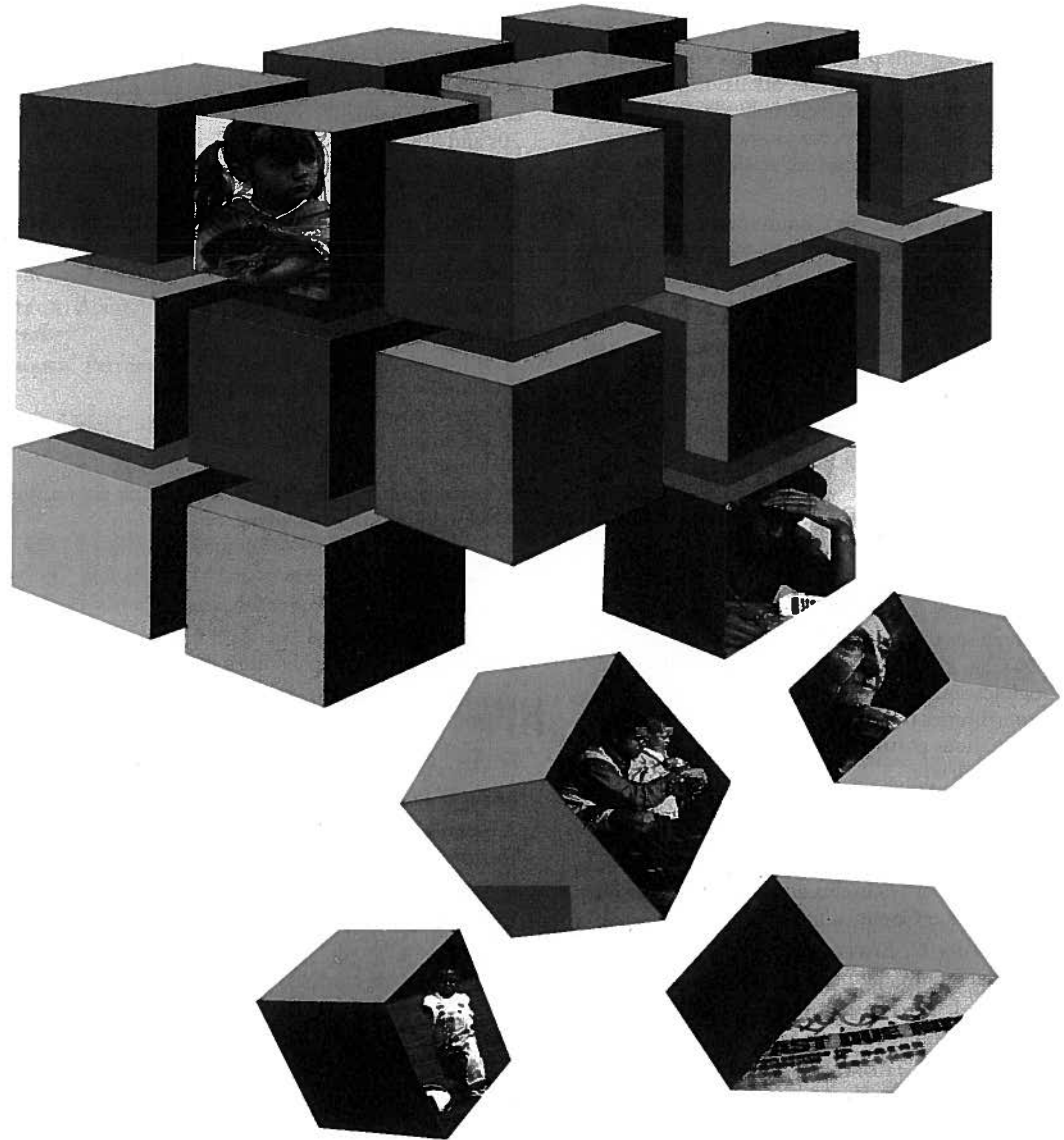


RATIONING JUSTICE

The Need Is Up and the Money Is Down

By Peter B. Edelman and Jonathan M. Smith



Margret is a single mother. She works a low-paying job to support her children and to pay her rent. It was always a struggle, but she kept current with her landlord. What she did not know was that her landlord was not making his payments to the bank.

The bank foreclosed on Margret's apartment building, and she received a summons and a complaint for eviction. At the same time, the lender was seeking to toss Margret and her kids from their home, the new owner stopped paying utilities for common areas, and the hallways were plunged into darkness.

Margret went to her eviction hearing not knowing what to do. She was up against a bank with a lawyer. She did not know her rights or how to assert them in the process.

She was referred to a Legal Aid lawyer working in a courthouse office who took her case. Her lawyer secured a temporary restraining order to get the lights turned back on and defended the eviction, ultimately achieving a settlement favorable to Margret. Disaster was averted for Margret and her children.

Margret got lucky. She found a lawyer who could help her navigate the court system and get her a just result. Thousands of District of Columbia residents with problems as serious as Margret's are forced to proceed without counsel every year, often with disastrous results.

Despite that law is the local industry, as many as nine out of 10 persons living in poverty in the District cannot get a lawyer when they need one. An effective legal services community and a generous pro bono bar have not been enough to bridge the gap, leaving most low-income people who face an eviction, have a battle over custody, need to resolve an unemployment dispute, or are fighting the termination of public benefits to do so alone without the help and counsel that a lawyer can provide.

Since the beginning of the recession, the gap between the demand for legal help and available services has grown. In the fall of 2009, we set out to determine what was happening. The D.C. Access to Justice Commission and the D.C. Consortium of Legal Services Providers surveyed legal assistance organizations about the impact of the economic downturn. We asked them about the effect of the recession on demands for services, new and emerging client needs, and any impact on funding, staff, and programs.

The results were alarming. Three interlocking factors worked together to magnify the crisis: more people are being driven into poverty, government and nonprofits have shrinking resources to serve people in need, and the legal services community has lost up to 25 percent of its financial support. We project that the crisis in civil legal assistance—which existed before the recession but has been made vastly worse by it—will deepen in 2010 and 2011. The commission and the consortium published the results of this survey in the report *Rationing Justice: The Effect of the Recession on Access to Justice in the District of Columbia*.¹ Our key findings include:

Funding for civil legal services has decreased by \$4.5 million since the beginning of the recession. We found that virtually every funding stream has decreased. Legal services programs primarily rely on support from individual lawyers and law firms, government grants, and the Interest on Lawyers' Trust Accounts (IOLTA) Program—each of which is being choked. IOLTA had over \$1 million fewer to give in 2009 than the prior year because of low interest rates and

reduced economic activity. Government and private grants are diminishing, and some law firms have reduced their charitable giving. Foundations play an important, although smaller role, but they also will have less to give. The decline in resources forced legal assistance groups to use limited reserves and to cut staff.

Legal services program staff was slashed. Twenty-one lawyers and 30 nonlawyer staff members were eliminated through attrition and layoffs. The corps of full-time lawyers working for communities living in poverty decreased by 12 percent. The cut to administrative and operations staff, paralegals, and policy advocates was 37 percent.

Salaries were cut or frozen, and benefits reduced. The compensation of legal services lawyers is among the lowest in the profession. Starting at around \$40,000 annually, legal services pay already trails government pay and is about one-fourth of what is paid in private firms. Nevertheless, compensation took a hit. In some cases, salaries were cut, and in others frozen. Many programs reduced benefits so as to avoid layoffs that would harm clients.

Services to clients were diminished. As a result of decreased staff, client services were cut. We estimate that the loss of lawyers resulted in more than 1,000 fewer cases being litigated and more than 2,000 additional people going to court without essential counseling or advice. Intake hours were cut, wrap-around services such as social work and counseling were reduced, and efforts to address broad-based or systemic issues were not pursued.

2010 will be worse. As bad as things were in 2009, this year likely will be worse. Employment opportunities for low-wage workers are not likely to reappear quickly, and the District government has hundreds of millions of dollars less to spend on social programs. The legal issues that emerge out of poverty will be magnified by the reductions in available social services. More clients will be seeking help, their problems will be more severe, and their options more limited.

Legal services programs will not be able to meet the increased need. In 2010 they will see a further decline in income, and many programs have exhausted much of their flexibility to absorb the cuts without reducing services. The District government is among the largest funders of legal services. Nevertheless, it cut its

appropriation to the D.C. Bar Foundation by \$700,000 for grants that will be awarded in May. This represents a 20 percent reduction in the District's commitment. The \$700,000 cut pays the salary, benefits, and associated overhead of as many as eight to 10 lawyers.

The District's reduced commitment comes at a time when state and local budgets are under severe pressure. However, by reducing legal services funding, the District has made itself an outlier. Recognizing the rising tide of need and the important role that legal services play in ensuring a functioning justice system, many states have increased their contribution to help fill the gap left by other funding sources. In some states, innovative, new initiatives have been launched in the midst of the crisis. Boston and California have undertaken large pilot projects where counsel is appointed in certain civil cases and data are collected to measure the effect of creating a right to counsel, with the goal of expanding the availability of lawyers.

The loss of \$700,000 from the District is compounded by the fact that other funding sources also will decline. Foundations will have less to give, and it will be a while before it is clear whether the changes in the law firm community will have a negative impact on giving. Even stimulus funding, which provided limited relief for some programs that do domestic violence work, will dry up. While federal support to the federal Legal Services Corporation will increase next year, the funds that will come to the District will be modest: an increase of \$100,000 to a single organization, the Neighborhood Legal Services Program.

Increases in Poverty and Legal Needs

Sam is blind and lives on a small Social Security Disability Insurance check. To make ends meet, he applied for food stamps, but he was incorrectly determined to be ineligible. His income, he was told, was too high. This was wrong. His income and medical expenses qualified him for benefits. It took a lawyer to investigate, and the threat of a hearing before an administrative law judge to get a settlement for current and back benefits. He now has access to adequate nutrition.

Chronic poverty in the District has, for a very long time, created a need for civil legal services. Nearly 20 percent of District residents are poor, the vast majority being women, children, the elderly, and persons

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living with disabilities.

Poverty has increased with the recession. Job loss in service and construction industries has forced families that were moving up the economic ladder to fall back. The result is uneven across the District. Communities that have historically high rates of poverty are suffering the worst. In East of the River neighborhoods, unemployment rates have risen to Depression-era levels: Ward 8, 28.3 percent; and Ward 7, 19.5 percent.

In the *Rationing Justice* report we found an increase in demand across the board. The issues that led to legal disputes for poor persons continued to dominate the dockets of legal services organizations. However, in a few key areas we found an increased need and the emergence of new problems.

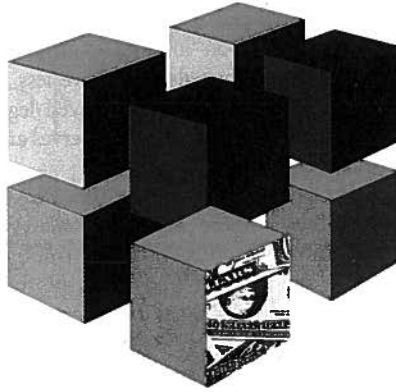
Foreclosure. Legal aid lawyers reported a significant increase in requests for help related to foreclosure. Foreclosure is on the rise in the District, and the East of the River neighborhoods are the hardest hit. As landlords lose properties to foreclosure, it often takes the intervention of counsel to keep the bank from evicting tenants. The foreclosure crisis affects thousands of the District's seniors and low-income families.

Domestic Violence. Economic pressures have put an enormous strain on low-income families, and, at the same time, the recession has deprived many women living in poverty of economic independence. These pressures and the lack of options combine to increase the incidence and severity of domestic violence. Access to a lawyer is, in many cases, the only effective way for a woman and her children to escape from an abusive relationship. Quality representation is time-consuming and requires expertise, experience, extensive training, and the ability to provide representation on a broad range of collateral issues for a sustained period of time.

Government Support. Access to government benefits often means the difference between being housed or homeless, between nutrition and hunger, between health care and illness, between destitution and a minimum level of basic human dignity. The recession has forced more people to rely on public benefits. Bureaucratic errors, language barriers, or mental disabilities make the system challenging to navigate, and, in turn, make mistakes impossible to correct without a lawyer.

The Effects of Not Having a Lawyer

Jane lived with her five children and her



granddaughter in subsidized housing. She paid a portion of her rent through a housing voucher. Several weeks before coming to Legal Aid for assistance, the Housing Authority had abruptly stopped paying the landlord its portion of the rent. She could not find out why until she secured a lawyer. It turned out to be a bureaucratic mistake—one that nearly rendered her homeless. Even after the problem was brought to light, it was not corrected until the eve of an administrative trial.

The legal needs of people living in poverty are immense, especially in times of economic turmoil. Low-income and poor people encounter the legal system at much higher rates and often in more high-stakes matters than people with greater means. Government resources such as income support, medical programs, public and subsidized housing, nutrition programs, and unemployment insurance are all highly regulated and have complex administrative schemes. The complexity leads to frequent errors that can only be untangled by an expert who has the ability to go to court or appeal to an administrative tribunal.

In private disputes such as child custody, a consumer dispute, or a private housing case, people living in poverty also are at a disadvantage. Decisions about important aspects of their lives and about basic human needs are being made through a complex and opaque process that they are required to face without help. No person who could afford a lawyer would go to court alone if the custody of a child or the loss of a home was at stake.

The consequences of not getting it right can be tragic:

- A child improperly denied medical benefits may suffer a lifetime of preventable chronic illness, or the illness may interfere with his or her education and future prospects;
- A senior who is defrauded and loses the deed to the family home may have

no other assets to provide support and security, rendering him or her homeless;

- A woman who is illegally fired because she took off a day to get a protective order that would provide safety from her abuser will lose the income necessary to support her children; or
- A family wrongfully evicted may lose all of its belongings, risk job loss and school disruption, and suffer a cascade of economic consequences.

Impact on Legal System and Administration of Justice

The hearing was not going well for Dianne. She was a victim of domestic violence and her abuser had just received custody of their child. He was calm, cool, and collected, and had persuaded the court that she was a bad mother and could only have supervised visits with their child. Her powerlessness in the situation and her abuser's use of the child to continue to control her made her emotional. Her emotion did not play well in the courtroom. The judge was exasperated and asked a Legal Aid lawyer to consult with Dianne. The lawyer stepped in. While not able to get custody in that hearing, at a later hearing she did turn the tide, and Dianne walked out with increased and unsupervised visits. She could now spend real time with her child.

The findings of the *Rationing Justice* report have profound implications for the entire legal community. The recession may well be creating structural changes in the justice system, as it relates to low-income individuals, that will have long-lasting implications.

Legal Services Community. The impact on the legal services community is obvious. Providers have become weaker and smaller, and vital infrastructure has been lost. As a direct result of the recession, there are fewer lawyers working for providers, training and other budgets have been starved, and support staff has been cut to the bone. More lawyers will be lost in the next year.

Through efforts of the Access to Justice Commission, Consortium of Legal Services Providers, D.C. Bar Foundation, and the provider community, significant progress had been made to strengthen and rationalize the system prior to the recession. Increased funding was secured and new offices were opened in communities of identified need, innovative collaborations were started, and progress was made to develop cross-program initiatives to provide more comprehensive services to clients. Much of this progress has been

placed at risk by the funding cuts.

The legal services provider community has developed in an organic fashion over the past 25 years. Programs were started to meet the needs of specific client communities or to fill gaps in the legal services network. During times of expanding resources, these new programs brought to the table new ideas and creative strategies for service delivery. But even in the good times, the network did not always work to maximum efficiency for clients. Programs too often worked in silos, and clients and social services providers had trouble finding the right point of entry.

Competition in the marketplace for funding has proven an imprecise planning tool to allocate resources to areas with greatest legal needs. Grants and restricted money help preserve silos. Initiatives meeting new needs are often only possible with new funding that has become rare in the past two years. With fewer dollars available, it is difficult for the community to respond to changing circumstances or emerging needs.

The Courts. The District's courts have adopted the motto "Open to All, Trusted by All, Justice for All." The court's commitment to this set of ideals has led it to take important steps to address the flood of litigants who cannot afford counsel. The court has established a Family Law Self-Help Center and worked with the D.C. Bar Pro Bono Program to create other self-help centers for other high-volume pro se dockets throughout the courthouse.

Nevertheless, the courts are fundamentally structured for litigants who have lawyers. Complex legal doctrines govern the rules of decision, and it is rare that a person without legal training can navigate more than the simplest of proceedings. Pro se support, while important, will only get a litigant so far, and for a person with a mental disability or a language barrier, it may be no help at all.

More than 63,000 civil cases are filed each year in the Superior Court of the District of Columbia. More than two-thirds of those cases—in excess of 44,000 actions—are in the Landlord and Tenant Branch where fewer than 3 percent of defendants have counsel. The situation is not much better in any of the other high-volume, "poor people" courts in matters such as child custody, child support, and small claims. Litigants show up on their own for complicated proceedings designed to be conducted by lawyers and in which the most important issues are at stake.

The growing gap between needs and available help further exacerbates the crisis in the courts. Without fundamental, structural changes, the mismatch between an increasing body of pro se litigants and a court process that requires counsel will not only lead to an unjust result in many cases, but also diminish public confidence in the court and its decisions.

Pro Bono Community. The generous contribution of time from lawyers in private practice is essential to ensure that every person who needs a lawyer to resolve a dispute gets one. However, the legal issues that confront people in poverty are not necessarily simple or casual matters. Often they require specialized training and expertise to be effectively resolved. Government benefits programs can be governed by a web of intersecting regulations, poverty law cases are resolved against a background of statutory and case law that must be mastered and heard in courts with specialized rules and customs, and clients living in poverty often have several intersecting problems to untangle and hard and complex lives.

Effective pro bono assistance depends on the existence of a robust provider community to offer mentoring and training for cases. As the legal services community shrinks and expertise, infrastructure, and talent are lost, the ability of private lawyers to be effective is diminished.

The Bar. The legal system works only if it works for everyone. To the extent that justice depends on the ability to pay for a lawyer, that the law is only applied to those who can afford it, the entire system is at risk. Every member of the bar has a stake and should be invested in the solution.

Funding and Reform

Restoration of the lost funding to the legal services network is essential. While it is not sufficient to fill the justice gap, it restores a solid foundation and ensures that certain essential services lost over the past year can be replaced.

Restoring the status quo is just a start. Justice is a grand and noble ideal. It requires fair laws, lofty and rigorous jurisprudence, and accessible and transparent institutions. But justice finds its meaning in the daily lives of individual people. Justice is whether a person is housed, has nutrition, is safe, can get medical care, is provided an education, and has the opportunity to earn a meaningful income. It is for this reason the *Rationing Justice* report draws its name from and begins with the words of Judge Learned Hand:

It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect.... If we are able to keep our democracy, there must be one commandment: THOU SHALT NOT RATION JUSTICE.

Out of the crisis created by the recession is an opportunity for our community to respond by ensuring adequate financial support for legal services, expanding on the culture of pro bono, and changing judicial institutions to be a venue for everyone, regardless of wealth, to get a fair hearing according to the law.

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Note

¹ *Rationing Justice: The Effect of the Recession on Access to Justice in the District of Columbia* report available at www.dccaccessjustice.org/rationing.html.

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