

Why Judges Support Civil Legal Aid

Fern A. Fisher

Abstract: To fulfill their role as neutral deciders in an adversarial legal system, judges need lawyers. Unrepresented litigants tax the court system and burden the people who work in it. Judges around the country, of all political stripes, are resolute in their support of civil legal aid. Judges support civil legal aid because they value equal justice and the protection of the disadvantaged. They support legal aid because it assists in the efficient and effective administration of the courts they run. They also support legal aid out of self-interest, because it makes their work lives less threatened and more effective.

The United States judicial system is designed to be adversarial, to resolve disputes of fact and law before a neutral judge.¹ The premise of the system is that each party in a court case is capable of understanding and using the law, since each must present the law and the facts to the judge. An effective adversarial system requires the presence of legally trained experts, typically lawyers, on both sides of a case.

The civil legal needs of both low- and moderate-income individuals in the United States are not being met.² The need for legal assistance by over one hundred million people in this country is dire.³ Today's courts look nothing like the ideal. Around the country, state and federal courts regularly encounter pro se litigants: that is, litigants without attorney representation.⁴ When opposed by an adversary with a lawyer, litigants representing themselves often lose even when the merits of the case favor them. The imbalance leads to injustice.

For the many millions of unrepresented litigants appearing in American courts each year, mastering the rules of the adversarial system is next to impossible.⁵ Such litigants often do not understand the rules of evidence, and so cannot understand what facts are relevant or how to present them to a judge.

© 2019 by Fern A. Fisher
doi:10.1162/DAED_a_00550

An attorney opposing an unrepresented litigant is more likely to withhold evidence favorable to the litigant who is unlikely to know that such evidence must be turned over or to ask for it.

The required briefs, memoranda of law, motions, and pleadings are governed by rules that can be difficult for untrained individuals to comply with.⁶ Courts sometimes sanction unrepresented litigants who are ignorant of the law or become too emotional in the courtroom for not complying with court rules or for frivolous litigation.⁷ For these reasons and others, a litigant without an attorney is much more likely to fail than one who is represented.⁸

Lawyers are necessary outside of traditional litigation, too. Many disputes today are resolved through settlements negotiated outside of court. Even when managed by a professional mediator, the inequality inherent in negotiations between an untrained lay person and a lawyer remains.⁹ Even when both parties represent themselves, one or the other often unintentionally negotiates away rights or entitlements that are theirs under the law, because they do not know what is due them.¹⁰

All of these challenges are made worse by the disparity in education between lawyers and many low-income individuals, who generally read at lower reading levels and are more comfortable with oral communication, in particular by relating stories. The American justice system depends on written rules and on written orders and decisions, written at a reading level much higher than that of the average low-income litigant. Without a lawyer (or other kind of legal problem-solver) to explain the rules, navigate the legal process, and translate orders and decisions into accessible terms, a low-income litigant is likely to be lost in the system and to lose his case.¹¹

Either the United States must abandon a pure adversarial system and adopt another justice model—for example, relying on magistrates to find the facts in disputes—or the nation must commit to providing substantially more civil legal services for those who cannot afford them.

The cost of providing attorneys for everyone who needs but cannot afford one would be huge. Providing just one hour of legal services to each person unable to afford it would cost an estimated \$20–\$25 billion.¹² Courts cannot possibly cover this cost: cutbacks in court budgets by state legislatures mean that many courts cannot even cover their basic operating expenses.¹³ Few courts have money in their budgets to provide lawyers for the indigent. With \$100 million for civil lawyers, New York State recently had more money for this purpose than any other state. Though the funding was far from enough to close the justice gap, the state saw a significant decline in the number of unrepresented litigants in the courts.¹⁴

In response to the shortage of lawyers, despite insufficient resources, many court systems are trying to find ways to level the playing field by making legal forms and processes simpler and easier to use by people without lawyers. Simplification works for some kinds of cases, but it is not a substitute for lawyers when people have complicated substantive or procedural defenses or claims to pursue. Providing a lawyer, or a legal problem-solver, to those who cannot afford one is often the only way to equalize justice. Other forms of legal assistance are helpful and necessary, but they are inadequate to close the gap in access to justice.

Judges of all political stripes and at every level of government support providing lawyers for people who cannot afford them. As the late Justice Antonin G. Scalia put it, “in today’s law-ridden society,

*Fern A.
Fisher*

Why Judges of judges. Stressed out and overwhelmed
Support Civil judges cannot do their work well.²⁴
Legal Aid

Why Judges
Support Civil
Legal Aid

ABA Journal

C

C

J

S

P

S

C

L

University of Richmond Law Review

The Pro Se Project

Pro Se Litigants: The Challenge of the Future