7-2016

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VOLUME 2 • 2016

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COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE

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Access to Justice is More Than the Right to Counsel: The Role of the Judge in Assisting Unrepresented Litigants

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The struggle to guarantee a right to counsel in civil matters has recently been in the forefront of access-to-justice literature and activism. New York has led this initiative. For example, a bill that would guarantee counsel to a significant number of poor people facing eviction or foreclosure in a variety of civil fora is pending before New York City's City Council (Intro 214-A).[2] New York's state legislature adopted a concurrent resolution (C776/B2995) that commits the State to ensuring "adequate" and "effective" legal representation as essential to the "ideal of equal access to civil justice for all."[3] Similar legislative and litigation initiatives have sprung up throughout the country.[4]

This emphasis on the right to counsel as key to equal access to justice is not surprising. Our adversary system presumes representation by counsel. Indeed, in the seminal due process case, *Goldberg v. Kelly*, the Supreme Court reasoned that, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[5] Scholars have consistently noted that this inherent need for counsel is the result of our system's very structure, procedurally and substantively:

> The design of a legal system that cannot be operated by laypeople is surely the result of state decisions, indeed, of the accretion of hundreds of millions of state decisions. Moreover, the inability of poor people to afford lawyers is also the result of choices made by the state, both formalistically as a matter of law and also as a matter of plain fact. . . . [T]he selective exclusion of the poor from the legal system does not simply fail to confer an advantage on them— it actively injures them."[6]

However, in spite of the success of some recent right-to-counsel initiatives, it will be a significant time before even the limited populations covered by those initiatives will have access to counsel. In addition, there is no prospect for the enactment and funding of a general right to counsel in all civil proceedings. Thus, courts will continue to be faced with millions of unrepresented litigants for the foreseeable future. Indeed, the access-to-justice movement has from its inception recognized this fact and, thus, looked to multiple strategies, other than the right to counsel, to assure equal access to justice to the unrepresented litigant; for example: disseminating legal

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[2] Int. No. 214-A-2014, New York City Council, http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80.

[3] Concurrent resolution no. C776/B2995, N.Y.S. Assembly & Senate (2015), https://www.nysenate.gov/legislation/resolutions/2015/b2995.

[4] See the website of the National Coalition for a Civil Right to Counsel, http://civilrighttocounsel.org/map, for up-to-date coverage of these developments.

[5] Goldberg v Kelly, 397 U.S. 254, 270 (1970).

[6] David Luban, Lawyers and Justice: An Ethical Study 246-47 (1988).

information; adopting simplified procedures; mandating plain language forms; providing assistance by non-lawyers; and structuring unbundled legal service programs; etc.[7]

In addition to these strategies, a key challenge has been to convince judges that they can and, indeed, should take a more active role to assist unrepresented litigants and that this can be done without compromising judicial impartiality. A central challenge has been to make judges realize that such an expanded role is essential even where other reforms are in place. Over two decades of research have confirmed that the legal information provided to unrepresented litigants by plain language forms, simplified procedures and resource centers is generally rendered relatively useless once the unrepresented litigant enters the courtroom. Without the assistance of the judge in helping her articulate her claims and present her narrative, the unrepresented litigant is generally incapable of mustering her evidence according to a cognizable legal theory that might demonstrate her right to the relief she seeks.[8]

Understandably, judges trained in our adversarial judicial system find this challenge daunting. Since the only model of intervention with which they are familiar is the intervention of a client's attorney, their interventions may inappropriately take the form of such adversarial intervention and risk their being viewed as advocating for one side against the other. However, judicial and bar associations, as well as scholars, have developed and recommended methods that avoid such impartiality concerns.[9]

Nevertheless, due to impartiality concerns and an overly restricted notion of the role "judge," some judges continue to resist providing the assistance needed by unrepresented litigants. Unfortunately, in some instances, the emphasis in right to counsel rhetoric regarding the categorical necessity of counsel has provided some judges with a further justification for their inaction. One recent case provides a troubling example.

In *Floyd v. Cosi, Inc.*, a well-respected judge *sua sponte* recused himself from an employment discrimination case because "[l]ack of civil counsel required intervention by the court on [pro se] plaintiff's behalf. This ***could*** create the appearance of partiality in future decisions and therefore ***requires*** recusal."[10] Apparently, the court had "intervened" by asking "a series of leading questions" that revealed the occurrence of discriminatory acts during a period that defeated the represented corporate defendant's statute of limitations summary judgment motion.[11] Nevertheless, the court also noted that, in spite of its "intervention," "no partiality could be construed in rejecting defendant's motion for summary judgment based on timeliness."[12] However, the court still concluded that "if the plaintiff were to continue *pro se*, the court would probably be forced to intervene and, in effect, advocate on his behalf, ***possibly*** prejudicing the defendant's case. . . . [R]ecusal now is desirable to avoid the appearance of partiality by the undersigned judge in future decisions in the case."[13]

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[7] *See, e.g.,* Richard Zorza, The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers (2002); Jona Goldschmidt et al., American Judicature Society, Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers (1998).

[8] *See* Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating their Cases in New York City's Housing Court*, 3 Cardozo Pub . L. Pol'y & Ethics J. 659, 661-63, 683-85 (2006) (and works cited there).

[9] *Id.* at 671–76 (and works cited there).

[10] Floyd v. Cosi, Inc., 78 F.Supp.3d 558, 560 (E.D.N.Y. 2015) (emphasis added).

[11] *Id.* at 561.

[12] *Id.* at 561–62.

[13] *Id.* (emphasis added).

But what was the consequence for the unrepresented litigant of the judge's *sua sponte* recusal? The court indicated that given the facts (i.e., monetary value) of the case, representation in the private market was unlikely and appointment of counsel by the court would be an unjust imposition on the private bar.[14] The court also noted at length the initiatives of the judicial system and bar associations to provide counsel in civil cases, all of which came up short in providing counsel in cases such as the one before this court.[15] So, the result for this unrepresented litigant was that "[t]he case should be assigned to another judge of the court by random selection."[16] Thus, he then got another judge who would be even less likely to "intervene" on his behalf after Judge Weinstein's recusing himself precisely because he had "intervened." Accordingly, he continued as a *pro se* litigant with no one to assist him.[17] But Judge Weinstein had noted that "[i]n many cases, [including this one?,] *pro se* justice is an oxymoron. Without representation by counsel, it is probable, to some degree, that adequate justice cannot be served in this case."[18]

Thus, by Judge Weinstein's own analysis, this unrepresented litigant would probably be denied equal access to justice because of his inability to afford legal counsel and the system's failure to provide free legal counsel, and also because of the court's refusal to continue to "intervene" on his behalf. But regarding the court's recusal and refusal to further intervene on the unrepresented party's behalf because of impartiality concerns, one must ask whether there was an alternative to such judicial passivity? As indicated above, there is a plethora of literature regarding the ways in which a judge can intervene to assist the unrepresented litigant without violating impartiality.[19] That literature and protocols for judicial intervention adopted in a number of state courts raise a number of questions regarding the interventions in this case. Did Judge Weinstein have to resort to leading questions about discrimination occurring on the key date (July 2013) that defeated the statute of limitations defense? The decision indicates that the record also contained disciplinary action forms "spanning from March 19, 2012 through July 24, 2013."[20] There is little dispute that a judge can ask open-ended questions about such evidence already in the record and that it can be done in a manner that does not imperil the court's impartiality. Indeed, one might ask whether the mere asking of "leading questions" necessarily compromised impartiality or was prejudicial to the defendant? Even in an adversarial proceeding where both parties are represented, leading questions are permissible under a number of circumstances; Federal Rule of Evidence 611(c) is particularly instructive in this regard.[21] We might also want to think seriously about how the revealing of truth through the intervention of the court can ever be deemed prejudicial to the represented (corporate) party? There are a number of other such questions that this case suggests, but which are beyond the scope of this essay.

Unfortunately, this learned jurist seemed to be aware of only one option for assisting the unrepresented litigant: representation by counsel. In the decision, the court refers at great length to the possibilities inherent in the modern right to counsel initiatives to "fill the void."[22] In stark

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[14] *Id.* at 561.

[15] *Id.* at 562–63.

[16] *Id.* at 562.

[17] The court database indicates that the case was later settled/discontinued by stipulation. The terms of the stipulation were not available on that database.

[18] *Floyd*, 78 F.Supp.3d at 561.

[19] *See, e.g.*, Rebecca A. Albrecht et al, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 Judges' J. 16 (2003); Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations and Implications,* 17 Geo. J. Legal Ethics 423 (2004).

[20] *Floyd*, 78 F.Supp.3d at 561.

[21] Fed. R. Evid. 611(c).

[22] *Floyd*, 78 F.Supp.3d at 562–63.

contrast, he does not allude to any of the literature regarding an enhanced role of the judge that might also "fill the void" by the court's eliciting facts necessary to reach a just determination by asking open-ended and, in some circumstances, leading questions without compromising impartiality. Rather, he seems to equate "intervention" as of necessity resulting in a loss of impartiality: "If the plaintiff were to continue *pro se*, the court would probably be forced to ***intervene*** and, ***in effect, advocate*** on his behalf, possible ***prejudicing*** the defendant's case."[23]

One might be tempted to use this case as an example of the necessity for a categorical right to counsel in all such cases as the only means of assuring access to justice. One could argue that it demonstrates the untenable position into which even a seasoned, learned and empathetic judge is placed when faced with an unrepresented party. One could argue that it also demonstrates the hopeless situation in which it places the unrepresented litigant, since without counsel, he has no assistance in articulating his case. Indeed, one could argue that it is also a striking example of the "justice gap" that results from the lack of counsel since, absent counsel, there are no other options for assisting the unrepresented party. Who could resist such an argument in favor of a right to counsel?

But I believe that approach would have an unfortunate result in terms of equal access to justice. The right-to-counsel movement does, in fact, expose the limitations and harms of our adversarial judicial scheme, by highlighting its effect on the lives of unrepresented litigants in cases such as *Floyd*.[24] However, the constitutional mandate underlying equal access to justice will not let us settle for such a Hobson's choice, which would deny access to justice to millions of unrepresented civil litigants until some future time (if ever) when counsel might be provided for unrepresented parties.[25] Thus, we must avoid giving credence to or support of judges who use the rhetoric of the right-to-counsel movement to deflect their own due process and equal protection responsibilities to assist unrepresented litigants in achieving equal access to justice. Such deflection is not a constitutionally viable or permissible option.

Such deflection of an adjudicator's duty to assist the unrepresented litigant was recently rejected in a case in which I provided some assistance to former New York Supreme Court Justice Emily Jane Goodman.[26] In that case, an administrative law judge ("ALJ") failed to intervene to assist the unrepresented litigant primarily because a Guardian ad Litem ("GAL") had been appointed. However, the appellate court, in reversing the administrative determination, noted that such an appointment did not relieve the ALJ of her constitutional duty to assist the litigant, especially since the GAL was not a "suitable representative," i.e., he was not capable of assisting the unrepresented litigant in developing the record. Thus, the appellate court held, "Under these circumstances, the hearing officer's failure to develop the record during the brief hearing, and to make inquiry of the pro se petitioner, who exhibited confusion, deprived petitioner of a full and meaningful opportunity to be heard."[27]

The United States Supreme Court has similarly held that due process requires that the court provide minimum safeguards for unrepresented litigants, including asking follow-up questions, to

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[23] *Id.* at 561 (emphasis added).

[24] *See, e.g.*, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About when Counsel is Most Needed*, 37 Fordham Urb. L. J. 38 (2009).

[25] *See, e.g.*, Benjamin H. Barton and Stephanos Bibas, *Triaging Appointed Counsel Funding and Pro Se Access to Justice*, Knoxville College of Law, Research Paper #157 (Sept. 2011), *available at* http://ssrn.com/abstract=1919534; Richard Zorza, *Turner v. Rogers: The Implications for Access to Justice Strategies*, 95 Judicature 255 (2012).

[26] *See* Russo v. New York City Housing Authority, 128 A.D.3d 570 (2015). Former Justice Goodman represented the petitioner in the case challenging the Housing Authority's determination.

[27] *Id.* at 571 (citations omitted).

assure that the record is fully developed.[28] Although an unrepresented party faced imprisonment in his child support civil contempt proceeding, the Supreme Court held that he did not have a categorical constitutional right to counsel because, in part, the proceeding could include "a set of 'substitute procedural safeguards,' which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty."[29]

Thus, in *Turner*, the court's refusal to find a right to counsel did not end the access to justice inquiry. Rather, the court required that, for due process purposes, "substitute procedural safeguards" had to be "employed together" in the absence of the appointment of counsel.[30] Those safeguards include clear notice of the central issue, the use of forms or other means to elicit relevant factual information from the unrepresented party, and giving that party an opportunity to respond at the hearing to the factual issues raised in opposition to his defenses.[31] It is also important to note that the Supreme Court reversed the determination due in part to the judge's failure to ask "followup questions" after the litigant's rambling short statement to elicit key facts or to "otherwise address" the central factual issue in the case.[32] Rather, all the judge asked was "anything you want to say."[33] The Supreme Court found that "[t]he record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. . . . Under these circumstances Turner's incarceration violated the Due Process Clause."[34]

While there are strong constitutional and policy arguments against the *Turner* court's rejecting a right to counsel in civil cases such as the one before it, it did emphasize that the absence of counsel does not relieve the court of its duty to provide alternative means by which the unrepresented litigant is given a full and fair opportunity to be heard, i.e., that s/he is given equal access to justice in spite of her/his inability to afford counsel. Thus, the choice apparently made by Judge Weinstein in *Floyd* is not the only choice and may in fact not be a constitutionally appropriate choice at all. As noted above, that choice ignores the implications of the litigant's unrepresented status on her/his access to justice if s/he is deprived of both a right to counsel and appropriate interventions by the court.

Access to justice is a multi-layered program that includes everything from right to counsel to plain language forms. Under some circumstances, one or more of the options within that scheme may be the more appropriate intervention. However, the focus must always remain on what is necessary under the circumstances to achieve the unrepresented person's right to equal access to justice, not just procedurally, but also substantively and in terms of outcomes. Thus, those of us involved in this struggle must guard against analytical approaches in favor of one option that might undercut the value and availability of other options. We must also challenge courts that deflect their own due process and equal protection obligations to assist unrepresented litigants by bemoaning the failure of others to provide a right to counsel and claiming that it is inappropriate for them to "fill the void."[35] •

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[28] *Turner v. Rogers*, 564 U.S. 431 (2011).

[29] *Id.* at 447 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) (also holding that counsel was not required since the opposing party was also unrepresented and the issue was not complex).

[30] *Id.*

[31] *Id.* at 447-48.

[32] *Id.* at 437–38.

[33] *Id.* at 437.

[34] *Id.* at 449.

[35] *Floyd*, 78 F.Supp.3d at 562.