

## TAKING THE STAND

# Reform of the Superior Court Is Necessary to Achieve Judicial Neutrality

By Jonathan M. Smith and Eric Angel

In recent years, the District of Columbia courts have taken impressive steps to improve access to justice for poor and unrepresented litigants. In 2005, the District of Columbia Court of Appeals created the District of Columbia Access to Justice Commission, which was instrumental in securing significant funding from the District government to increase the number of lawyers serving communities living in poverty. In addition, there are self-help centers available in the courthouse for family law, and landlord and tenant law—two of the most significant, high-volume courts dominated by pro se litigants. In recent months, the Superior Court of the District of Columbia has added to this capacity by making space available in the courthouse to legal services lawyers to provide representation on housing and small claims matters. The Superior Court also has undertaken a myriad of other changes to practice and procedure to create transparency and to assist litigants who do not have counsel to pursue their claims or defenses.

This progress is important and the court has shown a sincere commitment to continuing to bring about changes that will make the Superior Court more open and available. However, significant additional reform is necessary.

The legal problems of persons living in poverty often arise out of basic human needs, such as housing, family relationships, income, and education. Language and other barriers are much more likely to prevent litigants with limited means from meaningfully asserting their rights than those who have access to resources.

One in every five District residents lives in poverty. Although there are nearly 30 legal services organizations and an active pro bono culture, more than 90 percent of the need goes unmet. The

volume of cases in which a tenant is threatened with eviction illustrates the problem. Approximately 45,000 tenants are sued in the Superior Court each year for eviction. Most are poor and many have defenses. Only 500 get a lawyer.

The legal system helps lock people in poverty. Cases involving poor families frequently have far-reaching consequences. If a person living in poverty lacks the ability to assert a claim or raise a defense, his or her life, and the life of his or her family, will be further destabilized. The cost of a wrong decision to poor litigants often is the starting point of a cascade of crises. The following are but a few of the thousands of scenarios that illustrate this point:

- If a woman is fired because her abuser threatens her at work, and she doesn't have a lawyer to get her job back, she and her children are now without an income.



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- If a child is improperly denied Medicaid, she could go untreated for common conditions, such as ear infections, exposure to lead paint, or mold, which will later impair her ability to learn.
- If a family is evicted when it could be avoided, and the family is unnecessarily rendered homeless, job loss, disruption of education, and other setbacks are a predictable consequence.
- If an illegal debt-collection practice results in the repossession of a car, the owner could lose his job and his family's income.

In an ideal world, the crisis in access to justice would be resolved by adding many more lawyers to the network of anti-poverty legal aid organizations. While it continues to be important to work for universal access to a lawyer, it may be a long time before every poor litigant who needs free legal counsel is able to secure it. Until that time, it is critical that the court take affirmative steps to ensure the rights and claims of unrepresented litigants are protected.

Judicial neutrality often is raised as a barrier to reforms that would level the field for litigants who cannot afford counsel. Ad-

vocates and judges who oppose changes argue that to assist unrepresented litigants requires a judge to "pick sides." This argument turns the role of judges on its head.

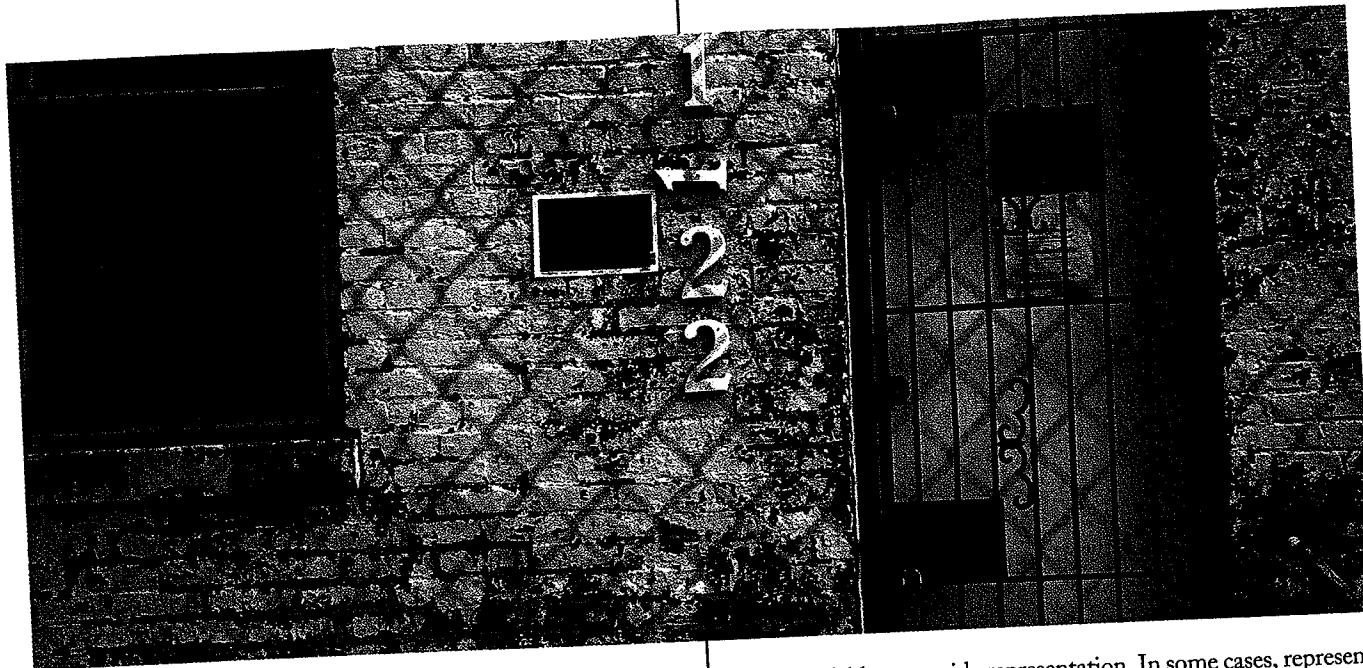
### **The Solution: Court Reform**

A common notion of judicial neutrality requires the court to resolve disputes based on the law and evidence which the parties bring before the judge. To remain neutral, the judge must be passive and consider only that which is presented. The court relies on the rules of procedure and evidence to ensure that each party is given the same opportunity to present its case.

The problem, of course, is that in many cases the parties do not start on equal footing, and many unrepresented litigants do not have the training or experience to navigate the procedural rules. While a judge will consider, in a neutral fashion, properly presented evidence or arguments, unrepresented litigants lack the tools to put evidence or a legal argument before the court.

From the perspective of the pro se litigant, the judge is like a referee in a peculiar foot race. Both sides are shackled to a heavy

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weight by the rules and the law, and the judge is required to measure who reaches the finish line first. The court applies the rules of the race in a scrupulously fair manner, but the rules permit some racers to purchase the key that will unlock their shackles. Under certain circumstances, the judge can loosen the chains, but never remove them. Few would call this race fair.

This paradigm of neutrality often is contrasted with an inquisitorial model in which a judge or a magistrate plays an active role in the development of the case, searching out evidence and questioning witnesses. Judges properly worry that to become too involved in helping unrepresented litigants, places them in the role of an advocate or undermines the adversarial system.

The choice between being a passive bystander and an active participant is a false one. Instead, genuine neutrality only can be achieved if the court purposefully structures its work so that the procedures are dynamic and actively facilitate fair proceedings. This will allow individual judges to address the merits of individual cases as presented.

The reforms proposed below will be hard to achieve. To be successful, the court will be required to reallocate its limited resources and change practices that have been in place for decades. Those who benefit from the current system will resist and fight to retain the status quo. However, these measures are necessary to make the court's motto real: "Open to All, Trusted by All, Justice for All."

**Ensure Lawyers When No Other Measure Will Guarantee Justice.** It is important to recognize at the outset that there are cases in which a fair result can only be achieved where one or both of the parties are provided counsel by the court. Matters involving complex legal issues, difficult factual questions, or expert opinion evidence may be beyond any layperson. Moreover, litigants with mental disabilities, persons who face language barriers, or individuals who are vulnerable to intimidation because of age, victimization, or other factors, are at a particular disadvantage.

As a matter of due process, if it is impossible for a litigant to obtain justice without counsel, the judicial system must provide that help. The District's courts should recognize this reality and appoint lawyers in appropriate cases where civil legal aid programs

are unavailable to provide representation. In some cases, representation at a critical hearing will be all that is required, but for many others, an ongoing attorney-client relationship will be necessary.

The American Bar Association and the bars of California and Massachusetts have acknowledged that a lawyer may be necessary for a just result and adopted "Civil Gideon" resolutions.<sup>1</sup> The state of New York has gone further and provides counsel to all poor litigants in custody matters. The state of California has embarked on an experimental program that creates the right to counsel in civil matters in three counties.

**Provide Adequate Judicial Resources to the High-Volume/Poor Person Courts.** When litigants walk into the Superior Court, they can immediately perceive whether the court is concerned with their disputes—whether it is neutral. The courtrooms to which litigants who lack means are summoned are crowded and the judges have little time to hear each dispute. If they are lucky, after a long wait, they may get a few confusing minutes before a judge.

The unrepresented litigant is fully aware that those branches of the Superior Court that hear cases involving persons living in poverty are allocated the fewest judicial and clerk's office resources. In domestic relations cases, for example, if there are property issues the matter is deemed "complex" and assigned to a special docket. As a result, the property aspects of a wealthy family's divorce receive far more attention from the court than the decision about the custody of a poor child. Similarly, commercial cases and tort cases consume far more judicial resources and are given immeasurably greater attention than whether a family will become homeless. Poor litigants also know that in their case, the docket is structured to aid the landlord or the merchant. Poor litigants must wait until it is convenient for the institutional litigant to get the case resolved. Indeed, once these cases are called, the few precious minutes before the court are generally dominated by opposing counsel, who is a repeat player and knows the rules of the game. In these courtrooms justice all too often is a commodity that values efficiency over substance.

The disparity in the treatment of cases can be cured by assigning additional judges to the domestic relations, landlord and tenant, and small claims courts. By doing so, the judges will have

a greater opportunity to give each of these cases the time and attention it deserves.

**Structure Proceedings to Guide Unrepresented Litigants.** Technical or complex pleading rules and the maze of court processes create barriers to the resolution of disputes on the merits. Something as simple as an application for status as in forma pauperis, if not made simple, can be an impossible hill to climb. Leaving aside that the poor litigant might not understand the Latin, completion of the papers can be impossibly complex. Just to get a case filed IFP, a litigant might be required to obtain a form from a clerk, have it notarized in another office, and submit to examination before a judge who may, or may not, be assigned to his or her case. Compounding the litigant's confusion, the standards to grant or deny are often vague and the exercise of judicial discretion without transparency.

Procedures should be restructured to guide litigants to ensure that they have an opportunity to address each element of claims and defenses and to present evidence in an admissible fashion. Necessary changes include:

*Interactive Forms.* Many litigants have claims or defenses that, without help, they cannot articulate in the proper legal format. The District should follow the lead of other urban courts and devise forms that take litigants through their case in an algorithmic fashion. Defendants could be asked about the elements of common defenses and guided to produce the most useful and effective evidence. Form answers, signed as a declaration, would in most cases be sufficient evidence to present a prima facie defense. Properly constructed, more narrative court forms would not only

improve the quality of judicial decisions, but increase court efficiency as well as give litigants the option of making written presentations of basic facts and arguments.

*Automatic Disclosures.* In proceedings with a high volume of institutional litigants, including the Landlord and Tenant and Small Claims branches, the rules should be amended to require the party seeking relief to be served, along with the complaint, basic information that will be used as evidence. Landlords seeking to evict for nonpayment of rent should provide the tenant with a copy of relevant portions of the lease to establish the obligation to pay rent and the rent record kept by the landlord. In a debt-collection case in small claims court, the defendant should be served with the underlying contract, documents to support that the goods or services were provided, and the bill. Without these basic documents, defendants often lack sufficient information to prepare to defend the case.

To justify requiring only scant information from plaintiffs, it is frequently argued that "tenants know if they didn't pay the rent" or a "debtors know if they didn't pay a bill." In no other proceeding is it acceptable to deny information to a litigant because they "ought to know." Moreover, in a material percentage of cases, the provision of the information will affect the outcome. For example, it is not uncommon for a landlord to apply a disputed charge to a rent ledger, apply rent payments to the debt, and then sue for failure to pay rent. The debt at issue is the disputed charge, not the rent, but the tenant has no way to know or prepare to meet the claim since the true nature of the case is never disclosed to him or her. This is but one of a multitude of scenarios in which an automatic disclosure would make a difference.

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*Reduce Emphasis on Settlement.* In an effort to deal with the crush of cases in which poor and unrepresented litigants seek the court's assistance to resolve disputes, the court has created mechanisms to encourage the parties to settle. The court's push to settlement has, for a very large percentage of litigants, had the unintended consequence of coercing unrepresented parties to waive rights and accept a resolution that is neither just nor in their best interest. While settlement often is appropriate, given current conditions, tenants routinely enter into unfair, skewed settlements that they would never enter into if properly advised.

In the Landlord and Tenant Branch of the court, up to 250 cases are set for the same hour in the morning. A tenant's case will not be heard until the landlord's attorney is ready to go before the court, often several hours later. Meanwhile, the landlord's attorneys meet with the tenants who have court appearances that day. The conversation between the tenant and the lawyer cannot be called a negotiation. The lawyer knows the process and the law and holds the keys to the tenant's continued housing. The tenant often has little understanding of his or her rights and no meaningful opportunity to raise the many defenses that are available under District law. To make matters worse, if the tenant declines to accept a settlement on the landlord's terms, the tenant must wait, often hours, while the landlord talks to other tenants before he or she can see a judge.

Mandatory mediation in family court carries similar risks where one or both parties are unrepresented. Unequal bargaining power that results from differences in economic status, a history of domestic violence, or the threat of a loss of custody will force a parent to choose an unfavorable settlement when the result would be different had the case been presented to a judge. While it might take longer and require additional judges, justice requires the court to mitigate the pressures it applies on unrepresented litigants to settle.

At a minimum, to ensure fairness, every settlement should be accompanied by a *voir dire* from the court, similar to the scripted questioning that occurs at sentencing. Unrepresented litigants should be advised of their right to raise defenses and the nature of common defenses should be explained, they should be advised that they are waiving the right to appeal and that settlement may preclude future claims, and they should be offered the chance to consult counsel—court-appointed, if necessary. In this way, the risk of exploitation that naturally exists where there is a knowledgeable represented party or a sophisticated institutional litigant against a pro se party can be mitigated.

**Schedule Proceedings in a Manner that Allows Low-Income Litigants to Meaningfully Participate.** Something as simple as the way the court manages the scheduling of hearings can have a profound effect on a litigant's ability to assert his or her rights. It often is not easy for a poor litigant to attend court. Transportation can be difficult and child care hard to find. If the litigant is working, it often is in a low-wage job, with little or no paid leave, and a boss that might well be unsympathetic to the needs of the litigant to attend court. Litigants who are forced to wait all day to resolve a simple matter, are required to return multiple times, or required to file separate actions to address related disputes are sometimes forced to settle or abandon their rights. A tenant sued for possession may give up the right to claim a defense of housing code violations because he or she cannot wait the hours it takes just to meet with the judge to get a court date at some point in the future in which he or she might be able to present her claim.

To make the court meaningfully open to low-income and working litigants, the court should:

- Eliminate "cattle call" dockets. Cases should be scheduled so that a litigant has the opportunity to be seen by a judge within a reasonable proximity of the time the hearing was set.
- Reduce the number of appearances required to resolve a case. Every time a litigant is required to attend court might mean a lost day of work or create a child care burden. Requiring unnecessary appearances has the effect of coercing litigants to waive rights or abandon claims.
- Ensure that, once commenced, proceedings will continue from day to day until completed. It is not uncommon for custody or housing cases to get tried in bits and pieces over periods of weeks or even months because the court did not have a sufficient block of time set aside to try a case to completion.

**Ensure Litigants in High-Volume Court Are Treated With Respect and Courtesy.** The District of Columbia Code of Judicial Conduct provides that "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity," (Canon 3.B(4)) and "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice ... based on ... socioeconomic status." (Canon 3.B(5)) The court as a whole takes these injunctions very seriously and the overwhelming majority of judges are deliberately attentive to the importance of civility. However, the high-volume poor person courtrooms test even the most patient judges and many unrepresented litigants experience inappropriately harsh treatment.

In most cases, sharp comments and bruising outbursts are the result of the inhumane procedures in the high-volume court and are not the product of the judge's true feelings or personality. It is unfair to ask the court to resolve each day dozens or hundreds of cases involving fundamental human needs with too few advocates, so little information at its disposal, and no real sense that justice is being done. Too frequently the humanity of the litigants must be obscured to allow the court's bureaucratic gears to grind under these circumstances.

Unfortunately, the result is the same. Litigants who feel the court does not respect them will be less likely to willingly accept the result and will continue to believe that the court is not available to them. A significant increase in the number of judges assigned to the high-volume courts, so that the overwhelming crush of cases is reduced, will go a long way to eliminating incidents of incivility.

Neutrality goes beyond a judge's conduct in an individual case. When unfair procedures are in place, our courts cannot be the neutral tribunals they aspire to be. The court must take this into account as it allocates resources and crafts the rules governing its high-volume courts. While the Superior Court's efforts to date are commendable, there is much more work to be done.

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#### Note

At its August 2006 meeting, the House of Delegates of the ABA adopted the following resolution:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, maintenance, safety, health or child custody, as determined by each jurisdiction.