



## BEYOND MERIT: WHAT RIGHT TO COUNSEL REVEALS ABOUT LEGAL AID CASE SELECTION

*By Scott Crain, Director of Advocacy,<sup>1</sup> Northwest Justice Project*

Any operation where demand far outstrips supply must make difficult choices. A business will increase their prices or scale up to meet demand. Legal aid has the same problem: no shortage of poor people in need of legal services and a very static level of the supply of providers of those services. We can't raise our prices, and our funding creates a ceiling of how much we can scale up to meet the demand.



We work around the edges of this problem by developing our pro bono services, creating self-help resources, and leveraging new ways to meet demand, like with the development of community justice workers. But at the end of the day, clients come to us because they want a lawyer or advocate to represent them in court or another forum. We have legal teams that must make decisions about which cases to take. When advocates are near capacity, helping Client A may mean that we can't help Client B.

One way we choose between these cases that has become very ingrained in our thinking is the concept of merit. How many times when you are trying to pitch a case have you been asked "does the case have any merit" or "is there a meritorious defense?"

Merit is a vague concept. At a minimum, we have to satisfy our ethical obligations and ask whether or not the claim or defense is frivolous. Beyond that, merit may be an attempt to judge whether the case is "winnable." Is the case likely to be very tough to win? Is the client likely to win only if we take the case? Each advocate may bring their own understanding of what this term means when we discuss merit.

Whether a case is winnable is worth asking as part of a well-rounded decision on case acceptance. Merit can tell us how many resources we may need to bring to a case or how long the case is likely to take. It can help us advise the client on what they are signing up for

if they litigate a case.

The problem is that merit can become the primary factor in case acceptance, overriding the risk to the client of not getting help, the opportunity to educate the court about the law, and the tendency of opposing counsel to take advantage of litigating against an unrepresented person. Merit can create excuses to reject cases because it can be rooted in fear of losing hard cases and the perception that the case and the client reflect on us and our organization's reputation.

Here is an example of merit gone wrong. I sat in on a case review for one of our offices a few years ago. The discussion centered around an elderly woman who, her landlord alleged, allowed her adult son to live with her in violation of the lease and program rules. She faced eviction and a subsidy termination. Her story was that the son was not living with her. Extrinsic proof of this—other than her and her son's testimony—was unlikely to be found. Suspecting she was not telling the truth, and that proof of the son's alternative residence would be hard to come by, we rejected this case for lack of merit.

Was that the right decision? The case wasn't frivolous, because it turned on a dispute of fact. It would be a hard case to win, no doubt. But, instead of merit, what if we had considered the risk to the client of not receiving help as our primary criteria? The client, an elderly woman with a disability, with no other family, income or support, faced homelessness and the loss of her federal housing subsidy for many years. Given her age, homelessness could result in her hospitalization or death. This is not hyperbole, as we have seen elderly clients that we represent after eviction end up hospitalized or dead. I don't know if we would have won the case or not, but if vulnerability of the client had been the criteria for case acceptance, we would have taken the case to hearing.

When we only take cases based on merit, we teach courts and opposing counsel that some poor people are not deserving of our help. Courts learn that the rules

that apply to some people only apply to the people we choose to help. Over time, this has resulted in eviction courts that rubber stamp landlord demands to evict renters. The case law around renters' rights atrophied.

One development in our practice turned the tide: a right to counsel for indigent renters in evictions. With a reinvigorated legislative response to protecting renters post-COVID, and a new right to counsel (RTC) in evictions, we have seen a remarkable change in the state of the law and our approach to helping renters in evictions. With RTC, we take cases to judgment and have dozens of new appellate decisions each year that develop the law in renters' favor.

The advent of Washington State's Right-to-Counsel for all indigent renters has forced us to look critically at the concept of merit and the failures merit creates in our delivery of legal services. RTC has revealed major fault lines in our organization about who we help and why. Advocates who may be used to a rigorous case acceptance process are now faced with taking a case based solely on two criteria: is this client eligible for RTC services because they are (1) being evicted and (2) poor. This has been very difficult for some staff, feeling that they are wasting their time on loser cases.

Personally, I find this liberating. I know every client I help will benefit in some way from representation. I never have to make a decision about whether they are "deserving" of my help. Even in a case that I will lose if I take it to trial, the client may get extra time to move, negotiate away some debt, or just have the ability to feel heard and know that the system itself wasn't just screwing them over. I have yet to see a case where there is nothing to do.

One side effect of not looking at merit is what we hear from opposing counsel. "Your office used to be easy to work with." What they are really saying is: "We didn't used to have to work hard because you only took the cases where we obviously messed up and we settled those." At least in eviction defense, some merit-based decisions on case acceptance may have encouraged a "deserving poor" attitude within opposing counsel and courts. Opposing counsel will imply, or outright claim, that somehow the decisions about the cases we take reflect poorly on us as legal aid providers. But if you come to this work believing that everyone deserves to have the benefit of legal representation when they go up against a well-funded or represented opponent, this criticism should be easily dismissed. Moreover, seeing

the consternation of opposing counsel when they realize we will fight each and every case equally hard is a reward in and of itself.

Another side effect is that we see travesties of justice we never would have given a second glance at in the past. In one example, we had a routine nonpayment of rent case come to us after the court had defaulted the tenant and issued an eviction order. Our RTC lawyer reviewed the case and was unsuccessful in vacating the default. But, working through this process, she saw that the owner was a housing authority and had engaged in several serious due process and Violence Against Women Act violations when it terminated the client's voucher, causing the nonpayment of rent. She referred the case to our local office, which sued for the client's damages and resulted in the first federal court decision holding that the Violence Against Women Act is privately enforceable through Section 1983. The eviction and the default, however, probably lacked merit at first glance.

As an organization, we are committed to RTC. That means we take evictions and do not look at merit. The benefit is that the courts and opposing counsel know that we are always looking at their cases. If they try to sneak in some garbage in their pleadings or arguments, they know they are likely to get caught. The result is courts that are more likely to follow the law and landlord attorneys who are less likely to try to pull tricks on poor renters.

Outside of eviction defense, removing the concept of merit is equally useful. Take for example a case involving allegations of racial discrimination. In this case, a recipient of public benefits suspects their race played a role in the decision of the state agency to place them in Temporary Assistance for Needy Families sanction. Victims of discrimination rarely come to us with fulsome proof of discriminatory motive. The information asymmetry in discrimination claims is enormous and biased in favor of the party engaging in the discrimination. Thus, these cases lack merit, under our traditional way of thinking, because they lack proof. But if your organization, like ours, has committed to race equity, you have rededicated yourself to taking cases with the goal of eradicating discrimination. You can't do that if you don't take the cases.

One way our organization has tried to reduce the importance of merit in case acceptance is to pair additional concerns with the merit decision. In a case acceptance tool created by our managers, we ask "Does the case have merit? Yes or No." Then, within this question, the advocate is asked to consider two additional

questions. They ask whether the case would advocate on behalf of people who are furthest from power, even if we lose the legal argument. It also asks whether our advocacy will improve the situation for the client or community.

An even better approach would be to eliminate entirely, at least in defensive cases, the question of merit. Just ask the second and third questions and get to the point: would this person or their community be helped by our legal advocacy?

Thinking about merit is not the problem. The problem is when merit becomes the main criteria, nearly to the exclusion of all others. Merit causes us to reject Case A even when we are not looking at Case B. Merit causes us to be fearful of losing, to turn down hard cases, and thus to let our own skills atrophy because we don't try cases where the outcome is uncertain. Worst of all, merit can make us reject a case when the upside to the client far outweighs the difficulty of the case.

Taking merit out of case selection will not change

how you accept cases overnight. You don't have to take merit out of every case decision. You can still consider how easy or hard the case may be to win. Merit will always be an important factor when bringing affirmative cases, since the client may benefit more from hearing that their case is ultimately very unlikely to be successful than from bringing the case. But by reducing the importance of merit in case acceptance, you free advocates to try hard things and gain new skills and you refocus your case acceptance criteria on what matters most: the benefit to the client and their community of having legal aid by their side.

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