, which studied the effectiveness of centralized telephone legal advice, brief service, and referral systems.

The study compared “before” and “after” caseload statistics in programs that adopted hotlines to determine the effect of the hotline system on the number of

clients served and the levels of brief and extended services. It also surveyed hotline clients to answer a variety of questions about the different legal outcomes and the characteristics of clients who experienced success.

Many civil legal aid systems in Europe and Canada have entities that conduct research on the civil legal aid system. The United States had such a component, the Research Institute, during the first era of the Legal Services Corporation from 1976 to 1981. It was shuttered during the funding and political crisis of 1981. Since then, only a limited amount of legal services delivery research has been undertaken.

Expand state access-to-justice commissions

The Justice Department and Legal Services Corporation should work with the American Bar Association to increase the number of access-to-justice commissions and similar state planning entities, and expand their role and focus consistent with the ABA's "Principles of a State System for the Delivery of Civil Legal Aid."

These commissions promote comprehensive and integrated state systems that ensure easy points of entry for all low-income clients. They coordinate institutional and individual providers and partners, allocate resources among providers, and provide access to a range of services for all eligible clients no matter their location, native tongue, or ethnicity.

Next steps

Pursuing the funding and improvements agenda recommended in this paper will require a coordinated and comprehensive effort among federal, state, and other funders. Leadership is essential. The Justice Department and Legal Services Corporation should convene the key groups and begin to push forward.

As we have learned over the last 30 years, however, no one key player must lead. In addition to federal and state officials, access-to-justice commissions, the National Legal Aid & Defender Association, and the American Bar Association must be central players in any new initiative. Many other supporters of legal aid, including those in the academy and related fields such as the self-representation movement, should also be included and heard.

It's our hope that the growing awareness of the mounting "justice gap" creates the impetus for a serious reform agenda to coalesce today.

Endnotes

¹ 42 U.S.C. § 2996 (1974).

About the author

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When Second Best Is the Best We Can Do

Improving the Odds for Pro Se Civil Litigants

Peter Edelman June 2011

Introduction

Courts are daunting places for nonlawyers and there's no substitute for having a lawyer when you have to be there. Trial judges who sit in high-volume arenas like landlord-tenant and small claims courts often say their most serious recurring problem is a never-ending flood of litigants who represent themselves because they have no other option. More than 90 percent of litigants in many high-volume city courts don't have a lawyer, statistics show.

We are a long way from closing the gap between people who need a lawyer and those who have one—and the chasm will remain even after the economy recovers fully. While we must keep pressing with undiminished energy for more lawyers, we also need to do everything we can to make the courts less impenetrable for people who struggle to use them without legal representation.

The District of Columbia has an extensive history of working to improve access for pro se litigants. The D.C. Bar's Pro Bono Program partners with superior court leaders and law firms to promote legal advisory services and volunteer representation of low-income people. The program and cooperating law firms run advice and referral clinics, staff resource centers in high-volume courts, provide training on child custody and divorce training in family court, and offer community-based immigration clinics. Its online resource, LawHelp, offers extensive information to guide pro se civil litigants.

Six years ago the D.C. Court of Appeals created the D.C. Access to Justice Commission, which I have chaired since its inception. Like more than two dozen such groups around the country, our mission is to improve the quantity and quality of representation of low-income people in civil matters, and to advance this population's access to justice. In addition to increasing the number of lawyers available for low-income people, another of the commission's priorities is improving support for pro se litigants, particularly in the city's landlord-tenant court. This paper presents a case study of our landlord-tenant court efforts, highlighting successes, and identifying work ahead.

Case study: Synergy for tenants

The establishment of the D.C. Access to Justice Commission six years ago created a new player in local efforts to connect low-income people with access to legal services. The commission—made up of judges, private attorneys, civic leaders, and legal-services providers—made its first priority the pursuit of local public funding for civil legal services, a step that had already been taken in 43 states at the time. The commission led the city’s first organized push for public funding, a successful effort that appropriated money for 30 more full-time legal-services lawyers in the district, a 25 percent increase.

The new resources were appropriated to the D.C. Bar Foundation, to be regranted to the city’s various provider organizations. In their advocacy for public funds, the commission and its partners stressed to city government officials the particular need for more lawyers in landlord-tenant court.

The landlord and tenant branch of the Superior Court of D.C. was an obvious place to look. Of the roughly 48,000 cases filed each year, only about 2 percent of tenants had counsel. Although they had access to a bar-sponsored “Landlord Tenant Resource Center,” and court officials had taken some steps to make the place somewhat pro se friendly, more attention was needed.

The resource center, like similar providers of free legal information in other high-volume courts, was certainly helpful. Its lawyers, mainly pro bono private practitioners supervised by experienced lawyers from the Pro Bono Program, coached pro se litigants involved in residential housing disputes before they went in front of a judge. But the tenant still entered the courtroom unrepresented by counsel. And under the stress and strangeness of a courtroom, tenants often forgot the lessons given them minutes earlier.

Unrepresented tenants needed a continuum of services. Pro se assistance was available through the resource center and some could eventually receive extended representation, but most tenants lost their way between the center and the point

at which counsel might become available. Tenants found negotiating a continuance by themselves frightening in the face of a landlord's attorney threatening immediate eviction if a proposed payment plan was not signed immediately.

A two-pronged approach

To confront the pro se problems in landlord-tenant court, the city's legal services providers joined to frame a proposal to the bar foundation. They came up with a coordinated two-pronged approach:

- Increase tenant defendants' access to lawyers for full representation.
- Establish a group of lawyers who would provide "unbundled" legal services. (see sidebar on unbundling)

Unbundling

One form of "unbundling" of legal services is known as "limited task representation," "temporary appearance," or "attorney for the day." It's a way to spread scarce legal talent, especially in the context of providing services to people living in poverty. Lawyers stationed at a high-volume court like landlord-tenant or small claims represent people through one court appearance or settlement negotiation. This practice requires approval from the court because it could be seen as violating professional ethics for a lawyer to be involved in a case on such a limited basis.

By way of temporary appearances, unbundling can avail pro se defendants of legal defenses they didn't know they had. But unbundling is no panacea. It's risky for lawyers to take on a limited representation role on short notice. Even knowledgeable lawyers can miss important aspects of a case if they haven't been involved from the beginning. And it's difficult to assess a case and effectively prepare an argument on the spot. The advocate providing same-day help must be an expert in the area of the law involved and have strong client-relationship skills. When the unbundled service does not resolve the case and the party has to continue on pro se, it is fair to ask how meaningful the service was.

The bar foundation responded positively and the number of full-time lawyers available to low-income defendants at the landlord-tenant court was nearly doubled to about a dozen. A new attorney-for-the-day project was established, helped by a superior court authorization for the limited representation.

About half of the new lawyers were assigned to the limited representation project. They appear on behalf of pro se litigants who are directed to them by the judge, the resource center, or the lawyers who do the full representation.

The process often begins in the resource center which, with the infusion of additional lawyers, can now refer more tenants for full or the new limited representation, and thereby be more effective. Two organizations—the Legal Aid Society and Bread for the City—staff the attorney-for-the-day project and are also among the providers who offer full representation. Because of their dual role, they too can decide whether a tenant should receive full representation or can be helped measurably by limited representation. With the number of lawyers still too few to meet all of the needs, these decisions are on-the-spot triage-like calls. It's a great asset to be able to provide full representation to defendants with more complex legal problems, or less capacity to fend for themselves. But having a second form of representation that allows scarce lawyer resources to be used to the fullest is also a big step forward. Same-day representation is a valuable asset, offering expertise in the law, client-representation skills, and cultural competence to tenants who would otherwise be on their own in the courtroom.

D.C.'s superior court has also worked hard to make its landlord-tenant branch more pro se friendly, adding staff and another judge as additional resources have become available. An especially noteworthy step was to add an "Interview and Judgment Clerk" whose job is to make sure unrepresented tenants understand the terms of an imminent settlement. If the tenant doesn't answer all the questions satisfactorily, the clerk refers the matter to the judge for follow-up.

How much difference have more full-time lawyers and the attorney-for-the-day project made? Lawyers who work at the court say they see an improvement, although there is a long way to go. The vast majority of the tenants are still unrepresented but the funding has brought representation—full or partial—to hundreds more tenants a year. More tenants are winning, better settlements are being reached, more continuances are being granted, and many tenants threatened by foreclosure proceedings against their landlords have been protected by having access to counsel.

Providing representation to more tenants is making a small dent in the power imbalance between landlords and tenants. More lawyers mean more opportunities to bring recurring problems to the judges' attention, resulting in changes in court procedures. Particularly vulnerable tenants—the elderly, the disabled—are more often referred for representation by judges, mediators, and even landlords' attorneys. If a tenant comes to a legal services office the day before a scheduled court appearance, they can often now get at least limited representation in court the next day.

Tenants have strong rights under D.C. law. They now have more tools to work with.

Pro se friendly lawsuits

In addition to the above improvements, the superior court and the Access to Justice Commission jointly developed a fast-track process for tenants to sue landlords over unacceptable housing conditions.

In D.C., only landlords can sue in landlord-tenant court. Tenants may assert housing conditions as a defense but they have to go to the civil action branch of superior court to sue as a plaintiff—not a pro se friendly process. Using a fast-track model developed for protective orders in domestic violence cases, the superior court created an expedited way for tenant plaintiffs to sue their landlords. The judge who originally suggested the approach administers the docket and, coincidentally, has recently become the superior court civil division's presiding judge.

The new process is working. About 250 such cases are being filed a year and the process is being publicized to attract more cases. So far, the fast-track process seems to work best when the landlord is willing to admit the need for repairs. The judge has a housing inspector on call to look at the premises to determine whether repairs are needed or have been satisfactorily made. The judge then brings the parties back in to report until everyone is satisfied. Legal services providers make legal representation available to the tenant when a landlord is recalcitrant and wishes to litigate.

The work ahead

The reforms described above have improved access to justice for pro se tenant parties in D.C., but much more work needs to be done, both locally and around the country. The D.C. courts are in fact a model in the way they have addressed many of the issues.

Clerks' offices and all court personnel need to be more responsive and supportive when a pro se litigant appears. Courts should simplify forms so pro se parties can understand them, and they should be available online along with accessible explanations of legal issues and court procedures. Pro se fact sheets should be available in multiple languages. Judges should better assist pro se litigants in understanding what's happening in the courtroom and be more aware of how far they can go without overstepping the boundaries of their role. Both judges and clerks should be regularly trained to ensure they are communicating effectively with unrepresented litigants. Language access is vital.

It's particularly important to pay more attention to the settlement stage of a case. All too often, lawyers representing landlords or business plaintiffs get pro se defendants to sign documents they don't understand or with which they cannot reasonably comply. Courts should assign a staff member to examine proposed settlement terms before approving them. They should require judges to hold so-called allocution hearings in which the judge asks pro se parties a series of questions to make sure they understand their rights, the significance of entering into a settlement, and its terms.

Of course, human resources are crucial. It's difficult to mete out "justice" on an assembly-line basis, and courts without enough judges and staff, or with cumbersome or outdated technology, cannot be as responsive to the needs of pro se litigants as they would like.

Our need for more lawyers, both full time and pro bono, cannot be overstated. We must mine every possible source to increase both the number of full-time lawyers and the magnitude of the pro bono commitment dedicated to low-income litigants. We need more financial resources in every respect. All but one state now provide financial support to civil legal services in communities, a welcome development over the past three decades. But law firm giving and pro bono work could be much more extensive. There is reason to be worried that recent belt tightening at law firms could hurt their volunteering and financial support of legal services.

If we combine innovative approaches to legal services provision with persistent efforts to increase resources, we can meaningfully reduce the number of pro se litigants who go through the legal process, lose, and never know exactly what happened. As Supreme Court Justice Hugo Black wrote in 1952's *Griffin v. Illinois*, “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

About the author

Peter Edelman is a professor of law at Georgetown University Law Center, where he teaches constitutional law and poverty law and is faculty co-director of the Georgetown Center on Poverty, Inequality, and Public Policy. On the faculty since 1982, he has also served in all three branches of government. During President Bill Clinton's first term he was counselor to Health and Human Services Secretary Donna Shalala and then assistant secretary for planning and evaluation.

Professor Edelman has been associate dean of the Law Center, director of the New York State Division for Youth, and vice president of the University of Massachusetts. He was a legislative assistant to Sen. Robert F. Kennedy and issues director for Sen. Edward Kennedy's 1980 presidential campaign.

Mr. Edelman's book, *Searching for America's Heart: RFK and the Renewal of Hope*, is available in paperback from the Georgetown University Press. He has written extensively on poverty, constitutional law, and children and youth. His article in the *Atlantic Monthly*, entitled "The Worst Thing Bill Clinton Has Done," received the Harry Chapin Media Award. With Harry Holzer and the late Paul Offner, he recently co-authored *Reconnecting Disconnected Young Men*, published by Urban Institute Press.

Professor Edelman has chaired and been a board member of numerous organizations and foundations. He is currently chair of the District of Columbia Access to Justice Commission and recently co-chaired a blue-ribbon Task Force on Poverty for the Center for American Progress, and he is board chair of the Public Welfare Foundation and the National Center for Youth Law.

Mr. Edelman has been a United States-Japan Leadership Program Fellow, was the J. Skelly Wright Memorial Fellow at Yale Law School, and has received numerous honors and awards for his work, including the William J. Brennan, Jr. Award from the D.C. Bar in 2005. He grew up in Minneapolis, Minnesota, and graduated from Harvard College and Harvard Law School.

Access to Evidence

How an Evidence-Based Delivery System Can Improve
Legal Aid for Low- and Moderate-Income Americans

Jeffrey Selbin, Josh Rosenthal, and Jeanne Charn June 2011

Introduction

Never before have more low-income Americans needed civil legal aid. About 57 million Americans, one-third of them children, qualify for free legal help when a foreclosure notice comes, a divorce looms, or debts mount after a job loss. But half or more who seek help are turned away because legal aid providers lack sufficient resources. Tens of millions more moderate-income Americans are ineligible for free legal aid, yet lack reliable access to an affordable lawyer.

Still, recent developments give us hope for improvement. State and local governments, nonprofit organizations, and law schools around the country are developing innovative approaches to addressing legal needs in their communities. The Obama administration can hasten these developments by promoting legal service delivery models that are backed by rigorous evidence of their effectiveness.

So-called “evidence-based” practices are taking hold across a wide range of fields. Research methods like randomized controlled trials, statistical mapping and analysis, and systematic qualitative studies allow providers and funders to determine which models deliver on their promised outcomes. By encouraging evidence-based approaches in civil legal assistance, the federal government can help service providers target resources more efficiently. Data on effectiveness will also bolster the case for new investments by Congress and other funders to increase access to justice.

With new leadership and initiative in key institutions, we recommend that the White House and Congress seize the opportunity to:

- Establish a “National Access to Justice Institute” in the Justice Department to coordinate legal aid research through a partnership with the American Bar Foundation and the Legal Services Corporation.
- Support state and regional centers for legal aid research to catalyze innovation and evaluation through collaboration between the new institute, state access-to-justice commissions, legal services providers, and law school clinics.

- Target federal funds to incentivize evidence-based legal aid delivery systems through competitive grants and market-based mechanisms.

By pursuing these steps, we can improve the legal services delivery system for millions of low- and moderate-income Americans, and enhance the likelihood of continued and strengthened public and private support.

Background: The state of legal services delivery

For more than four decades, the federally funded Legal Services Corporation has been the largest single provider of civil legal assistance to the poor. LSC's budget was slashed in the early 1980s and again in the mid-1990s. At the same time, Congress imposed significant program restrictions on LSC providers. With a current budget of \$420 million, LSC is once more on the chopping block as Congress looks to reduce the deficit by cutting social programs.

While LSC remains the largest single funder of legal services, local providers have responded to LSC funding shocks by identifying new financing and creating a more diverse service delivery system. Congressional curbs on LSC funding have further splintered the delivery system during the last 15 years. In particular, programs have spun off from LSC field offices to avoid the so-called “poison pill” restriction, which extends to all public and private funding the same limits imposed on LSC dollars within a single program.

Today, roughly two-thirds of legal aid funding comes from nonfederal sources. The private bar, the courts, and state and local governments are filling some of the void by establishing or funding their own efforts to increase civil legal assistance.¹ Law school clinics have also proliferated during the last four decades, and meet some of the civil legal needs in their communities. This decentralized, mixed-model environment can make case management and direct comparisons difficult, but it has simultaneously allowed for a wide range of innovative service delivery strategies.

Some models “unbundle” the services provided by lawyers, only representing clients during one stage of a case, or giving advice via hotlines.² Others enlist lay advocates, or help people find legal advice or file legal actions on their own (known as pro se representation). Some organizations pursue market-based approaches to legal assistance, like legal insurance and sliding fee scales. Still others use technology to lower costs of service or rely heavily on volunteer (or pro bono) contributions from attorneys in private practice.

These innovations are encouraging, but we don't know enough about where lawyers make the biggest difference for clients. With few exceptions, we don't have reliable data about which problems require the help of a lawyer, or which clients could benefit from a nonlawyer or some other form of limited legal assistance.

Regrettably, the federal government has made little effort to capture information about legal aid funding sources, service provision, and delivery outcomes. Insufficient data make it hard to know how and where to spend the limited money available to get the best results for low and moderate-income Americans. In an unfortunate feedback loop, this absence of data in turn deprives programs of evidence to make the case for more funding at a time when public and charitable dollars are increasingly scarce.

The promise of an evidence-based approach

Even in this constrained environment, there are some hopeful signs. Leaders in the legal services community are focused on the need for better legal service provision, and are beginning to turn toward evidence-based approaches. By “evidence-based,” we mean a hard-nosed commitment to rigorous evaluation of program effectiveness—that is, a commitment to discovering through established research methods what works best to address clients' varied legal problems.

The Obama administration has embraced evidence-based social policy in many areas. The Office of Management and Budget has called for greater investment in program evaluation and recommends prioritizing programs backed by strong evidence. Progressive voices, including the Center for American Progress's Doing What Works program, have likewise encouraged strategies to identify and scale up successful local innovations. The Government Accountability Office in 2009 examined a range of evaluation methods that can generate useful evidence about social interventions. Effective evaluation methods include random assignment of clients to treatment and control groups, quasi-experimental comparison groups, statistical analysis of observational data, and in-depth case studies.

In the legal services context, an evidence-based approach would allow funders and service providers to determine which problems most often require the help of a lawyer and, more broadly, what approaches to service provision are most effective. In 2010, the Justice Department launched its Access to Justice Initiative to address the “dramatically understated” crisis in legal services, and is actively pursuing

innovative responses to the so-called justice gap. The American Bar Foundation, the nation's leading organization devoted to the empirical study of pressing legal issues, subsequently established a research initiative focused on access to civil legal assistance.

Under new staff and board leadership, the Legal Services Corporation is committed to enhancing program effectiveness. More than half of all states have formed access-to-justice commissions to coordinate and improve the delivery of legal services, and many of these bodies increasingly are interested in evidence-based approaches to civil legal aid. In 2011, a group of leading law schools founded a Consortium on Access to Justice to promote research and teaching focused on the fairness and legitimacy of the American civil justice system.

These promising developments augur well for a cultural transformation of the civil legal aid community into one that embraces evidence-based approaches at every level. But for that to happen, the federal government will have to provide leadership.

Recommendations: Toward an evidence-based system

The federal government retains a key role in the legal services community. With a targeted investment of human and financial capital, Congress and the Obama administration can coordinate, catalyze, and incentivize evidence-based approaches to legal services. These efforts could help answer critical questions: Where are lawyers needed most? What types of services are most effective in different circumstances? Which clients benefit from what level of legal intervention? And what areas merit prioritization by funders? Moreover, a strategic approach to federal funding would encourage more legal assistance organizations to pursue evidence-based evaluation and spur further innovation in service provision.

To these ends, we recommend the White House take the following steps to drive evidence-based policymaking in the delivery of legal services:

1. Establish a National Access to Justice Institute to coordinate legal aid research

We need centralized coordination of legal aid research. The Justice Department already houses the National Institute of Justice, a research, development, and evaluation agency focused on using science to improve the criminal justice system and reduce crime, especially at the state and local levels.

The department should lead a partnership with the American Bar Foundation and the Legal Services Corporation to establish a National Access to Justice Institute. The institute should have a broad mandate, but need not have regulatory or grant-making authority at the outset. It would be an independent and objective entity focused on identifying and promoting evidence-based policies and practices.

The institute, in consultation with other legal service practitioners and academic researchers, should undertake the following interrelated activities:

Identify current funding streams

An effective civil legal assistance delivery system can only be designed more sensibly if we have a clearer picture of its constituent parts and how they fit together. The institute should identify current funding streams from federal, state, and local sources, and it should map the existing legal aid delivery system by programs and services. The American Bar Foundation has started gathering baseline data, and the institute should regularly update and refine such data collection.

Develop a research agenda

The institute should develop a research agenda to study substantive, comparative, and longitudinal case outcomes to inform individual providers and local, state, and regional planners. The Legal Services Corporation will be a key partner in identifying pressing knowledge deficits and research questions for the field.

Collect and share best practices for evidence collection

The institute should create and share research “best practices” and protocols to determine which evidence-based approaches yield the most useful information about what works in delivery of legal services. The new law school consortium can lend direct expertise and also serve as a portal to social scientists and other university researchers.

Publish results of evaluations and experiments

To enhance the impact of the research agenda, the institute should compile and publish the results of all evaluations and experiments (including so-called null findings, where there is no statistically discernible impact of the intervention). The institute should create and maintain an accessible resource database for programs and researchers to promote understanding of both the potential and the limits of empirical research.

2. Support state and regional centers for legal aid research to catalyze innovation and evaluation

While a National Access to Justice Institute can play a clearinghouse and coordinating role, a comprehensive research agenda requires a sustained commitment of time and resources at the state and local level. The federal government should provide seed funding for the establishment of state and regional “Centers for Legal Aid Research.” These centers would join the institute in partnership with state access-to-justice commissions and law schools to evaluate existing and new forms of service provision.

The legal services community needs a way to catalyze innovation and assess comparative delivery methods among providers, including those that target moderate-income clients and which are not subject to LSC restrictions. Building on the example of the National Institute of Justice’s recent direct funding of researcher-practitioner partnerships, the administration should seed such centers via a competitive grant program outside of the LSC appropriation process.

These centers could be based at a single law school or involve multiple schools. The new law school consortium would be an obvious collaborator in this effort. The centers would work closely with legal services providers such as court-based programs, not for profits, and even for-profit entities. To access center resources, service providers and funders would have to be engaged in significant service provision and commit to rigorous study of delivery methods and innovations.

Many law school clinics would be ideal research sites, especially those with deep subject matter expertise and decades of experience developing and deploying legal services delivery models. Law schools are increasingly involved in empirical research, and most law schools are situated within larger research universities whose faculty and graduate student involvement will be critical in this enterprise. In addition to their labor, such university partners possess the requisite independence, and substantive and methodological expertise to mount high-quality, cost-effective studies.

3. Use federal funds to incentivize development of evidence-based legal aid

The White House has recently deployed a number of tools to encourage organizations and local governments to innovate and increase accountability, such as the Race to the Top competitive grant program in education. As the admin-

istration seeks additional funding for the Legal Services Corporation, it should designate new investments for competitive grants based on outcomes, not inputs, with a clear preference for funding projects that employ the most rigorous and independent evaluation methods. Congress and the administration should also pilot market-based mechanisms to generate private-sector resources and reward evidence-based performance.

Authorized by Congress in 2000, LSC's successful Technology Initiative Grant is an example of the type of competitive effort we propose. The TIG program funds projects to develop, test, and replicate technological improvements in legal aid delivery. TIG grantees must implement meaningful evaluation plans, including clearly articulated program goals, activities designed to achieve such objectives, and methodologies to gather data and assess effectiveness. By all accounts, the program has been a success. The National Institute of Justice regularly administers competitive grants that favor applicants utilizing evidence-based practices and measuring outcomes, including a strong preference for random assignment to treatment (service) and control groups. Such a sustained approach over time builds progressively valuable knowledge regarding program effectiveness.

Beyond competitive grants, Congress and the administration should target a portion of proposed "pay for success" bonds (called social impact bonds in the United Kingdom) to encourage innovation and evaluation in legal services.³ The president's FY 2012 budget includes \$100 million in social impact bonds to spur private investment in social interventions with the potential to serve public purposes and save public resources. Investors are repaid with public funding, but only if providers achieve agreed-upon performance targets. With even a modest amount of social impact bond support, LSC and non-LSC programs alike could raise and target funds to specific areas in which legal aid can help clients and reduce their overall demand on public services. Examples might include community re-entry assistance to reduce recidivism for people with criminal records, and transactional assistance to reduce defaults for people dealing with mortgage, credit, and other financial needs.

Conclusion

The federal government can play a key leadership role in coordinating, catalyzing, and incentivizing innovation and evaluation in the legal services delivery system. But moving the legal services community toward an evidence-based delivery system will not be quick, easy, or risk-free. Resources for research will be in short supply, so public and private funders must either devote additional money for evaluation in every grant or establish dedicated funding streams for evaluation.

As we have learned from practitioners in other fields, it is challenging both to measure service delivery in complex settings, and to do so in a way that is consistent with professional obligations to clients. Studying disability hearings will not tell us much about eviction actions. Some clients may be more interested and successful in representing themselves, while for others, self-help may be impractical or impossible. The more detailed and precise the study, the less we can generalize about the findings, while broader studies may not provide a basis for targeting resources.

Researchers will also need to think carefully about how to engage client communities in design and implementation of studies, so as not to exploit vulnerable populations, impose added burdens on them, or raise unwarranted expectations. An objective assessment of almost any social intervention practice will confirm some deeply held beliefs and refute others. Early studies are likely to raise as many questions as they answer, but will help us to refine inquiries and to produce increasingly actionable results.

In a politically charged environment where funding for low-income programs is under pressure, proponents of legal aid may fear exposing the field to additional critique or attack. Our experience suggests these risks are worth taking. Better information ultimately will improve allocation of existing resources and help justify greater public and private investments in delivering legal services to low- and moderate-income Americans.

Endnotes

1 For a detailed look at the current state of legal services funding, please see Alan Houseman, “The Justice Gap: Civil Legal Assistance Today and Tomorrow” (Washington: Center for American Progress, 2011), available in this volume.

2 For more on bundling and unbundling, see Peter Edelman, “When Second Best is the Best We Can Do: Improving the Odds for Pro Se Civil Litigants” (Washington: Center for American Progress, 2011), available in this volume.

3 For background on social impact bonds, please see Jeffrey Liebman, “Social Impact Bonds” (Washington: Center for American Progress, 2011), available at http://www.americanprogress.org/issues/2011/02/social_impact_bonds.html.

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