



# THE EMERGING ACCESS TO JUSTICE CONSENSUS AMONG COURTS, BAR AND LEGAL AID AND THE IMPLICATIONS FOR LEGAL AID LEADERSHIP

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## I. Introduction and Summary

An emerging consensus about how to solve the access to justice problem is laying the groundwork for dramatic progress in the next few years. The four key elements of the consensus — court simplification and services, bar flexibility, legal aid efficiency and availability, and systems of triage and assignment, have developed from the practical challenges that the constituencies face in doing their jobs.



That the elements of consensus have grown from shared experience at both national and local levels is one reason that improvements in one part of the system support and multiply the effect of changes in other parts of the system. For example, reducing costs of litigation by making changes in the courts means both that fewer people need counsel to obtain access and that the cost of access to counsel when needed is reduced. One potentially good impact of *Turner v. Rogers*<sup>2</sup> is that it may emphasize how court innovations are a critical part of the overall solution. The three areas of consensus are:

- **Court Simplification and Services.** Courts must become institutions that are easy-to-access, regardless of whether the litigant has a lawyer. This can

be made possible by the simplification of how the court operates, and by the provision of informational access services and tools to those who must navigate its procedures.

- **Bar Service Innovation.** The bar must, through the expansion of flexible services such as discrete task representation and *pro bono*, continue to become more cost effective and innovative in reaching and providing access services to both poor and middle income households.
- **Availability and Cost-Effectiveness of Subsidized Counsel.** For those matters and individuals where subsidized experienced legal counsel is needed to obtain access, we must make sure that those services are actually available through *pro bono*, non-profit, and other subsidized methods, and that they are provided in the most flexible and cost effective way.

There is one additional area as to which there are significant hints of agreement from all the major constituencies:

- **Triage and Referral.** To take full advantage of these changes, there must be some system that ensures that litigants obtain the services they need to access most efficiently and effectively.

## II. The Court Contribution to Change

Courts, bar, and legal aid are in general agreement that court processes must be made more accessible. First, the realignment of the court's processes can make the courts more welcoming and accessible. Secondly, additional informational services provided to litigants can further open up the system. Nationally, a major overview, including details and examples, of all of these approaches can be found in *Best Practices in Court-Based Self-Represented Litigation Innovation*, prepared by the Self-Represented Litigation Network.<sup>3</sup>

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Examples of realignment include changes in the way judges conduct hearings with self-represented litigants, now frequently the subject of judicial education programs, and changes in the way clerks deal with the self-represented, also adopted by states in one way or another throughout the county.

Additional informational services include the provision of plain language paper and automated forms, self-help centers, informational clinics, and the like. Inherent in the approach is far greater use of non-lawyers as information sources and/or finders, both in the courts, and in outside institutions such as public libraries. Broader changes include the restructuring of the hearing and paper flow to simplify the process, including intervention and additional services when required steps are not being completed by litigants on time.

National state court leadership has long recognized the affirmative role of the courts in taking such steps to enhance access to justice. In *Turner v. Rogers*, the Supreme Court put its weight behind these innovations, indeed, in certain contexts constitutionalized them. The ongoing recognition by the state courts of the need for such initiatives has been reflected in their participation in the Self-Represented Litigation Network, including attendance by teams from thirty states at the Judicial Conference on Self-Represented Litigation held at Harvard Law School in 2007.

Perhaps the most comprehensive vision of court change is the one articulated in California by the so-called Elkins Family Law Task Force, which was requested to “conduct a comprehensive review of family law proceedings and make recommendations to the [California] Judicial Council that would increase access to justice for all family law litigants.”<sup>4</sup> Its Report includes a broad range of recommendations, including the following issues appearing in the table of contents: *Helping People Navigate the Family Court Through Caseload Management, Providing Clear Guidance Through Rules of Court, Streamlining Family Law Forms and Procedures*, and, *Improving Domestic Violence Procedures*. In addition, the Report urges *Expanding Services to Litigants to Assist in Resolving Their Cases*.<sup>5</sup>

The most recent national leadership in re-engineering processes from the National Center for State Courts particularly reflects the deep anxiety courts are feeling from the budget pressures they are experiencing. State Access to Justice Commissions generally support this.

These innovations are important for access to justice not only because they save time and money for the courts but because they:

- Make it more likely that the self-represented will be able to navigate the system on their own,
- Mean that those who need lawyers will be able to obtain them at lesser cost thereby making it easier for lawyers to meet the need,
- Decrease the number of people who have to have lawyers to obtain access, and, therefore,
- Reduce the costs of providing such access, both by reducing the number of those of who need subsidized help, and by reducing the unit cost.

The bar’s general support for this approach is demonstrated by the American Bar Association (ABA) approving the changes to its Model Code of Judicial Conduct to authorize judges to modify their procedures in the interest of access to justice for the self-represented. At the service level, in some states, such as Minnesota, the bar’s pro bono programs provide direct assistance to litigants in cooperation with courts’ self-help centers. In some states, such as Maryland and California, non-profit legal aid programs provide direct informational services in the courthouse under contract to the courts, thereby participating directly in making the courts more accessible. In other states, such as Illinois, legal aid programs are funded by IOLTA to provide court-based informational services, by agreement with and in cooperation with, local courts.

Most dramatic has been the involvement of the Legal Services Corporation (LSC) and state and local legal aid programs in supporting the simplification of forms and the automation of online forms preparation systems. This has been strengthened by a partnership with the State Justice Institute (SJI), in which SJI and LSC have jointly funded national capacity for forms automation and local projects in which courts and legal aid providers have worked together to simplify and automate forms.

Finally, this support is illustrated by the fact that the legal-aid-supported California Shriver Pilot Project, enacted by the state legislature in 2009 to test the impact of provision of additional counsel, includes for its grants to legal aid programs a requirement that courts be involved.

### III. The Bar Innovation Contribution to Change

The main recent new area of access innovation for the bar itself, has been “discrete task representation,” often colloquially referred to as “unbundling.” This is the concept that lawyers and clients can agree that the lawyer will perform only certain of the required tasks, with the client doing the remainder. The approach

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makes hiring a lawyer financially feasible for many who would otherwise be unable to do so.

Broad bar support for this unbundling concept is highlighted by the inclusion in The Ethics 2000 version of the ABA Model Rules of Professional Conduct of two important changes that facilitate unbundling. The ABA modified Rule 1.2 so that Rule 1.2(c) now explicitly authorizes unbundling.<sup>6</sup> The ABA also added a new Rule 6.5 relaxing imputed conflict and conflict checking rules when the lawyer is providing limited short term representation.

The bar has also focused on access for middle-income individuals,<sup>8</sup> and encouraged innovations, such as use of websites by practitioners. The overall impact on access to justice and on budgets of these bar innovations is thus that:

- More litigants can afford to pay for counsel for at least some part of their cases,
- More lawyers can survive in middle income practice,
- More lawyers are providing *pro bono* help to those in need,
- Court cases move more quickly because they have lawyers in the key moments, helping court calendars and budgets,
- Fewer cases need legal aid because only the complex portions of the case are handled by lawyers.

The ABA's model unbundling-friendly changes have been adopted in one form or another in over forty states.

The Conference of Chief Justices has strongly endorsed judicial support of Pro Bono. State courts have approved a wide variety of pro-bono friendly rules including those relating to emeritus practice, insurance for pro bono participation, government attorney practice, mandatory reporting, major disasters, etc. In several states, Chief Justices have convened statewide "Pro Bono Summits" to stimulate planning to expand pro bono service.

#### IV. Legal Aid Changes

Of most impact on legal aid's court and bar partners have been two recent major thrusts for efficiency and availability in the legal aid world, the LSC Technology Initiative and, with respect to availability, the campaign for so called "civil Gideon."

The LSC Technology Initiative Grants Program (TIG) has focused on access tools for those without lawyers, but the program has funded a wide variety of innovations such as phone hotlines, networking improvements, advocate websites and document assembly.<sup>9</sup> These grants reduce the cost of providing assistance. While support for the "civil Gideon" concept is qualified in some legal aid quarters, its main successes have been in persuading the ABA to come out in support,<sup>10</sup> and to pass a Model Act,<sup>11</sup> and additional materials,<sup>12</sup> and to stimulate the launching of pilot projects,<sup>13</sup> including in Massachusetts with bar leadership<sup>14</sup> and in California through the passage by the legislature of the Shriver Pilot Project.<sup>15</sup> As time goes by, some, but at least at this point, far from all, advocates are coming to support a more nuanced version in which the entitlement is to access, which that access can be provided in ways short of the provision of counsel. This view may be strengthened by the U.S. Supreme Court's decision in *Turner v. Rogers*.

The increases in efficiency and this work in support of availability of services together make possible:

- Increases in the number of people who have counsel at any funding level,
- Increases in funding, thus further increasing the number of counsel,
- Smoother movement through the courts of the cases that receive counsel, and
- Depending on the delivery system chosen, potential additional cases for the bar to be paid for.

Not so often discussed, but implicit in this overall formulation, is the assumption that impact and policy advocacy work on behalf of poor communities can and should remain in non-profit legal entities such as legal aid programs. Moreover, the increasingly close relationships between components of the system will provide more leverage for the information and ideas developed, particularly through Access Commissions. Mechanisms will, of course, be required to ensure policy independence.

#### V. An Emerging Potential Fourth Area of Consensus: Triage and Referral

The central idea is simple, perhaps even obvious, that if there is to be access to justice, there has to be some system of sorting those in need so that people get the services that will be helpful. This idea generally includes the realization that while some people and cases require the full attention of a lawyer, others can be resolved by less expensive interventions such

as unbundled services or referral to self-help information and tools. Of course, *Turner v. Rogers* makes this explicit as a matter of constitutional law in some circumstances, and perhaps, as a general matter in a broad range of circumstances.

As discussed below, courts that provide self-help services have to have some kind of internal referral workflow, and, for those they cannot help directly, some system of referrals, if only to legal aid and bar referral systems. Today even those courts that do not provide in-house self-help services will generally refer to legal aid programs and to bar referral systems. Bar referral systems are organized to send low-income people to legal aid programs, and, in a limited number of places, make discrete task referrals to those who need that service. Finally, legal aid programs, with their limited priorities and capacities, usually now maintain detailed referral systems, and, the California Shriver Pilot Project includes in its statutory mandate, a list of triage factors to be used in deciding who is to get counsel (obviously only one part of the calculus, but including sufficiency of self-help).

There are now hints in all parts of the system of support for a more comprehensive and data driven system of assessment and referral. This system would go beyond just using a list of agencies to give a caller another number to call, and would involve a research-validated questioning process to identify the level of services needed to obtain access to justice for a particular individual, and which organization would both be able and have the capacity to actually provide those services.

The broadest court engagement with the concept is through so-called “differentiated case management,” the idea that cases should be processed differently through the courts depending on their complexity and circumstances. The potential of his approach is illustrated by the *Report of the Elkins Task Force*,<sup>16</sup> which highlights the need for a “continuum of services.”

Bar-based lawyer referral services have similarly been experimenting with alternative forms of referrals for those for whom full service representation is not necessary or not available. On the pro bono side, there have been, of course, a number of efforts to optimize attorney-client matching.

Legal aid providers engage in a wide variety of triage, assessment, and referral processes. Some, perhaps many, programs, manage the disconnect between the huge area of demand and the relatively scarce resources by establishing highly limited times for intake in priority areas. Many also make heavy use

of the brief service and advice hotlines as a safety valve to which the majority of callers are referred.<sup>17</sup> LSC has made a number of grants through the TIG program to encourage innovation in the intake area.

In sum, therefore, the access and budget impacts of such a triage approach are that:

- The courts can operate more efficiently since each case is optimally handled,
- The bar spends its time on the cases in which it can have the most impact,
- Legal aid spends its resources on the cases most in need, and
- Litigants get the services they actually need to obtain access.

## VI. The Reciprocal Leveraging of the Elements of the Consensus

One important point must be underlined about this consensus: each step taken or supported by one of the stakeholders increases the impact upon access of steps taken by the others. For example:

- Every increase in court efficiency decreases the cost of counsel in a case, thus making it easier for people to pay for counsel, and ultimately increasing the total amount of money lawyers can earn from middle income clients. It also means that legal aid can operate more efficiently, serving more people on the same budget.
- Each increase in access supporting services, such as a self-help center, makes unbundling easier, similarly increasing the range of cases that private lawyers can serve in this way. It also decreases the number of those who need a legal aid lawyer, allowing legal aid to focus on those in most need.
- Every bar enhancement of unbundling or pro bono helps both courts and legal aid because the courts can operate more efficiently, and legal aid can keep its staff focused on those that need staff services.
- Every legal aid improvement helps the courts operate more efficiently and therefore also more justly and protects the bar from impossible to meet requests for services.

## VII. Open Questions for Legal Aid Leadership

### A. How is Triage to be Done?

Because there has been so little focus on triage, assessment or assignment, there is little agreement about how it is to be done or by whom it is to be done. There is however, a general consensus about the kinds of factors to be used in the process.

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There are three main sets of factors: the area of law, the specific facts and circumstances related to the case, and the capacities and behavior of the parties.

There is the difficult fourth dimension, which is the accessibility of the court itself. We often forget that, for example, if a court does not have standardized forms, let alone automated online forms, available, then everyone will need a lawyer. Similarly, if the litigant is to appear before a judge who is hostile, or even just passive, to the self-represented, then all but the most confident will need a lawyer.

In the Shriver Pilot, the triage is to be performed within grantee legal aid programs, which will take referrals from other legal aid programs, and the courts. However, there is a substantial alternative argument that placing the decision in the court would give the system greater credibility and make funding it easier. Of course, there are ways that decision-making can be placed in the court without putting it directly in the hands of judges.

#### *B. How Are Middle-Income People's Needs to Be Met?*

There is certainly broad consensus that middle-income people are closed out of the system, agreement that court self-help services assist the middle income, some agreement that unbundling is of particular help to this population, some increasing flexibility in the legal aid income threshold,<sup>18</sup> but also anxiety about the implications for legal aid and little agreement about how to meet middle income needs.

In any larger solution, the diagnostic/triage component is going to be crucial, with capacity to pay/contribute being an additional component in the mix. It is also hard to imagine any middle-income solution that does not include significant co-payments. This makes sense, even though the traditional legal aid world has not been sympathetic to any system of co-payments.<sup>19</sup>

There are huge potential political advantages to

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building the system as a whole for all who need assistance to obtain access including middle income. It may be that most middle income needs will best be met by a new component of the system, rather than by using the legal aid model.

#### *C. Should the Private Bar Be Subsidized for Participation in the Provision of Access Services?*

It may well be that middle income litigants would best be served by systems of vouchers and co-payments, with at least some of the services being provided by qualified private lawyers. This would avoid the risk that the legal aid system would be undermined by a shift to serving the more politically palatable. It would also bring the private bar much more strongly into supporting access, since it would provide a revenue stream.

#### *D. Where Is the Funding to Come From?*

While the overall subject of access to justice funding is beyond the scope of this paper, some general points may be useful:

1. The current incremental strategy has not met the challenge of need.
2. The funding issue remains the Achilles heel of the "civil Gideon" movement. State courts are deeply reluctant to mandate expenditures on counsel, and have been refusing the opportunity to do so.
3. Funding components must be counter-cyclical, rather than cyclical with changes in the economy. In this sense, IOLTA is the opposite of what it should be.
4. The only way to get funding is through a comprehensive approach that changes the politics of the whole access issue, and brings in a far broader alliance.
5. In such a grand bargain, the interests of the private bar as well as middle-income people cannot be forgotten.
6. In such a bargain, cost savings are as important as new sources of revenue. The political system will only make resources available if it is convinced of the system's cost effectiveness.
7. Management and budget structures must be designed to incentivize efficiency. In the current structure, courts do not reap the benefit when they institute changes that mean that people can proceed without lawyers, or cut the cost to legal aid. If access to counsel budgets came through the courts, that would change.

### E. What is The Federal Role in Building the System?

We cannot expect the federal government to take on the primary burden of building this system. We can however expect it to provide subsidies and incentives for pilots, information systems, and infrastructure.

### VIII. Conclusion

We must realize and leverage the fact that the consensus described in the article represents the foundation of a 100% access to justice system. The different constituencies have everything to gain, and nothing to lose from embracing a consensus, advocating for its implementation, creating the national institutions that will promote it, and working together at every level to put it into place. The excluded demand no less, the future of our democracy depends on no less, and the future will not forgive us if we achieve any less.

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- 6 [http://www.abanet.org/cpr/mrpc/rule\\_1\\_2.html](http://www.abanet.org/cpr/mrpc/rule_1_2.html). See also Comments 6 and 7 to the Rule, discussing informed consent and the reasonableness of the agreement, [http://www.abanet.org/cpr/mrpc/rule\\_1\\_2\\_comm.html](http://www.abanet.org/cpr/mrpc/rule_1_2_comm.html).
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