



Right to Counsel and Legal Services: From Fear and Loathing to Love and Support

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For the past three years, I have been involved with my local bar association's effort to push the Civil Gideon movement forward. This is conceptually very exciting work, which at its core is intimately connected with the work of legal services and public interest law communities to represent the nation's most vulnerable and least powerful residents and to make the nation's repeated assertions of "justice for all" a reality. I am extremely proud that the Philadelphia Bar Association stepped forward to be in the vanguard of this movement, and that the American Bar Association took on this issue and continues to push it, even in a time of worldwide financial stress and a national climate of anti-government sentiment. It is wonderful that lawyers are standing up to point out the problems of our judicial and legal system, with a focus on those who are excluded and indigent.

Okay, now that I have said all that (and I really do believe it), I also want to note some of my own gut issues. I am the Executive Director of a large legal services organization, who has been doing legal services work pretty much my whole (long) career. (I admit it. I am getting old.) I know I am not alone in feeling that the push for a right to counsel somehow has made me uncomfortable, even frightened for the future of legal services. It disturbs me to admit this and it should. It is very troubling that our community, which one would think would be in the forefront of pushing for a concept of access to lawyers for all, and which is made up of visionary, creative and courageous leaders, somehow gets feeling protective, scared and concerned when we talk of expanding the right to access justice. What is going on with this? Where does it come from? How do we analyze and deal with it?

For several years I have been trying to look at

these questions and figure out the tensions that have made me uncomfortable. Our community is an open, generous and intelligent one, and my conversations around this issue with my national colleagues have reflected those strengths. And I start this discussion with thanks to the many people who have helped me talk and think this issue through. I will not pretend I have complete clarity, but I think my experience may be helpful to others who may feel as I have: why the heck am I scared of the idea of working for every American to have the access to a lawyer for their civil case? Isn't that exactly what is behind my career as a public interest lawyer?

My discussion with our community's leaders in the right to counsel movement has helped me break down my concerns and fears and face them. Like good teachers (and therapists?), they have encouraged my questions, patiently listened, answered and challenged me, and I hope I have learned and moved forward in my own clarity and understanding.² This is my attempt to write it down and I hope I can be helpful to others. (I do not suggest others are as dense or confused as me by all this. I have been impressed by many who have sorted this stuff out quickly and clearly and moved forward, while I have struggled along.) Here, in a question and answer format are fears I dealt with and where I have ended up.³

Question Number One: Won't the establishment of a right to counsel mean less money for legal services?⁴

Okay, the biggest struggle in the life of a legal services leader has got to be funding. We worry about it all the time, every day. So our brains go there quickly when we think about this movement: Hey, if there really is a successful movement that establishes that a right to counsel, then won't all the existing funding for lawyers for the poor get diverted to pay for that right? Alternatively, does this mean we will have to provide all the



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newly required lawyering with our current funding? Don't we already have too much to do? We are trying our best already, doing what we can to provide representation; how are they thinking that we can do more? And if it isn't our job to do it but some other provider, then won't they just get our money? We struggle so hard for the limited pots of money we are now getting. Who the heck thinks that there will be more money for newly established rights to counsel? And especially in this economy!

Response: First, calm down. It has taken me a long time to realize this, but the movement for a right to counsel is not necessarily about legal services. Sure we have a relationship, our work has an overlap, and we have a strong interest, but really, *this is not all about us*. And more importantly, indeed I'll call this "Rule Number One:" *right to counsel funding does not necessarily come from legal services budgets*.

Look around at existing "rights to counsel" in the civil realm. There are a range of them as John Pollock sets out in his article in this *Journal*. Generally they are based on state constitutions or statutes, since federal constitutional law is not very helpful.

There are rights to counsel in parental termination and dependency proceedings, in adoption, in mental health and in guardian proceedings in a variety of states. And while sometimes this mandatory counsel requirement is provided through legal services organizations, in most places it is not. And interestingly, where legal services providers do provide this representation, in my experience, it is done pursuant to specific contracts with dedicated funds.

My own organization is an example. We have a city government contract to represent some parents in abuse and neglect proceedings, as such persons have a right to counsel in Pennsylvania. But we only do some of them, we are paid to do them, and the local court also pays other attorneys to represent other parents in these proceedings. While there is a right to counsel in guardianship proceedings in Pennsylvania, my office does not handle these, but contracts are entered into with the private bar for representation. Indeed, if the local court wanted a legal services organization to handle guardianship cases, we would expect funding for that work.

So, my point is that communities have experience with established rights to counsel in the civil realm, and the obligation to provide that counsel has not fallen

automatically on legal services providers and become an unfunded mandate for our programs. We should not assume that in the future new rights will become the responsibility of legal services, nor that the funding that pays for them will come from the sources that now fund legal services programs.

Of course, there is a risk that the funds we now receive could be diverted to new "right to counsel" cases once they are established. But that is far from certain. Funding to implement new rights to counsel will be determined by the communities involved, and the debate on how that happens is one in which we and other stakeholders can have a voice. We should remember that so far our experience is *not* that providing more legal assistance to people in need diverts our funds. In recent decades we have seen policy makers and the public pay more attention to the protection of domestic violence victims, to the protection of elders, to representing victims of mortgage foreclosure; the increased public concern about these problems has raised opportunities for us to seek new funding to represent and assist those in need, rather than displacing funds we already receive.

We have long had to balance the varied and conflicting demands of people in need of legal services, and had to make troubling decisions about what gets funded and what does not. We cannot now let a fear of too many demands for legal services and too little funding stop us from zealously working for more representation for those who need it badly. Indeed, this is a chance to join with the larger community in an effort that joins many parties, beyond legal services, in expanding justice for all.

Question 2: What about all the great systemic work, policy work, and anti-poverty work that we do? Where does that fit into a right to counsel? The legal services movement is about a lot more than simply representation in a court room on individual cases. If we establish a right to counsel in lots of individual cases, then where does that leave all the other great work we do?

Response: I think the best answer to this question is the same thing I said above. *Establishing a right to counsel is not all about us*. Why are we afraid that if we can get more counsel in more courtrooms helping individuals with their critical cases, somehow that will keep us from doing the good work we are doing now, whether it is working with community groups, filing proactive litigation to challenge systemic problems that hurt our clients, or providing community education?

A right to counsel will not replace much of the work we do. Generally the right to counsel movement has focused on cases in litigation, and the need for individuals in litigation to be properly represented. Our work includes some of that, but is much broader. Yes, we represent clients in court, but we also advise clients about legal problems that are not yet and may never be in litigation, and we do a broad range of other activities. Once we accept Rule Number One, that establishing a right to counsel does not mean the funding is diverted from us, we can then accept this corollary: Our legal services work does not need to change just because new rights to counsel are established.⁵

Question 3: Once there is a broad right to counsel, won't the more conservative public want to put their funding into individual "access" cases that are entitled to counsel, and not into legal services? Ever since the 1960s legal services movement was born as part of the war on poverty, our community has struggled with the tension between broad-based public support for legal assistance to vulnerable people in their individual cases, and less consistent support for aggressive proactive advocacy such as class actions, policy work and systemic reform efforts, which efficiently challenge problems our clients face.⁶ Congress has put restrictions on the funds we receive, restrictions which both limit our work and send a message that individual representation is preferred to cases that challenge systems or policies. Won't the establishment of a right to counsel just create an alternative system of lawyers for the poor, and one that will be more politically palatable, less threatening, and less able to achieve real change for the communities we represent?

Response: While yes, legal services programs are always going to face the need to justify and protect our ability to take on unpopular work on behalf of our clients, this problem is not really affected by an expansion of the civil right to counsel. We must be vigilant in making sure our important work continues — work that goes beyond the individual representation of clients in litigation — but that is true with or without a right to counsel in a wide range of cases. We could continue to exist and do the work we do, even if a fabulous new and separate system providing counsel in custody, guardianship, eviction and mortgage foreclosure cases were to spring into existence next year. Of course that will not happen. This movement will be long and gradual, and we and other community leaders, allies and adversaries alike, can participate in its

development. We can work to ensure that both individual representation and systemic advocacy are available to vulnerable populations.

Question 4: Who gets to control the priority setting process? If there is a right to counsel established by courts or legislatures, won't that dictate what kinds of cases are handled and take away our ability to set priorities about how our limited money is spent? We have gotten to control our funds, and make the decisions about how they are spent. If law somehow dictates what get cases get counsel, won't we lose that decision-making power? And aren't we more in touch with the difficult decisions of who should get counsel and who should not than courts or legislatures?

Response: Okay, by now you probably know where I'm going. The answer to this is just a corollary to Response Number One above. *Right to counsel isn't all about us* and maybe isn't about us much at all. If we still get our money and still do our work, then we still set our priorities with our funds, just as we always have done. Who knows how the right to counsel work will be funded, but it is really separate from our work, unless we somehow choose to put ourselves into that mix and take on that funding and the work. And yes, some other process will be used to decide what types of cases will have guaranteed counsel, a process separate from our difficult priority setting and triage work. So what? Some cases we have not made a priority may get funded, but that still means more people in need are getting counsel.⁷ And why would we complain if some group of cases we do now handle are determined to be "right to counsel" work? Certainly the movement vision is that right to counsel means that funds are provided to pay for counsel. If a right to counsel is eventually attached to the kind of child custody cases we are now doing, we will be in the perfect position to bid for the new funds that follow the right. More money for our important work!

And while we may now have the "luxury" of setting our own priorities about what work matters most or makes the most difference, we also do it knowing that 80% of the people in need are getting no service. Study after study has demonstrated this. Don't we need to push for a movement that may bring more representation to that huge group of unrepresented people? Working for a right to counsel gives us a way to push for more services for all those we turn away each day, and all those we never see at all, but who appear in court proceedings without representation or assistance.

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Question 5: The quality of representation in lots of the right to counsel cases in my locality really sucks. The attorneys are paid peanuts, and it shows in the work that is done. Why are we working for more of that kind of representation, rather than trying to get more quality representation done by legal services organizations?

Response: Okay, once again, this isn't a question of legal services versus right to counsel. We can push for both. We can keep our good, high quality, work going, for the relatively small group of litigants and clients we serve, even as we push for a broader guarantee of counsel that would reach more people in need. I have certainly sometimes wondered whether my time wouldn't be better spent raising a fuss about low quality counsel in a variety of existing "right to counsel" cases in Philadelphia instead of working for more areas with a right to counsel, which may simply establish more chances for underpaid lawyers to do a lousy job representing clients. However, in the end we need to do both. If we can expand the areas where litigants or potential litigants are provided counsel, then the next step can be making sure counsel is of high quality. And to the extent legal services programs can demonstrate what high quality lawyering for the poor can look like, we can serve to set a standard and push for higher quality all around.

Question 6: Isn't pushing for lots of lawyers and lots of money to pay for them simply going to lead to more pro se programs and limited assistance models since such programs and models are much cheaper? Look at the Supreme Court decision in Turner vs. Rogers, where the push for a right to counsel led to the right to a form to fill in. What we in legal services really care about is great representation for the poor — holistic, in-depth, high quality, broad based, systemic. Aren't we working against that if we push for too much mandated representation, which comes at great cost? Is it simply coincidental that the talk about limited representation is growing at the same time as the talk about right to counsel?

Response: Right to counsel is about getting people their own lawyer. It is not about pro se forms or kiosks or help desks or advice lines. It is about lawyers to help people with cases where critical interests are at stake.

That sounds simple. But in Philadelphia we agonized a lot about what we should include in our right to counsel work. Because it is a whole lot easier

and cheaper to provide limited representation or pro se assistance than to give someone a lawyer, and there is an argument to be made that providing limited representation is a first step in a continuum towards providing a right to counsel (as it is better than nothing and educates the public about the need for assistance to litigants), many saw working to provide brief advice or other limited assistance as right to counsel work. I am not sure I buy this. But I do believe that as we move forward defining what types of cases require counsel, we open the door to the discussion of what we do for the cases where there is not a right to counsel; and for those cases, limited representation, pro se forms, kiosks, or similar assistance may be an answer.⁸ But let's recognize that these are really two separate pieces of a vision for the future of access to justice: getting lawyers in the critical cases in which society makes a judgment they are required is right to counsel work; providing something less than counsel is the second rate backup plan for instances in which we don't yet have such consensus.

Conclusion

After a couple of years of struggle, I am a convert to the need for legal services folks to speak up loudly and clearly in support of the right to counsel. We know the difference counsel makes, particularly for the vulnerable populations we serve, and we know the critical stakes involved for our clients as they face the loss of their homes, their income, their health and safety, or their family. While the right to counsel movement is not really about our legal services organizations or our work or our funds, it is about justice for the poor, the excluded and the most vulnerable. It pushes forward a vision of a system which will provide more to our client communities and to all litigants seeking access to our judicial system. We need to be part of this work, to make sure that our client communities benefit, that high standards are maintained for legal services provided to people in true need, and that the future of justice in America is one of which we can be proud.

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