

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
	Boston	50 percent of landlords 92 percent of tenants
Landlord-tenant	Utah	97 percent of tenants
	California (Eastern District)	15 percent to 17 percent of filings
Bankruptcy		

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.

Endnotes

- 1 Richard Zorza, "Access to Justice: Economic Crisis Challenges, Impacts, and Responses" (New York: Self-Represented Litigation Network, 2010).
- 2 Madelynn Herman, "Pro Se Statistics Memorandum" (Virginia: National Center for State Courts, 2006), available at <http://www.ncsconline.org/WC/Publications/Memos/ProSeStatsMemo.htm>; Christian Nolan, "More Litigants Go To Court Without Lawyers," *Connecticut Law Tribune*, March 16, 2009; Judicial Council of California, "Statewide Action Plan for Serving Self-Represented Litigants" (2004); Committee on Resources for Self-Represented Parties Strategic Planning Initiative, "Report to the Judicial Council" (2006); The Urban Justice Center, "Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor" (2007); District of Columbia Access to Justice Commission, "Justice for All?" (2008).
- 3 "How and How Much Do Lawyers Charge" Lawyers.com, 2010, available at <http://research.lawyers.com/How-and-How-Much-Do-Lawyers-Charge.html>.
- 4 John Greacen, "Self-Represented Litigants and Court and Legal Services."
- 5 For an example of some best practices, 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 at [LINK].
- 6 American Judicature Society, Tables Showing Significant Features of Pro Se Assistance Programs, available at http://www.ajs.org/prose/pro_tables.asp http://www.ajs.org/prose/pro_tables.asp.
- 7 For a proposal of how to evaluate the effectiveness of civil legal services, see Jeffrey Selbin and others, "Access to Evidence: How an Evidence-Based Delivery System Can Improve Legal Aid for Low and Moderate-Income Americans" (Washington: Center for American Progress, 2011), available at [LINK].
- 8 American Bar Association, "Legal Needs and Civil Justice: A Survey of Americans" (1994).
- 9 Legal Services Corporation, "Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans" (2009).
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- 15 American Bar Association, "Civil Right to Counsel Resolution" (2006).
- 16 Judicial Council of California, "Fact Sheet: Pilot Projects Under the Sargent Shriver Civil Counsel Act (AB 590[Feuer])" (2010).
- 17 See *Turner v. Rogers*, Docket No. 10-10 briefs, available at http://www.americanbar.org/publications/preview_home/publiced_preview_briefs_march2011.html.
- 18 *Turner v. Rogers*, Docket No. 10-10 (2011), available at <http://www.supremecourt.gov/opinions/10pdf/10-10.pdf>
- 19 Joy Moses, "And Justice for All" (Washington: Center for American Progress, 2009).

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.

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