



Kansas Journal of Law and Public Policy Symposium
Access to Justice: Commemorating the 50th Anniversary
of the Criminal Justice Act
Adams Alumni Center, University of Kansas
February 20, 2015

10:45 – 11:15 am Ethics - .5 *CLE credit ethics*

“Access to Justice and the Role of Private Practitioners”
Professor Russell Engler, New England Law

University of Kansas
Access to Justice: Commemorating the 50th Anniversary of Criminal Justice Act
ACCESS TO JUSTICE AND THE ROLE OF THE PRIVATE PRACTITIONER
Russell Engler, Professor of Law & Director of Clinical Programs
New England Law | Boston

Abstract

In this presentation and forthcoming article, I address the issue of Access to Justice and the Role of Private Practitioners as part of a comprehensive strategy to promote meaningful access to justice. The backdrop to the conversation includes trends involving unmet legal needs, the legal services delivery system, the flood of unrepresented litigants in the courts, the available data on the impact of counsel on case outcomes, and the Access to Justice and Civil Right to Counsel Movements. The evolution of self-help and limited assistance programs, involving initiatives with the courts, collaborations with legal aid programs, pro bono initiatives, and the provision of representation to moderate income clients, all occur against the backdrop of these trends. Private practitioners can and should play important roles in each of these components to a comprehensive delivery system.

The conversations implicate questions about evaluation and ethics at every turn. Regarding evaluation, how do we measure the effectiveness of each new initiative, and how do we make choices about allocation of scarce resources? Regarding ethics, where lawyers are involved in providing assistance short of full representation, how do traditional issues such as the scope of representation, competence, conflicts of interest apply? Even where lawyers provide full representation, what added considerations are involved when lawyers oppose unrepresented litigants? Where the innovations involve judges, court-connected mediators and clerks, what steps may those court actors take without crossing the line and no longer appearing neutral?

Where nonlawyers are involved, how do they provide assistance without running afoul of prohibitions against the unauthorized practice of law?

I connect the threads of the conversation by urging a three-pronged approach to a coordinated, overarching access to justice strategy that includes 1) revising the roles of the key players in the court system, 2) the increased use of assistance programs short of full representation, but paired with evaluation measures to prioritize the programs that impact case outcomes; and 3) where lesser steps are insufficient and basic human needs are at stake, the provision of publicly-funded counsel. While the three-pronged approach focuses on the court system, its analysis applies as well not only to administrative agencies as well, but to front-end initiatives aimed at prevention. After illustrating the way in which the prongs are interrelated, and the extent of the need for counsel depends on the effectiveness of the other initiatives, I conclude by returning to the question of where the opportunities for private practitioners assistance might lie, but also raising questions about the need to evaluate the effectiveness of various programs, and the use of private practitioners, to insure that the efforts contribute to meaningful, rather than mere, access to justice.

Annotated Outline

I. Introduction

II. **Backdrop – The Justice Gap and Consequences**

1. Unmet Legal Needs -- The vast majority of the legal needs of the poor and working poor are currently unmet.¹

2. Legal Services—Publicly-funded legal services has never been funded at a level to meet the demand, and has faced crippling cutbacks in recent years.²

3. Courts as a result face a flood of unrepresented litigants--most tenants, many landlords, most litigants in domestic relations cases and most debtors appear without counsel³

4. Data—Studies repeatedly show that unrepresented tenants, debtors and litigants in domestic relations cases, as well as claimants in administrative proceedings obtain far worse results than represented ones.⁴ The findings are complicated by recent randomized studies, but the consistent conclusions across the reports are that a) representation is an important, but only one variable impacting case outcomes along with the substantive and procedural law, the quality and strategies of the lawyers, features of the forum and tendencies of the judge and the characteristics and capabilities of the litigants and b) power, the lack of power and power imbalances are crucial to the analysis.⁵

¹ See, e.g., Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HLPR 31, 34-36 (2013)(hereinafter “*Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*”); *Legal Needs Study 2011*, Kansas Legal Services, Inc, available at <http://www.kansaslegalservices.org/files/Kansas%20Legal%20Needs%20Study%202011.pdf> .

² *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, *supra* note 1, at 34-36.

³ *Id.*,

⁴ See, generally, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010)(hereinafter “*Connecting Self-Representation to Civil Gideon*”).

⁵ See, Russell Engler, *When Does Representation Matter?* Book Chapter for Estreicher & Radice, ed., *Beyond Elite Law: Access to Civil Justice for Americans of Average Means*, Cambridge University Press (forthcoming)(hereinafter *When Does Representation Matter?*); *Connecting Self-Representation to Civil Gideon*, *supra* note 4 at 73-81.

III. Access to Justice- Limited Assistance and Self-Help

Access to Justice (ATJ)– The issue of unrepresented/pro se litigants increasingly gained attention in the 1990’s and early 2000’s, with increasing numbers of states creating Access to Justice Commissions to organize the responses to the reality of self-representation.⁶

A. ATJ Initiatives Inside and Outside the Courthouse

1. Responses inside the courts include revising the roles of the key players (Judges, Clerks, Court-connected Mediators), a move toward simplification to reduce procedural barriers, and increased use of technology.⁷
2. The period has often seen an explosion of innovative and varied Self-Help and Limited Assistance Programs.⁸

B. The Innovations and Trends implicate a package of ethical issues

1. Familiar issues in Unfamiliar Contexts
(e.g. Lawyer--Client Relationship, Scope of representation, Competence, Confidentiality, Conflicts of Interest, use of non-lawyers & law students)⁹
2. Unbundled Legal Services & Ghostwriting¹⁰
3. Challenges for lawyers opposing unrepresented litigants¹¹

⁶ *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, *supra* note 1, at 36.

⁷ *Id.*, at 45-47; Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 367–68 (2008)(hereinafter *Ethics in Transition*).

⁸ *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, *supra* note 1., at 47; Russell Engler, *Opportunities and Challenges: Non-Lawyer Forms of Assistance In Providing Access to Justice for Middle-Income Earners*, in *Middle Income Access to Justice* 155-56 (2012) (Michael J. Trebilcock, Anthony J. Duggan and Lorne Mitchell Sossin eds.)

⁹ See, Russell Engler, *Limited Representation and Ethical Challenges*, Book Chapter for Estreicher & Radice, ed., *Beyond Elite Law: Access to Civil Justice for Americans of Average Means*, Cambridge University Press (forthcoming); Russell Engler, *Approaching Ethical Issues Involving Unrepresented Litigants*, 43 Clearinghouse Review 377 (Nov-Dec, 2009)(hereinafter “*Approaching Ethical Issues Involving Unrepresented Litigants*”).

¹⁰ See, Kansas Limited Representation Rule, Kansas District Court Rule 115A, available at http://www.kscourts.org/rules/New_Rules_and_Amendments/Rule%20115A%20updated/115A_Updated.pdf; ; *Approaching Ethical Issues Involving Unrepresented Litigants*, *supra* note 9 at 378-81.

4. Court players: Judges, Court-Connected Mediators & Clerks¹²

C. Evaluation & Assessment—The evaluation of limited assistance programs has focused less on case outcomes and more on “customer satisfaction.” The programs tend to be popular, but the extent to which they are sufficient is harder to assess without comparable data and data points.¹³

IV. Civil Right to Counsel (CRTC)– Brief Update Regarding Doctrine and Activities

A. The CRTC Backdrop– The period since the 40th anniversary of Gideon v. Wainwright has seen a surge in interest in a CRTC, and activity around the country including test case strategies, statutory initiatives, pilot programs and the adoption of ABA Resolution 112A.¹⁴

B. The United States Supreme Court’s decision in Turner v. Rogers,¹⁵ is generally analyzed as a CRTC loss and an ATJ win.¹⁶

V. Synthesis: A Comprehensive ATJ Strategy that includes CRTC

The disparate ATJ and CRTC initiatives can be most effectively understood as components of a comprehensive ATJ strategy. My recommended synthesis is characterized as a 3-pronged approach, including

1. Revising the Roles of key players in the court system, so they provide the key assistance to litigants they are permitted to provide;

¹¹ See, Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CAL.L.REV. 79 (1997).

¹² See, *Ethics in Transition*, *supra* note 7.

¹³ See, *Connecting Self-Representation to Civil Gideon*, *supra* note 4, at 66-73; D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Phillip Hennessey, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future* 126 HARV. L. REV. 901 (2013).

¹⁴ See, e.g., *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, *supra* note 1, at 36-37.

¹⁵ 131 S. Ct. 2507 (2011).

¹⁶ See generally, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, *supra*, note 1.

2. Increasing use of, and experimentation with, forms of assistance programs short of full representation, paired with evaluation to measure which innovations impact case outcomes and which instead achieve other goals, such as reducing headaches for the courts or otherwise making cases proceed more quickly or smoothly; and

3. Where lesser steps are insufficient, and the interests at stake involve basic needs, provision of counsel in keeping with 2006 ABA Resolution—basic human needs.¹⁷

VI. The Role of Private Practitioners,—

A. The three prongs of a coordinated ATJ system reveals the opportunities for important roles for individual private practitioners at every juncture, to help increase access to justice not only for the poor, but the near poor and many middle-income litigants who cannot afford counsel

1) Prong 1—a) assist at self-help centers; information centers; and other court-based programs; and

b) help the bench and bar navigate ethics rules to facilitate assistance

2) Prong 2—Participate in all forms of assistance between court initiatives and full-representation

a) hotlines – see e.g. Kansas Legal Services (KLS) hotlines for elders; serving our troops.¹⁸

b) pro se clinics & form preparation- e.g., KLS programs funded by Interest on Lawyers Accounts (IOLTA)¹⁹;

c) limited representation- in one's private practice²⁰

¹⁷ See, e.g., *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, *supra*, note 1, at 42-43; Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REV. 196 (2006).

¹⁸ See, e.g., Kansas Legal Services, Inc., 2013 Annual Report, at 5, available at http://www.kansaslegalservices.org/sites/kansaslegalservices.org/files/2013%20Kansas%20Legal%20Services%20Annual%20Report_0.pdf.

¹⁹ *Id.*

3) Prong 3-full representation and expanded CRTC

a) Develop “Low Bono” practices- focusing on areas involving fee-shifting²¹

b) Incentivize Law Schools to insure that graduates are equipped to handle clients in the “justice gap” areas of law- MA added the topic of Access to Justice to the Bar Examination for this reason²²

c) Accept referral of Reduced Fee or Pro Bono Cases- e.g., KLS has reduced fee and pro bono panels²³

d) Serve on the board of, or donate money to, legal services programs so they may reach more clients²⁴

e) Follow San Francisco’s lead and organize a civil right to counsel initiative with pro bono representation²⁵

B. As a community, private practitioners must Provide Leadership on Access to Justice issues-

1) We are well past the days when we can expect legal services alone to handle issues involving those who cannot afford counsel

2) Chief Judge Lippmann of New York contends that the Judiciary must lead on Access to Justice issues²⁶

²⁰ See, Rule 115A, Kansas Limited Representation Rule, *supra* note 10.

²¹ See, Singen et al., *Dollars and Sense: Fee Shifting*, in Herrera, Ed., *Reinventing the Practice of Law: Emerging Models to Enhance Affordable Legal Services*, ABA Standing Committee on the Delivery of Legal Services, 87-110 (2014).

²² See, Memorandum of the MA Access to Justice Commission supporting the addition of the topic of “Access to Justice” to the Massachusetts Bar Examination, available at <http://www.massacesstojustice.org/resources/amendment-bbe-rules-proposal.pdf> and the definition of the new topic, available at <http://www.massacesstojustice.org/resources/amendment-bbe-rules-brief-description.pdf>.

²³ Kansas Legal Services, Inc., 2013 Annual Report, *supra* note 16, at 5.

²⁴ The KLS Board of Directors includes a number of private practitioners, and IOLTA and Bar Sponsored Revenues are important components of the KLS budget. *Id.*, at 17, 19.

²⁵ See, *San Francisco Right to Counsel Pilot Program Documentation Report*, John and Terry Levin Center for Public Interest and Public Service, Stanford Law School (2014), available at <http://www.law.stanford.edu/sites/default/files/child-page/341183/doc/slpublic/SF%20RTCC%20Documentation%20Report.pdf>.

3) The Private Bar is an essential partner in the ATJ leadership as well

VI. Conclusion

²⁶ The Honorable Jonathan Lippman, *The Judiciary as the Leader of the Access-to-Justice Revolution*, 89 N.Y.U. L. REV. 1569 (2014).