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ACCESS TO JUSTICE: A CALL FOR PROGRESS

*Honorable Dina E. Fein**†

INTRODUCTION

The Western New England University School of Law should be commended for devoting this issue of the *Law Review* to the topic of access to justice. In so doing, the *Review* joins a long list of thoughtful individuals and organizations turning their attention to this important topic.

Our constitutional democracy depends on well-functioning and fully accessible courts. The rule of law, which we in the justice system take as an article of faith, is built on public trust and confidence. Put differently, the rule of law—the framework that assures a transparent set of rules that govern social behavior, and a

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reliable mechanism for resolving disputes that arise under those rules—is part and parcel of the social compact. We collectively opt into the rule of law, out of the widely-held belief that we each and all benefit from it; we recognize and understand the rules by which we have implicitly agreed to live with one another, and we willingly do so.

Judges care about equal and meaningful access to justice because it is essential to ensuring the rule of law. We must have confidence that individuals leave our courtrooms with reason to accept the rule of law in their lives, and that we have reinforced this fundamental precept of our constitutional democracy. If we do not achieve this standard, we are disserving our constitutional oath and the social order it is intended to support.

I am grateful to the *Review* for this opportunity to set the stage for the Articles that follow. Towards that end, I will begin with a discussion of what we mean by access to justice; reflect on the challenge we face in the civil justice system and the various efforts underway to address that challenge; describe the continuum of resources that exist to ensure access to justice; and explore an approach for connecting those in need of legal assistance with the appropriate resource to meet that need.

I. WHAT DO WE MEAN BY “ACCESS TO JUSTICE”?

The term “access to justice” has come to signify the many efforts being made by a range of stakeholders to address the needs of historically underserved populations in relation to the civil justice system.¹ These include self-represented litigants, individuals of limited English proficiency, and individuals with disabilities.

The influx of self-represented litigants to state courts across the country is well-documented.² It is also well-recognized that the vast majority of self-represented litigants proceed without an attorney because they cannot afford to hire one.³ In addition, the

1. There are, of course, critically important issues in terms of access to meaningful assistance in the criminal justice system. *Office for Access to Justice*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/atj/about-office> [<https://perma.cc/43U5-S3DK>]. This article is limited, however, to discussing efforts underway with respect to essential civil legal needs.

2. See, e.g., JOHN M. GREACEN, SELF REPRESENTED LITIGANTS AND THE COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 1-3 (2003).

3. Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 752 (2015) (“[M]ost studies that have examined the characteristics

seemingly intractable problem of generational poverty has given rise to increasing numbers of court cases that arise from underlying social problems, including substance use, domestic violence, and mental illness. Those who have experienced generational poverty are particularly ill-equipped to navigate the conventional adversary system effectively.⁴

The publicly funded legal aid system is overwhelmed and wholly incapable of meeting the legal needs of low-income individuals and families.⁵

The need for basic civil legal assistance for individuals living at or below the poverty level is vast and cannot be overstated. According to the most recent data from the U.S. Census Bureau, 63 million people—one in five Americans—met financial requirements for services provided by the [Legal Services Corporation]. The LSC provides funding to 134 independent non-profit legal aid programs in every state, the District of Columbia, and U.S. Territories. In 2016, income eligibility for LSC-funded legal aid—125 percent of the federal poverty guideline—is \$14,850 for an individual and \$30,375 for a family of four. Yet, the funding made available to LSC by Congress accommodates only a small fraction of people who need legal services. As a result, in some jurisdictions, more than eighty percent of litigants in poverty are unrepresented in matters involving basic life needs, such as evictions, mortgage foreclosures, child custody disputes, child support proceedings, and debt collection cases.⁶

In addition to the poor, it is estimated that a majority of the legal

of unrepresented litigants conclude that poverty is the primary force driving individuals to represent themselves in court.”).

4. Hon. Fern Fisher & Richard R. Buery, Jr., *The Challenge of Economic Inequality*, in *IMPACT: COLLECTED ESSAYS ON THE THREAT OF ECONOMIC INEQUALITY* 13 (2015).

5. BOS. BAR ASS'N STATEWIDE TASK FORCE TO EXPAND CIVIL LEGAL AID IN MASS., *INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS* 1 (2014), <http://www.bostonbar.org/docs/default-document-library/statewide-task-force-to-expand-civil-legal-aid-in-ma---investing-in-justice.pdf> [<https://perma.cc/DNG8-8MCG>]. “In Massachusetts, civil legal aid programs turn away 64% of all eligible cases.” *Id.*

6. ABA COMM'N ON THE FUTURE OF LEGAL SERVS., *REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES* 11–12 (2016), http://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf [<https://perma.cc/Y5V6-5PUB>]; see also *Number of Attorneys for People in Poverty*, NATIONAL CENTER FOR ACCESS TO JUSTICE, <http://justiceindex.org/2016-findings/attorney-access/> [<https://perma.cc/E862-AHHJ>].

needs of middle-income Americans remain unmet.⁷

These trends—the overwhelming influx of self-represented litigants and the social problems that they bring with them, and the limited legal aid resources available to assist them—have converged to create a crisis that impacts all elements of the civil justice system, places untenable stress on the courts, and takes an enormous toll on individuals, families, and society at large.⁸ In the face of this reality, it is essential that the courts adapt as necessary to ensure meaningful access to all, engaging in a coordinated approach with the private bar, the legal aid system, law schools, social service providers, and executive branch agencies.

Significant innovation and institutional change are required on multiple fronts in order to bring about meaningful progress toward “creating a continuum of meaningful and appropriate services to secure effective assistance for essential civil legal needs[.]”⁹ The importance of access to justice cuts across case types and litigant populations, and efforts to expand access to justice must extend equally, for example, to mothers and fathers, landlords and tenants, small business people and the consumers they serve. Access to justice initiatives should not benefit one group over another. To the contrary, access to justice initiatives by definition are intended to promote a civil justice system that is equally accessible to all litigants, precisely so as to ensure that it brings about just results.

II. THE LEGAL PROFESSION RESPONDS

In recent years, stakeholders across the justice system have turned their attention to addressing this crisis.¹⁰ In many states,

7. Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 429 (2016); see also DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004) [hereinafter RHODE ACCESS].

8. See RHODE ACCESS, *supra* note 7 at 3–5.

9. *Conference of Chief Justices, Conference of State Court Administrators: Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All*, NAT'L CTR. FOR STATE COURTS 1, https://www.ncsc.org/~media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20All_final.ashx [https://perma.cc/H7FH-LM79] [hereinafter *Resolution 5*].

10. See *Office for Access to Justice*, U.S. DEP'T OF JUST., <https://www.justice.gov/atj> [https://perma.cc/Z83N-6QMZ].

The U.S. Department of Justice established the Office for Access to Justice (ATJ) in March 2010 to address the access-to-justice crisis in the criminal and civil justice system. ATJ's mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.

Access to Justice Commissions are working to promote a coordinated approach.¹¹ In 2015, the national Conference of Chief Justices reaffirmed its commitment to meaningful access to justice for essential civil legal needs in all state courts by passing Resolution 5,¹² which is worth quoting in its entirety here:

WHEREAS, the Conference of Chief Justices acknowledged in 2001 in Resolution 23 that the promise of equal justice is not realized for individuals and families who have no meaningful access to the justice system and that the Judicial Branch has the primary leadership responsibility to ensure access for those who face impediments they cannot surmount on their own; and

WHEREAS, the Conference of Chief Justices and the Conference of State Court Administrators passed Resolution 2 in 2008 recognizing that ensuring access to justice in adversarial proceedings involving basic human needs, such as shelter, sustenance, safety, health, and child custody is one of the Conferences' highest priorities and encouraged their members to take steps to ensure that no citizen is denied access to the justice system due to the lack of resources, or any other such barrier; and

WHEREAS, significant advances in creating a continuum of meaningful and appropriate services to secure effective assistance for essential civil legal needs have been made by state courts, national organizations, state Access to Justice Commissions and other similar bodies, and state bar associations during the last decade; and

WHEREAS, these advances include, but are not limited to, expanded self-help services to litigants, new or modified court rules and processes that facilitate access, discrete task representation by counsel, increased pro bono assistance, effective use of technology, increased availability of legal aid services, enhanced language access services, and triage models to match specific needs to the appropriate level of services;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators support the aspirational goal of 100 percent access to effective assistance for essential civil legal needs and urge their members to provide leadership in achieving that goal

Id.

11. *Access to Justice Commissions*, ABA, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions.html [<https://perma.cc/N7JK-K99Q>].

12. *Resolution 5*, *supra* note 9.

and to work with their Access to Justice Commission or other such entities to develop a strategic plan with realistic and measurable outcomes; and

BE IT FURTHER RESOLVED that the Conferences urge the National Center for State Courts and other national organizations to develop tools and provide assistance to states in achieving the goal of 100 percent access through a continuum of meaningful and appropriate services.¹³

“From 2014 to 2016, the American Bar Association Commission (Commission) on the Future of Legal Services examined various reasons why meaningful access to legal services remains out of reach for too many Americans.”¹⁴ The Commission issued its report in August 2016, expressing the consensus view that “significant change is needed to serve the public’s legal needs in the 21[st] century.”¹⁵ Among its specific recommendations, the Commission concluded that “[t]he legal profession should support the goal of providing some form of effective assistance for essential civil legal needs to all persons otherwise unable to afford a lawyer.”¹⁶

The Commission made specific findings, including that most people living in poverty and those of moderate means do not receive the legal help they need, that legal aid providers are inadequately funded, and that pro bono assistance alone is insufficient to address this unmet need.¹⁷ The Commission recognized the impact of this phenomenon on all court users, specifically that “[t]he vast number of unrepresented parties in court adversely impacts all litigants, including those who have representation.”¹⁸

Now is the time to rethink how the courts and the profession serve the public. The profession must continue to seek adequate funding for core functions of the justice system. The courts must be modernized to ensure easier access. The profession must leverage technology and other innovations to meet the public’s legal needs, especially for the underserved. The profession must embrace the idea that, in many

13. *Id.*

14. ABA COMM’N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 1 (2016).

15. *Id.* at 4.

16. *Id.* at 37.

17. *Id.*

18. *Id.* at 15.

circumstances, people other than lawyers can and do help to improve how legal services are delivered and accessed.¹⁹

III. ORGANIZING PRINCIPLES

The work of achieving 100% access must be guided by organizing principles, to serve both as a conceptual framework and as touchstones for measuring progress. Consistent with the need for broad-based engagement, these principles should be agreed-upon at the outset, and revisited periodically. Stakeholders in the civil justice system must identify and rely upon organizing principles that arise from their respective missions. The following are offered for consideration by court systems in particular: (1) access to justice is a lens through which the court system must examine all aspects of its work; (2) ensuring access to justice requires that the court system shift its focus from one that looks out (the perspective of those who work within the courts), to one that also looks in (the perspective of those who use the courts); (3) access to justice initiatives should improve the efficiency of the court system overall and thereby benefit all court users; (4) access to justice requires the commitment of people across the court system, including court leaders, judges, administrators, and front line staff; and (5) the court system must evaluate its access to justice initiatives in order to assess their impact and ensure their continuous improvement.

IV. A BLUEPRINT FOR PROGRESS

The Conference of Chief Justices Resolution points to the “significant advances in creating a continuum of meaningful and appropriate services to secure effective assistance for essential civil legal needs” across the civil justice system.²⁰ Additionally, the Conference challenges state civil justice systems to achieve 100% access by developing an approach for triaging litigants through multiple portals into that continuum, based on the needs and the capacity of the litigant and the resources that are available to address the litigant’s problem or question.²¹ Many state justice systems already provide a continuum of services to litigants and prospective litigants in a variety of case types and locations, ranging from written self-help information to full representation. In order

19. *Id.* at 9.

20. *Resolution 5, supra* note 9.

21. *Id.*

to achieve 100% access to effective assistance, however, “[t]he goal of the system will be to match [a litigant’s] needs to the most cost-effective intervention that meets that need.”²²

More specifically, the approach asks a civil justice system to build out a continuum of services for the case types in which self-represented litigants appear in state courts most frequently, focusing specifically on essential civil legal needs as contemplated by the Resolution, so as to utilize the limited resources that are available to meet the needs of those litigants strategically and to maximum effect. In so doing, the expectation is that justice system stakeholders will better understand what legal needs can be met with existing resources, and what the most critical gaps are that need to be addressed with new resources in order to achieve 100% meaningful access to justice.

Achieving the objectives of the Resolution will require a multi-dimensional approach in which the justice system stakeholders collaborate, coordinate, and adjust in response to an evolving dynamic. The courts must be prepared to simplify and standardize their processes, so as to ensure that the range of limited resources for assistance are deployed only as necessary. The justice system partners must build out a continuum of self-help, limited assistance, and full representation resources. Finally, the providers of assistance along the continuum must develop and apply uniform triage criteria, in order to ensure that similarly situated individuals with essential civil legal needs are matched in a rational and predictable way with the form of assistance that is best suited to meeting their needs.

V. SIMPLIFICATION OF COURT PROCEDURES

“The complexity of the justice system, coupled with a lack of knowledge about how to navigate it, undermines the public’s trust and confidence.”²³ The most challenging and most valuable improvement that courts can make to enhance access to justice is to simplify court processes.²⁴ Simplification and standardization

22. JEANNE CHARN & RICHARD ZORZA, BELLOW-SACKS ACCESS TO CIVIL LEGAL SERVS. PROJECT, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS 22–23 (2005), <http://www.courts.ca.gov/partners/documents/bellow-sacks.pdf> [https://perma.cc/9XA5-SPFQ].

23. REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES, *supra* note 14, at 34.

24. CHARN & ZORZA, *supra* note 22, at 17.

We will not solve the access problem by focusing exclusively on getting help

benefit court staff and court users alike,²⁵ and will lay the necessary foundation for effective triage into appropriate levels of service.

Best practice recommendations for court operations include coordinating self-help services with case flow management;²⁶ expanding procedural fairness efforts;²⁷ modifying practices for disseminating information to litigants; courthouse design; litigation options and alternatives; and protocols for interactions with self-represented litigants in the courtroom.²⁸ Ultimately, however, the institutional change necessary to achieve 100% access to effective assistance represents more than the sum of these specific examples; it represents a profound cultural shift to a system that unequivocally values and actively promotes meaningful access to justice.

VI. SELF-HELP

Self-help services are provided by an array of stakeholders and run from static, one-directional information to interactive or bi-directional information. One-way information includes web content and plain language forms and instructions, and should be targeted, accessible, deployable,²⁹ multilingual, multimedia, and available for widespread distribution to the public. Interactive, bi-directional self-help resources include legal workshops, court service centers, law libraries, and digital interactive tools, and should enable in-person and remote access to information, forms,

to consumers while ignoring the ways in which legal rules, procedures, courts and agencies make resolving legal problems unnecessarily complex, time-consuming and opaque. Simplifying, explaining, and de-mystifying legal processes may turn out to be one of the most cost- and outcome-effective strategies for increasing access to justice.

Id.

25. For example, through improved court forms, modifications to court rules, and litigation alternatives such as alternative dispute resolution, as well as a menu of litigation options. *See id.* at 27–29.

26. Mike Williams, Chief Clerk, Bronx County Family Court, Presentation at the Equal Justice Conference (May 7, 2015).

27. *See generally Special Issue on Procedural Fairness*, 44 CT. REV. J. AM. JUDGES ASS'N 1/2 (2007–08).

28. SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, ISSUES FOR EXPLORATION, EXAMPLES, CONTACTS, AND RESOURCES 54 (2008), <http://www.srln.org/system/files/attachments/SRLN%20Best%20Practices%20Guide%20%282008%29.pdf> [<https://perma.cc/3P8F-5HDR>].

29. *See* D. James Greiner et al., *Self-Help, Reimagined*, 92 IND. L.J. (forthcoming 2016–17).

and assistance.³⁰ Advances in technology, including the development of new apps, offers fertile ground for providing cost-effective and wide-reaching digital self-help assistance.³¹

VII. LIMITED ASSISTANCE

Limited assistance is provided by lawyers and non-lawyers.³² When provided by lawyers, limited assistance includes “unbundling,”³³ lawyer-for-a-day programs, and online pro bono legal advice. Limited assistance by non-lawyers includes “navigators” and paraprofessionals. “The profession must embrace the idea that, in many circumstances, people other than lawyers can and do help to improve how legal services are delivered and accessed.”³⁴ In New York, “[s]pecially trained and supervised non-lawyers, called Court Navigators, provide general information, written materials, and one-on-one assistance to eligible unrepresented litigants[]” in housing and consumer debt cases.³⁵ Arizona has a similar program for litigants in family court,³⁶ as do California,³⁷ and Washington.³⁸ Paralegals can be a significant factor in providing pro bono assistance.³⁹

30. The Self-Represented Litigation Network has developed a methodology for inventorying the services that courts provide to self-represented litigants.

31. Joe Dysart, *20 Apps to Help Provide Easier Access to Legal Help*, ABA J. (Apr. 1, 2015, 6:01 AM), http://www.abajournal.com/magazine/article/20_apps_providing_easier_access_to_legal_help [<https://perma.cc/GV4X-AAA4>].

32. See, e.g., 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 (Michael J. Trebilcock et al., eds. 2012).

33. See ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVS., UNBUNDLING FACT SHEET (June 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_fact_sheet.authcheckdam.pdf.

34. REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES, *supra* note 14, at 9.

35. *Volunteer Opportunities: Court Navigator Program*, NY COURTS (Feb. 10, 2014), <http://www.courts.state.ny.us/COURTS/nyc/housing/rap.shtml> [<https://perma.cc/D538-ND24>].

36. See ARIZ. COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE ARIZ. JUDICIAL COUNCIL (Mar. 26, 2015), <http://www.azcourts.gov/Portals/74/ACAJ/ReportACAJ.pdf> [<https://perma.cc/X5SW-C8PB>].

37. *Family Law Facilitators*, JUDICIAL BRANCH OF CAL., <http://www.courts.ca.gov/selfhelp-facilitators.htm> [<https://perma.cc/U6LK-KMF2>].

38. *Courthouse Facilitators*, WASH. COURTS, http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=108 [<https://perma.cc/4XP4-23U9>].

39. See *Involving Paralegals*, ABA, http://www.americanbar.org/groups/probono_public_service/resources/pro_bono_role/paralegals.html [<https://perma.cc/HWY8-PV9U>].

VIII. FULL REPRESENTATION

Improving access to full representation requires new mechanisms for connecting litigants with attorneys, and also requires more attorneys available for low and moderate-income clients. Pro bono assistance is a key component. “Access to affordable legal services is critical in a society that depends on the rule of law. . . . Without significant change, the profession cannot ensure that the justice system serves everyone and that the rule of law is preserved.”⁴⁰ In order to expand availability of full representation, state justice systems must optimize the expertise of legal aid in direct representation and systemic advocacy; expand and focus the contributions of pro bono assistance from lawyer and law students; identify all case types in which there is a constitutional or statutory right to counsel and secure public funding to provide representation and;⁴¹ develop and promote models that permit people of modest means to afford full representation.

IX. TRIAGE FACTORS

Many state justice systems offer a number of the legal services along the continuum described above, each with accompanying intake and triage portals. In courts alone, litigants are often triaged on an ad hoc basis by judges, clerks, and front line staff. Justice system partners with some form of triage include legal aid, law school clinics, pro bono programs, county and state bar referral services (including specialized referrals), executive agencies, local mediation and dispute resolution centers, social service organizations, court service centers, and law libraries.

Unfortunately, access to these services and portals is often too fragmented.⁴² Fragmentation risks creating a service delivery

40. REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES, *supra* note 14, at 8.

41. See *National Coalition for a Civil Right to Counsel*, NCCRC, <http://civilrighttocounsel.org/> [<https://perma.cc/2KVA-JD5C>]. “The National Coalition for a Civil Right to Counsel (NCCRC) works to expand recognition and implementation of the right to counsel for indigent litigants in civil cases involving basic human needs.” *Id.*

42. REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT ix (2011) (“The results [of the research] are sobering. They underscore a fundamental absence of coordination in the system, fragmentation and inequality in who gets served and how, and arbitrariness in access to justice depending on where one lives.”).

model that is inefficient and inconsistent in its application. Triage often occurs on an ad hoc or informal basis, with limited connection among the various stakeholders that interact with a litigant. Achieving 100 percent access requires a better-informed and more refined triage system that is well understood across the justice system.

[F]or triage to be successful on a systemic level, stakeholders cannot continue independently to design and deploy triage systems for litigants. By definition, a litigant portal requires coordination between the courts, and the legal and non-legal service providers because litigant users will want these portals to provide access to legal and practical information.⁴³

As a first step, triage requires assessment or diagnosis of the legal question or problem at hand. The “sorting” process of triage requires complete and accurate information, both about the legal problem and goal of the court user, and about the options and services available. This first step—diagnosis or assessment—is the most complex and difficult part of the overall triage process. Whether conducted in person or online, an effective diagnosis of a court user’s goal and potential procedural next steps requires that the individual be informed about the following: legal resources available on specific topics; various paths that can be taken, and the possible outcomes associated with each; and special considerations for the particular issue at hand.⁴⁴

After assessing the presenting legal problem, justice systems must apply agreed-upon triage factors. Analogizing triage in a justice system to triage in an emergency room is tempting, but imperfect. While it is unlikely that the justice system will ever diagnose and treat legal problems with the precision of medical protocols, it is self-evident that certain factors must be included in the system’s triage matrix, including the following: the nature, complexity, and urgency of the presenting problem or question; the role of the court in solving the presenting problem; the litigant capacity to navigate the complexity of the presenting problem; and

43. TOM CLARKE, RICHARD ZORZA & KATHERINE ALTENEDER, TRIAGE PROTOCOLS FOR LITIGANT PORTALS: A COORDINATED STRATEGY BETWEEN COURTS AND SERVICE PROVIDERS 2 (2013) [hereinafter TRIAGE PROTOCOLS], http://www.srln.org/system/files/attachments/Triage_Protocols_for_Litigant_Portals__A_Coordinated_Strategy_Between_Courts_and_Service_Providers.pdf [https://perma.cc/5SH5-AZEF].

44. See *id.* at 4.

the nature and availability of resources to assist litigant.

A critical factor in triage is the level of court involvement in the presenting legal problem. Generally, the more court involvement that is necessary to resolve a legal question or dispute, the greater the level of need for legal assistance.⁴⁵ Depending on the level of court involvement in the case, different factors affect the type of service to provide. Generally, if one party to a case is represented or is an otherwise sophisticated entity, there is a stronger presumption toward some form of representation for the other party. In addition, with respect to litigant capacity, the following factors have a demonstrated effect on a litigant's level of need from service providers:⁴⁶ language need, mental capacity, literacy, and willingness to negotiate.⁴⁷

As described in the section on Continuum of Services, above, achieving 100% access to effective assistance requires strengthening and expanding the services that are available. That said, unless and until services are fully developed, any triage system must address whether there is an actual resource available to meet the need, and if not, to provide an alternative. Depending on resource availability, the triage mechanism may also need take into account the "merit and stakes" of a case.⁴⁸ A related issue is the legal topic(s) and relevant expertise of the resource (e.g., attorney or mediator) to assist with that topic.

Finally, for triage to be effective, stakeholders in the justice system must come together to ensure that there are adequate resources to assist a litigant once the triage has been conducted.⁴⁹ Those resources might include the following: referrals from triage assessment to a list of unbundled lawyers; "warm" referral from triage assessment (e.g., a court service center) to legal aid or pro bono attorneys, where litigant information can move directly from

45. See generally *id.*

46. See Richard Zorza, *The Access to Justice 'Sorting Hat': Towards a Triage and Intake that Maximizes Access and Outcomes*, 89 DENV. UNIV. L. REV. 859, 874 (2013).

47. See *id.*

48. *Id.* at 875.

49. The issue of "vexatious litigants" has arisen in relation to the triage model and limited availability of resources. Upon evaluation, the legal system may see a need to develop a "vexatious litigant" statute or other mechanism for addressing those who use the court system to harass or intimidate others. See, e.g., Richard M. Zielinski, *Vexatious Litigation: A Vexing Problem*, BOS. BAR J. (Sept. 12, 2012) <http://bostonbarjournal.com/2012/09/12/vexatious-litigation-a-vexing-problem/> [https://perma.cc/QQH9-XMY4].

the entity doing the assessment to the attorney who can provide the legal assistance, without the litigant providing the same information multiple times; and information about community resources made available in courthouses, as well as outreach from self-help and legal services to community organizations.

Clear, transparent, consistent connection from assessment to triage and referral will presumably result in cost savings and time savings, by reducing the re-routing of individuals and improving the matching between litigant needs and available resources.

X. TRIAGE PROTOCOLS

As indicated above, triage is already taking place in justice systems. Existing ad hoc approaches should be refined and advanced as to specific case types involving large numbers of self-represented litigants. As a first step, front line staff who handle these case types should be solicited for knowledge and lessons they can share. This would, at a minimum, mean exploring, through surveys and focus groups, the criteria and processes that are currently utilized, however informally, for triaging litigants. Next, the stakeholders in the justice system who currently play a role in these case types or are available to do so in the future should convene, to secure mutual commitments to a continuum of services predicated upon shared triage criteria. Based on the expertise of those involved with each case type, the services currently available as to each case type, and realistic projections about additional resources that can be added and/or achieved in light of greater overall system efficiency, the participants should develop an agreed upon set of triage criteria and commit to providing services consistent with those criteria for a sufficient period of time to allow for meaningful assessment.

XI. EVALUATION

As triage protocols are developed and services are expanded and better connected to one another, it is essential to evaluate whether the steps being taken are serving the stakeholder's organizing principles and moving toward the goal of 100% access to effective assistance. Evaluation should be used as a tool for continuous improvement, and also to identify gaps that do not surface during the initial strategic planning process.

As part of the collaborative planning process, stakeholders should agree upon a set of goals for enhanced access to justice.

Among those goals, for example, may be the following: increased procedural fairness; improved efficiency of the court process, and presumably of the other stakeholders (e.g., legal aid intake); clarification of the range of need and gaps in services as to specific case types; and more just case outcomes (as identified by the stakeholders).

It will be critical to include experts in empirical analysis among the community of stakeholders who convene to develop the continuum of services and design the triage criteria and protocols. The involvement of stakeholders with this expertise is necessary from the outset in the planning process, to assist in identifying measurable goals, and developing metrics for evaluating progress. Potential methods for measuring progress include utilization rates, case management data, consumer and staff surveys and focus groups, and randomized controlled trials.

XII. “JUSTICE FOR ALL” GRANTS

The Justice for All (JFA) project was established in February 2016. Supported by the Public Welfare Foundation and housed at the National Center for State Courts, the goal of the JFA is to support implementation of Resolution 5.⁵⁰ Towards that end, the JFA offered strategic action planning grants, intended to facilitate planning among civil justice system stakeholders in a number of states. Seven states, including Massachusetts, were awarded JFA grants.⁵¹ Having been awarded planning grants, these states are eligible to apply for implementation grants at the end of the planning phase. As this issue of the Review goes to print, civil justice systems across the country thus find themselves with an historic opportunity to reflect, plan, and experiment, in an effort to improve their own systems and learn from one another about how best to enhance access to justice for all members of society.

CONCLUSION

The civil justice system must discharge its responsibility to

50. RALPH GANTS & LAURIE ZELON, NAT’L CTR. FOR STATE COURTS, JUSTICE FOR ALL: PROJECT ANNOUNCEMENT (Feb. 1, 2016), <https://www.ncsc.org/~media/Microsites/Files/access/Justice%20for%20All%20Project%20Description%20Final.ashx> [<https://perma.cc/A9V9-B9ES>].

51. *Justice for All Project Grants Announced*, PUB. WELFARE FOUND.: NEWS (Nov. 10, 2016), <http://www.publicwelfare.org/justice-for-all-project-grants-announced/> <https://perma.cc/PG4Q-JJ5A>.

preserve and advance the rule of law for all members of society. It is therefore incumbent upon the system to recognize the needs of all who seek access to justice, and ensure that entry points and services exist commensurate with those needs. As discussed here, the goal of achieving 100% access requires coordination and cooperation across the system, and a collaborative approach to serving those with legal needs. While complex and challenging, the leadership exists to make such an effort, and the unmet needs of too many requires nothing less.