

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.

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