

## ACCESS TO JUSTICE IN TIME OF CRISIS

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SYMPOSIUM CONFERENCE\*\*

IMAGINE THAT YOU ARE REQUIRED BY YOUR BOSS TO PLAY IN A TENNIS TOURNAMENT on behalf of your place of employment. When you arrive, you learn that your opponent is Monica Puig-Marchán, the Olympic gold medalist in tennis. You have never played tennis before and you do not know the rules of the game. Wait, it gets worse! You also lack the appropriate equipment, wearing flip flops instead of tennis shoes. You must play and win or lose your employment. The end result is inevitable.

What I just described is what *unrepresented* litigants experience in our courts everyday: facing formidable opponents improperly prepared. The end results are inevitable and have dire human consequences. *Unrepresented* litigants must face skilled lawyers who know the law and the procedures of our courts. People without lawyers don't know the rules of the legal system game and we don't give them the tools needed to succeed in the legal system.

In a survey recently conducted by the Federal Judicial Center of Federal Chief Judges, between one half to two thirds of the sixty-one Chief Judges who answered the survey indicated that *pro se* litigants don't know procedures, legal decisions, rules of evidence, or understand the legal consequences of their actions or inactions.<sup>1</sup>

I have two points to make about the survey. First, we have to stop calling people without lawyers *pro se* litigants. Unless the litigant speaks Latin, the litigant has no idea what it means. We must change our vocabulary so we can begin to change our thinking. In New York, we refer to litigants without lawyers as *unrepresented* litigants. Many people in this country use the term *self-represented* litigant. We opted not to use *self-represented* because it seems to imply that the individual has chosen to appear in court without a lawyer and that the person is able to represent him or herself in the same way as a trained lawyer. Most people who come to court do so because they can't afford a lawyer. Our heroes from Legal Services programs have resources sufficient to represent

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<sup>1</sup> DONNA STIENSTRA *ET AL.*, FEDERAL JUDICIAL CENTER, ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES vii (2011), [https://www.fjc.gov/sites/default/files/materials/2017/ProSeUSDC\\_o.pdf](https://www.fjc.gov/sites/default/files/materials/2017/ProSeUSDC_o.pdf).

only about twenty percent of people who seek their services.<sup>2</sup> There is a small percentage of individuals who choose to be unrepresented. They are the *do-it-yourself* types or have an antipathy for all lawyers. Therefore, with all due respect to the Federal judiciary and all that use the term *pro se*, STOP. Secondly, is it really necessary to conduct surveys to determine the problems *unrepresented* litigants have litigating their cases? As my kids would say, “that’s a no brainer”. Law students pay thousands of dollars to obtain a legal education to learn procedure, substantive law, and evidence to become litigators. Do we really have to ask ourselves if *unrepresented* litigants have problems presenting or defending their cases? Let’s move on from asking the questions that have obvious answers to finding the solutions that are not always that easy to find.

My hope for today and tomorrow is that we can begin to explore solutions that are possible. I will tell you in this conference that solutions are possible if we are willing to embrace change and accept some realities about the challenges. Our system is most often rooted in who presents the best case and not on the pursuit of truth. Success in our legal system depends on drafting the right pleadings, using discovery effectively, making the right motions, making the right legal arguments, asking the right questions at trial or on the evidence that you either get admitted or prevent the court or jury from considering. The reality is that our adversarial system is inherently unjust to *unrepresented* litigants. There are an estimated 1.8 million litigants without lawyers in New York. In Puerto Rico, it is estimated that 75% of litigants do not have lawyers. Why are we still estimating the problem? We need real data not estimates. I am here to talk about lawyers as the symposium program indicates, but because I have been a Judge in charge of courts for over twenty years and I am used to being the boss, I have amended my charge today to expand the conversation just a bit. We must have hard conversations.

*Unrepresented* litigants cannot fare well unless we give them, not just lawyers, but an array of services and until we also address our systemic deficiencies. I do not mean to bring doom and gloom to this conference. My goal is to ensure that all of us here today move away from our comfort zones and think outside the box, be willing to roll up our sleeves and embrace challenges.

Mahatma Gandhi said “you must be the change you wish to see in the world”. Raise your hand if you are here to try your very best to be part of the change that we need in our legal system. By the way, I have people writing down who have not raised their hands. They will be getting calls from me in the near future. *No* is not an answer. Change is always a possibility and is needed now.

Before I talk about using lawyers to reach full access to justice for all people, I want to point out a few other issues that face our litigants besides not being lawyers or having lawyers. These issues often impede a lawyer’s ability to represent clients effectively and must be addressed as we think of providing more lawyers to people. Throwing lawyers on top of systemic ills and doing nothing

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<sup>2</sup> FY 2017 Budget Request, LEGAL SERVICES CORPORATION (2017), <http://www.lsc.gov/media-center/publications/fy-2017-budget-request#bfrtoc-fy-2017-budget-request> (last visited May 22, 2017).

else will not result in change. We can't talk about providing lawyers to everyone unless lawyers can make a difference in procedural fairness and actual outcomes.

In New York, 120 different languages can be spoken in our courts by individuals from many cultures. Someone who speaks another language starts off with a disadvantage. Their culture might also have bearing on how they perceive authority or what transpires in the courthouse. Culture can affect how people understand and accept our laws, dress for court, and even how they respond to questions by the court. Here, in Puerto Rico, you are not faced with 120 different languages, but the island is facing rules in federal court that require English in the courthouse. Only twenty percent of the island's population speaks English proficiently, which means a large percent of the litigants in the federal courts do not understand the proceedings. Puerto Rico has the same problem of language that New York has and the problem involves a high percentage of people.

While there are not as many cultural differences here in Puerto Rico as there are in New York, there is one factor that is commonly shared: poverty. More than fortysix percent of your population lives below the poverty line, the unemployment rate is significantly high and the median income is very low.<sup>3</sup> This is stark information. We must begin to understand how poverty increases the people's legal problems. We must consider that being poor makes it difficult to get to court, pay court fees, dress properly for court, and affects how people perceive the system and receive and utilize information that is needed to succeed in court. People who are from generational poverty receive information best through oral communication. The legal system is mired in written communication through motions, orders, and decisions that many people cannot understand.<sup>4</sup>

Literacy rates in Puerto Rico are fairly high, however those rates are based on literacy in Spanish. Since proceedings in the Federal courts are in English, many litigants from Puerto Rico will inevitably face difficulties. Furthermore, legal documents and decisions are written on the college level while the average reading level of the United States is 5<sup>th</sup> to 8<sup>th</sup> grade, which means translating things into Spanish will not fix the problem.<sup>5</sup> The legal system must move toward the use of plain language. Plain language will help the unrepresented. In my experience, lawyers would also benefit from plain language when communicating with their clients. Plain language will increase comprehension and de-

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<sup>3</sup> *Population estimates, July 1, 2015, (V2015)*, CENSUS.GOV, <https://www.census.gov/quickfacts/table/PST045215/72/embed/accessible> (last visited May 22, 2017); *Puerto Rico Economy at a Glance*, BUREAU OF LABOR STATISTICS, <https://www.bls.gov/eag/eag.pr.htm> (last visited May 22, 2017).

<sup>4</sup> Honorable Fern Fisher, *Insuring Civil Justice for All: Meeting the Challenges of Poverty*, in IMPACT: COLLECTED ESSAYS ON THE THREAT OF ECONOMIC INEQUALITY 9-17 (2015), [https://www.ny.courts.gov/ip/nyazj/pdfs/Fisher\\_NYLS\\_Economic-Inequality-Publication-2015.pdf](https://www.ny.courts.gov/ip/nyazj/pdfs/Fisher_NYLS_Economic-Inequality-Publication-2015.pdf).

<sup>5</sup> *The U.S. Illiteracy Rate Hasn't Changed in 10 Years*, THE HUFFINGTON POST (Dec. 12, 2014) [http://www.huffingtonpost.com/2013/09/06/illiteracy-rate\\_n\\_3880355.html](http://www.huffingtonpost.com/2013/09/06/illiteracy-rate_n_3880355.html) (last visited May 22, 2017).

crease disputes. It does not help a client if he or she has no idea what the lawyer is explaining.

We have to consider gender differences and gender bias and how that affects women in the justice system. We will be challenged increasingly on how the members of the LGBTQ community receive access to justice.

As our population grows older, ensuring that the elderly are not left behind in the legal system, as well as protecting those with mental disabilities are priorities. In the New York City Housing Court, we have programs run by my office that are especially designed for the elderly and the mental and physically challenged litigant. We have an Assigned Counsel project that we operate in partnership with the New York City Department of the Aging which assigns a lawyer and provides social services to individuals.<sup>6</sup> Persons who are not able to adequately assert their claims or defenses in housing court are appointed Guardian *Ad Litem*s who are trained and supervised by the Court.<sup>7</sup> A guardian stands in the shoes of the litigant in proceedings and helps a litigant throughout a case with both legal and social services.

Legal problems are frequently fueled by social services issues in all levels of income but particularly with the indigent. Lawyers must not work in a silo, but address the problems of people in a holistic manner, working with other professionals to address the underlying problems that cause legal problems. If we don't, lawyers are not effective, leading to the same problems with the same clients, which keeps lawyers from helping other people.

Let's move on to talking about solutions. As time is short, my comments are regarding civil legal needs. Should we establish a right to counsel in civil cases? You may be surprised to hear that my answer is a qualified yes.

The road thus far to the right to counsel has not been smooth. In a case decided by the United States Supreme Court in 2011, called *Turner v. Rogers*, the Court considered the right to counsel in a child support case where the defendant was found in contempt for non-payment and facing incarceration. The Court found there was no right to counsel but found he should have received legal information and the judge should have been more inquiring about the defendant's inability to pay.<sup>8</sup> The Supreme Court will probably not visit the civil right to counsel anytime soon. State courts also have not established a right to counsel in civil cases.

In 2015, the Conference of Chief Justices and the Conference of State Court Administrators passed a resolution bypassing a right to counsel and supporting

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<sup>6</sup> *Litigants with Diverse Needs - Assigned Counsel Project (ACP)*, NEW YORK STATE COURTS ACCESS TO JUSTICE PROGRAM (2017), <http://www.nycourts.gov/ip/nyajj/diverseneeds/assignedcounsel.shtml> (last visited May 22, 2017); *Volunteer Opportunities - Assigned Counsel Project (ACP)*, NEW YORK STATE COURTS ACCESS TO JUSTICE PROGRAM (2017), <http://nycourts.gov/COURTS/nyc/housing/intern.shtml> (last visited May 22, 2017) (law students do internships in this program).

<sup>7</sup> *Guardian Ad Litem Program*, NEW YORK CITY HOUSING COURT (2017), <http://nycourts.gov/courts/nyc/housing/GAL.shtml> (last visited May 22, 2017).

<sup>8</sup> *Turner v. Rogers*, 564 U.S. 431 (2011).

instead the aspirational goal of 100% access to effective assistance for essential civil legal needs. Within the target of the 100% access concept are the indigent, working poor, and those with moderate income. The Conference recognized that in reaching the 100% access goal, we would have to utilize a continuum of meaningful and appropriate services.<sup>9</sup> The continuum includes a range of services from full representation or unbundled representation by a lawyer to assistance from a non-lawyer to self-help.

As commonly defined, the right to counsel entails access to free lawyers providing full representation to indigent people. During the course of the forty years that I have been a public interest lawyer and a Judge, I have evolved from striving to attain the perfect world in which we provide full representation by lawyers for all indigent individuals, to hoping to reach the less perfect goal of “100% effective legal assistance” for all. Focusing on only a right to counsel for the indigent and overlooking the other forms of legal assistance and systemic change will continue to keep our legal system inherently unfair to the working poor and moderate income individuals. Moderate income people will not receive free lawyers and will continue to face a flawed legal system.

The hard truth is that not every person needs the full representation of a lawyer. Nor can we now or in any of our lifetimes obtain the perfect goal. We should not ignore the good that working on attaining 100% effective legal assistance can bring to the whole of the legal system by limiting ourselves to attaining the perfect.<sup>10</sup> There are a whole lot of angry folks out there who feel government neglects their interests. Our plans for the future legal system must fix systemic problems and make the system work for all people. We cannot afford for the justice system, the foundation of democracy, to lose the confidence of the public. Polls and studies are showing we already have problems.<sup>11</sup>

Full representation is listed at the top of this chart of legal assistance in a bigger box because, for a large number of people, full representation by a lawyer is the only effective legal assistance that will provide justice. Those indigent individuals who can't afford a lawyer should have the right to full representation by a lawyer only if full representation is needed. Law professors, lawyers and judges must let go of the notion that everyone must have a lawyer and that a

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<sup>9</sup> RESOLUTION 5 *Reaffirming the Commitment to Meaningful Access to Justice for All*, in CONFERENCE OF CHIEF JUSTICES, CONFERENCE OF STATE COURT ADMINISTRATORS (2015).

<sup>10</sup> I must attribute this paraphrased statement to Jim Sandman, President of the Legal Services Corporation, which was made when he was referring to unbundled legal services during a conference on unbundling sponsored by the New York Courts Access to Justice Program and the New York State Bar in 2015.

<sup>11</sup> See Anthony V. Curto, *No justice for all -- how our civil justice system is failing Americans*, FOX NEWS (Aug. 12, 2012) <http://www.foxnews.com/opinion/2012/08/10/no-justice-for-all-how-our-civil-justice-system-is-failing-americans.html> (last visited May 24, 2017); Ron Faucheux, *By the Numbers: Americans Lack Confidence in the Legal System*, THE ATLANTIC (Jul. 6, 2012) <https://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/> (last visited May 22, 2017).

lawyer is necessary at every stage of a case, particularly if indigent persons do not need full representation or non-indigent people will not have lawyers.

The legal profession suffers from a “circle the wagons mentality.” We think that only lawyers can solve a legal problem. The medical profession backed away from thinking doctors were the only game in town and embraced other professionals to solve medical problems. It is time the legal profession puts aside its fears and accept that there are other solutions to legal problems other than the full services of a lawyer. Professor Deborah Rhode will more fully speak on the full spectrum of legal assistance.

How do we provide lawyers for all those who need full representation? One obvious solution is funding. In New York City, the problem has been addressed partially by a combination of State and City monies. One hundred million dollars in State funds for civil legal services has increased the availability of lawyers in all types of cases. Mayor Bill de Blasio just recently announced \$155 million in funding for “Universal Access to Counsel” in landlord and tenant cases for every indigent tenant at or below 200% of the Federal Poverty Line. Tenants at or below the cut off will be entitled to full representation in Housing Court. Tenants with incomes over the guidelines will receive advice only. \$62 million is already funded with the balance phased in over five years.<sup>12</sup> Services are currently being provided by Legal Services providers. Details for the future are pending. The funding in New York for lawyers is the highest in the country. This large sum of money is more concentrated in New York City, addresses only housing cases, and still leaves large numbers of people without lawyers.<sup>13</sup> In many jurisdictions in economic crisis, such as Puerto Rico, the ability to provide lawyers for people by increasing funding is an impossibility. In fact, a decrease in federal funds for Legal Services programs is a real possibility. IOLTA funding and increases in court fee or tariffs will not produce enough revenue. Should we throw up our hands and concede defeat? I hope you and others in Puerto Rico are resolved to push on and look at other ways to provide lawyers.

All of us, particularly those jurisdictions unable to fund lawyers for full representation, must fully maximize the use of pro bono. In 1997, when I first became a court administrator, I was faced with a Housing Court where only one percent of tenants had lawyers and ninetyfive percent of landlords were represented. I was unable to convince the bar association to start a pro bono program,

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<sup>12</sup> *State of the City: Mayor de Blasio and Speaker Mark-Viverito Rally Around Universal Access to Free Legal Services for Tenants Facing Eviction in Housing Court*, CITY OF NEW YORK (NYC) (Feb. 12, 2017), <http://www1.nyc.gov/office-of-the-mayor/news/079-17/state-the-city-mayor-de-blasio-speaker-mark-viverito-rally-universal-access-free> (last visited May 22, 2017).

<sup>13</sup> The current funding in New York City has increased the numbers of people in Housing Court with lawyers from one percent to twentyseven percent. *See City Report Reveals Major Increase In The Number Of Tenants In Housing Court Who Have Legal Representation*, CITY OF NEW YORK (Aug. 30, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/698-16/city-report-reveals-major-increase-the-number-tenants-housing-court-who-have-legal#0> (last visited May 22, 2017); NYC OFFICE OF CIVIL JUSTICE 2016 ANNUAL REPORT (2016).

so I started the New York State Court's first Volunteer Lawyer Program in Housing Court. After the course of twenty years, there are now Court sponsored and run volunteer programs in housing, uncontested divorce, foreclosure, family, and consumer credit. The Court recruits, trains and supervises volunteer lawyers with the help of partner bar associations, legal services programs, and law schools. All the programs use existing court funding and small grants for part-time attorneys from partner agencies. These part time attorneys provide the hands-on guidance in the courthouse to volunteers, while court employees oversee the entire program.

When we started the first program we were first stymied about what to do about malpractice insurance. Perseverance found an answer. Malpractice insurance is not needed as all volunteers are deemed public employees when volunteering and are therefore subject to indemnification and representation by the New York State Attorney General. I obtained an opinion from the New York Attorney General that allowed us to launch the program. In twenty years, we have never been sued or received a serious complaint.

Thousands of individuals have received assistance. The Consumer Debt program alone, called the Volunteer Lawyer of the Day, has represented over 25,000 consumer defendants. While all of the programs are unbundled by our design, a full representation model could also work. We have been able to use the unemployment rate of lawyers to attract volunteers who hope to learn new skills and add the prestige of working for the Court to their resumes. We have also recruited large law firms to provide volunteers for our programs.<sup>14</sup> Undoubtedly, when the Court asks, lawyers respond. Creating a culture of pro bono must be led by the judiciary. In addition to the resume value of volunteering at the court, incentives for pro bono service have included meeting the Chief Judge, recognition ceremonies, publishing lawyers' names and law firms' names in the newspapers, certificates, recognition plaques, Lawyer of the Year awards, volunteer pins, free Continuing Legal Education credits and free food. Don't underestimate the power of incentives, including good food. Some of you are questioning if it is the Courts' role to lead pro bono initiatives or even operate them. I have worked with three Chief Judges during my twenty plus years as an administrator. All three bought in. If we can follow this path in New York, you can do the same here.

We have used law students for a number of years in all the volunteer programs that the Court operates. They practice pursuant to a student practice order issued by our Appellate courts. They volunteer primarily during the summer. Law students who have graduated volunteer until they pass the bar and find employment. The biggest incentive for law students and law graduates to volunteer is the requirement that all law students and law graduates fulfill a bar ad-

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<sup>14</sup> The New York City Family Court Program has over 30 participating law firms. See *New York City Family Court Volunteer Attorney Program*, CORPORATE PRO BONO COORDINATORS (2017), [https://www.probono.net/ny/corporatecounsel/opportunities/item.2162-New\\_York\\_City\\_Family\\_Court\\_Volunteer\\_Attorney\\_Program](https://www.probono.net/ny/corporatecounsel/opportunities/item.2162-New_York_City_Family_Court_Volunteer_Attorney_Program) (last visited May 22, 2017).

mission requirement regardless of the law school they attended. Before a person is admitted to the bar he or she must establish that they provided fifty hours of public service. Public service must involve legal work and includes service at a government agency as well as traditional pro bono work for the indigent. Do not make the error New York made defining public service too broadly. Limit the rule to providing services to the indigent. Under our present rules, volunteering in a judge's chamber qualifies. Helping poor people or helping judges? Another "no brainer" in my opinion.

The other incentives for law students and law graduates to volunteer in the Court programs include: enhanced resume value due to the prestige of working in the court and the attraction for employers that the student has some practice experience. The Pro Bono Scholars program allows third year students to work in a legal service provider's office the last semester in lieu of a clinic or traditional classes. These students are allowed to take the February bar in advance of graduation. Early bar admission and actual experience give these students a jump on other students in finding employment. The fifty-hour pro bono rule and the Pro Bono Scholar program were made possible due to rules implemented by our highest court. These programs, in addition to the work law students do through traditional law school clinics, put a further dent in the need for lawyers. Pro bono programs led by court initiative and in partnership with others will not fulfill the great need for lawyers but will provide services for more. Your Legal Services program is already shouldering as much as it can. What will you do if its funds are cut?

Changing how lawyers practice, making it easier for them to practice and creating more efficiencies, is another route to insuring that there are more free lawyers for the indigent and more affordable lawyers for those above the poverty level but unable to pay exorbitant legal fees. Lawyers are entitled to make money and to live comfortable lives. However, they must consider business models that make it within reach of the working poor and moderate income individuals to afford their services. Legal Services providers could represent more people if they triaged the services they provide using a combination of full services and unbundled services. I know that your rules prohibit limited scope representation or unbundling which would make the service of a lawyer more reachable for the moderate income. Start working on changing the rules and the legal culture that is petrified of unbundling. I found a way around our rules to do our unbundled rules to do the Volunteer Lawyer for The Day Programs in the courts I directly administer in New York City. After eighteen years of pushing, the governing body of our court system just passed a resolution that will allow expansion of unbundling throughout the State. Change can be slow but it has to start with a first step. Take a baby step, then another and another until it's done.

Simplification of court processes, plain language and uniform forms will make it easier for lawyers to charge less and represent more people. Technology can be helpful to all. In New York, we have computer programs for use just by *unrepresented* litigants and programs just for advocates to use. Both types of computer programs are document-assembly programs that make it easier to



produce a pleading. The programs for litigants also have tutorial features and are available in languages other than English. There is no magic wand that will give any of us enough lawyers to have a full “Right to Counsel”. We can do a bit of everything to increase lawyers to the biggest extent we can.

In order to fix our systemic problems and to provide, most importantly, full representation by lawyers, law schools and law students, bar associations, lawyers, social service organizations, other professionals and the courts must all pitch in and work together to triage the needs of litigants and to provide appropriate assistance.

There must be the right to counsel but only when an attorney is needed. One day we will get to a perfect world when we do not have to ration access to justice. We should aspire to the perfect in the future, but we must keep our focus on the good we can do now. With a combination of minds, hearts and firm hands we must push the moral arc of the universe that Martin Luther King spoke of bending the justice system as one of full access to justice for all. The arc does not remain bent unless there is action. The time is now Puerto Rico.