

**Triage Protocols for Litigant Portals:
A Coordinated Strategy Between Courts and Service Providers**

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I. Introduction

The central importance of triage¹ within the legal system is increasingly recognized by numerous stakeholders in the justice system, including court administrators seeking to gain financial efficiencies through technology, legal service providers allocating the scarce resource of attorney assistance and judicial officers who must maintain fair proceedings when litigants are self-represented.²

As explored in the 2011 article *Case Triage for the 21st Century*, by Thomas M. Clarke and Victor E. Flango, triage takes differentiated case management to the new levels of sophistication and has profound implications for how courts are organized and offers opportunities for significant gains in efficiencies.³ Triage has also been the focus at two recent Legal Services Corporation (LSC) Strategic Technology Summits that identified six components as priorities for enhancing access to justice: business process analysis, expert systems and intelligent checklists, statewide legal portals, document assembly, triage and mobile technologies.⁴ Yet it is clear that these components are not independent and discrete strategies; rather they themselves can be sequenced and integrated with to provide a litigant-centered set of assistance services. And finally, in light of the 2011 Supreme Court decision in *Turner v. Rogers*⁵, trial court judges must now be asking themselves whether the procedures within their court for the self-represented litigant (SRL) pass constitutional muster.

In studying this issue, the Research Committee of the Self-Represented Litigation Network (SRLN) found that courts generally lack formal protocols for helping litigants to find appropriate assistance. Instead, courts make decisions based on available resources or intuitive decisions about individual litigants by court self-help staff. The need for more formal triage protocols that could be used by both litigants and court staff is evident. And while many legal services programs and self-

¹ Triage in the legal context is distinctly different than in the medical context. It does not prioritize resources to certain litigants over others to the extent that it leaves some untreated. Rather it is a process of rational distribution of resources based on litigant need and case complexity to assure all litigants have equal access to justice. In other words, triage should be designed to sort resources and people to enable the most just, accurate and efficient result for all.

² For a comprehensive discussion of legal triage itself, see *The Access to Justice "Sorting Hat" – Towards a System of Triage and Intake that Maximizes Access Outcomes*, 89 *Denv. U. L. Rev.* 859 (2012)

³ Clarke, Thomas M. and Victor E. Flango. *Case Triage for the 21st Century*. National Center for State Courts, Future Trends in State Courts (2011). <http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1847>

⁴ The 2012 Summit resulted in a collection of white papers, included seven that were published by the Harvard Journal of Law and Technology. Visit <http://tig.lsc.gov/lsc-technology-summit-papers> for a complete list of work produced.

⁵ *Turner v. Rogers*, 131 S. Ct. 2507 (2011) reversing a child support civil contempt incarceration for failure to provide procedures that would ensure sufficient fairness and accuracy to a self-represented litigant. The court indicated that the procedures needed would depend on the particular circumstances of the case, thereby in effect endorsing the need for triage, at least in such cases in which such accuracy and fairness were not protected by the provision of counsel.

help centers use checklists to screen and sort cases, these have been designed only to meet the program need, and do not consider broader systemic issues.

It is an extremely complex undertaking to redesign these systems, and in the broadest sense these ideas involve court re-engineering, which is beyond the scope of this paper. The modest goal of this paper is to introduce a framework of triage protocols to improve the litigant experience, expand access to justice and offer new efficiencies to courts and legal service providers. The protocols are designed around the concept of web portals,⁶ which are becoming a central tool for courts as they plan how to respond to the growing number of SRLs even while facing shrinking budgets. In addition to enabling on-line document assembly and e-filing, web portals offer a tremendous opportunity for providing high quality legal education and access to appropriate legal service providers.

A project team that included representatives from the courts, the civil legal aid community and the private bar engaged in a joint process to develop these protocols. The process gave rise to an illuminating dialogue of how each constituency presently conducts triage. But for 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. This will make it possible for them to explore how specific facts and circumstances could generate different outcomes, and what, if anything, they could do to improve their outcomes. Moreover, close analysis makes clear that the services litigants receive externally to the court case greatly impact how the case will proceed within the court's case management system. Hence, any set of triage protocols must integrate the services and processes of all stakeholders, and be designed to accommodate a dynamic and iterative process.

The proposition in this paper is that it is possible to collect information in a way to establish generally standardized and coordinated triage protocols that link litigant services, courts and legal services. From this process each stakeholder will realize significant gains in efficiency, cost savings and user satisfaction. This paper proposes protocols for evictions, divorces, foreclosures, and credit card debt, case types in which a high percentage of cases involve self-represented litigants. The

⁶ The word portal is a term of art that refers to specific website functionalities and how users interact with those functionalities. A web portal is a specially designed webpage at a website that brings together information from various sources, often allowing users to configure what is displayed, and permitting the user to search the collection. It may offer a secure log-in so that users can create their own space, which can include digital files, services and information. Many court webpages that provide comprehensive self-help materials have essentially created a self-help portal, but a true portal has not been created until users can create their own space and control what resources are engaged. E-filing applications and on-line document assembly projects have web portals. This paper is proposing that triage resources be integrated into such portals.

intent of this paper is to be a starting point for future elaborations of the protocols for triage of self-represented cases.

II. Three Distinct Protocols for the Key Stakeholders: Litigants, Courts and Legal Services Providers

The underlying assumptions guiding these protocols are that 1) litigants are driven by a desire for easy-to-understand information to anticipate outcomes and an assessment of the degree of professional assistance they might reasonably need, and 2) both the courts and legal service providers are driven by an need to maximize fixed resources to meet the ever expanding demand in an accessible and just manner. By considering these assumptions in conjunction with technological and human tools and practices, the basic structure of the protocols is as follows.

A. Litigant Choice Protocol

The Litigant Choice Protocol is designed to allow the layperson to access legal information and to predict how a matter might progress depending on different variables. This protocol is designed to collect and share information with the following progression:

- Litigant Goal
- Information Gathering and Exchange
- General Analysis Concerning Legal Complexity and Possible Outcomes
- Highlight of Special Considerations
- Options & Choice

B. Court Protocol

The Court Protocol is designed to collect and share information to assist courts in predicting and selecting resources required to process a matter based on certain facts that are well accepted indicators of complexity, and in doing so track cases based on whether they need:

- Formalization Only
- Finalization With Assistance
- Decision Making With Assistance
- Intensive Attention / Full Litigation

C. Provider's Protocol

This protocol is designed to collect and share litigant information in a way to assign an appropriate mix and level of legal and non-legal assistance such as:

- Self-Help
- Non-Attorney Professional Services
- Unbundled Assistance
- Full Representation

III. How Diagnosis is Performed

Implicit in these ideas is the concept of diagnostic triage – that factors will be taken into account in order for cases to be assigned to tracks and for litigants to be assigned services to enable them to manage and present their cases within the assigned tracks.

While the diagnostic process will vary depending on case type, and circumstances, the project initially envisioned a hierarchy of three possible diagnostic processes, automated, human review, and human assistance, with the second being used if the first is deemed inadequate as either a general matter or on the facts of the case, and the third if the second was inadequate; it would not necessarily be the case that all three processes would be needed.

However the project team found that these processes could not be so clearly separated in the real world. For example, litigants facing an emergency or immediate court deadline require access to a skilled person whose interviewing skills will be essential in prioritizing action. Similarly, people lacking access to quality web based resources and/or skills to navigate the web must not be excluded. Whereas, those who can navigate the Internet and are not facing a time sensitive issue can reasonably use on-line resources in a logical progression. While it is definitely advantageous to provide triage advice based on easily acquired or available data if possible, there are times when more complex services and processes may be required either as a default or as a frequent insurance of due diligence.

A. Automated Review & Interface

In order to maximize efficiency and accuracy, the diagnostic process within each protocol is likely to begin with automated assessment, with allowances for special circumstances such as an emergency, deadline or access challenges. Today's litigant seeks nearly all of their information from the Internet, and has demonstrated a widespread comfort in obtaining diagnostic assessments from the Internet, whether through portals such as WebMD or online calculators to determine how much they can borrow or how much their car is worth. In the context we describe in this paper, a web portal ought to permit a user to learn and plan, including communications with legal services providers, and when ready, to file with the court through on-line documents assembly programs and then to track and manage their court case.

The potential efficiency of designing integrated litigant/court/provider portals that can ship data back and forth without duplicative data entry is extraordinary, but must be engaged upon with extreme caution. From the litigant perspective, the threshold issue is accuracy, followed quickly by concerns for privacy and preservation of strategic choices. For instance, it is reasonable to expect that a litigant may enter hypothetical information to experiment with different results or simply guesstimate because he or she does not have access to the information. He or she should not want to be held accountable for such inaccuracies. Additionally, a

litigant may or may not recognize the potential privacy concerns from the click of a button, and without legal advice certainly will not understand how premature disclosure of certain information may forestall strategic options. From the court's perspective, a seamless data exchange could result in inaccurate and unnecessary information that would require more procedures to sift and verify. And while a provider is likely to seek to collect the same screening information as requested by a litigant portal, legal services providers must assure that information is collected in a manner that ensures attorney-client privilege attaches and is protected. Because of the complexity of these issues, the project team was concerned that localities may be dissuaded from attempting an integrated system, and therefore recommended that pilots progress incrementally.

B. Human Review

Based on the outcome of an initial automated process, a human review of the documents must be made available to handle the exceptions. And like most modern portals, the option to interact with a human in real time via multiple channels should always be available.

C. Human Interview

The final potentially available, but not necessarily always used, diagnostic triage process would be a human interview.

As will be seen in the examples that follow, the division of labor between people and computers becomes intuitively obvious, but so does the fact that a strict independent hierarchy between diagnostic techniques is not appropriate. Rather this is an interdependent and dynamic process between the protocols of each stakeholder that requires the planners and designers to consider this as an iterative process.

IV. Application of the Protocols to Various Case Types

As the multi-state project team worked through the protocols for each case type, the variations in state law and local practices made it impossible to propose universal triage protocols. However, the team was comfortable recommending general approaches and ultimately concluded that the most successful triage protocols will be those that are not overly complex, but rather focus on dispositive data points that impact resource allocation.

For example, in eviction matters, if the tenant has a Section 8 housing voucher, he or she stands to lose that voucher if evicted, with major long-term impact. Therefore courts could reasonably predict that cases with vouchers will be more vigorously defended than those without, and as such those cases will consume more court resources and could be tracked accordingly. Perhaps a forms revision that collects

this data point, which is generally irrelevant in the eviction case before the judge, would allow the court to batch more cases without a voucher on one calendar, and fewer cases with vouchers on another. Having such a straightforward count of the voucher cases in a given jurisdiction would also help legal and non-legal service providers to predict and adjust their resource allocation. Attention to this detail in a litigant portal may impact litigant behavior in such a way that homelessness is reduced and the housing security of children is increased. Engaging in this kind of coordinated triage among stakeholders can create significant cost savings and social benefits for the entire community.

V. Eviction Protocols

In the eviction scenario, which requires the two separate litigant perspectives of landlord and tenant, this report proposes a model in which the litigant makes a decision based on desires and predictions about outcomes. The court protocol determines the track by the strength of the defenses and the strength of the landlord's determination to evict. The provider protocol creates results that depend on the capacity of the litigant to raise and present defenses effectively in the context of the court.

A. Litigant Choice Protocol

The litigant choice protocol envisions an on-line portal that permits users to enter different permutations of data to predict possible outcomes, identify dispositive pieces of information, and locate resources – whether legal, non-legal or alternative dispute resolution options outside of the judicial forum, including on-line systems. Given the expedited nature of evictions in many jurisdictions, a human option would need to be easily available.

1. For the Landlord

Goal

The first question is whether the goal of the landlord is to get as much money as possible, and minimize loss, or to terminate the tenancy. In either case, the decision whether or not to file depends on the costs, the benefits, and the likely outcomes. If the landlord decides to file, the decision is to file for possession only or also for damages.

Information Gathering and Exchange

Some of the key information to be collected from the landlord includes basis for eviction, confirmation notice requirements were followed, relationships, financial flexibility, rent control, and whether the tenant has a public housing voucher. Other useful information may be how many rental properties the landlord owns, where they are located, and whether any complaints have been filed against him or her for

code violations. Capacity⁷ and representation status of both the tenant and the landlord are important.

General Analysis Concerning Legal Complexity and Possible Outcomes

The system could help landlords calculate estimates for the length of time until eviction/execution, the costs of the procedure, and the probabilities of outcomes (based on information about the underlying claim and possible defenses.)⁸ If the court filing fee is large enough, it may need to be assessed against the size of the estimated reward. These numbers will depend partly on state law and the culture of the particular court.⁹ The calculator should offer odds (and costs) that the tenant will get a lawyer. Results for both possibilities should be estimated. Landlords can then make decisions about whether to proceed, and whether to get a lawyer.

Highlight of Special Considerations

Because the willingness of the tenant to fight the action is probably the most important criterion, followed by the tenant's capacity or representation by counsel, the portal should highlight factors that impact these criteria such as a public housing voucher, rent control and tenant's experience defending these matters.

Options & Choice

In addition to offering likely outcomes based on the facts, the options stage should also include an assessment of the whether the legal complexity warrants unbundled or full legal representation, whether non-lawyer services could be helpful, and an option for an on-line negotiation tool should the landlord want to try a direct negotiation before incurring the costs of filing in court.

2. For the Tenant

Goal

There are two initial choices here – whether to default, or whether to seriously contest the eviction and/or negotiate the best possible terms.

Information Gathering and Exchange

The information available to gather or exchange will vary depending on whether the tenant has been served with a complaint for possession or whether he or she is

⁷ Capacity in the context of the triage discussion does not refer a litigant's legal capacity to proceed, rather it refers to a litigant's ability to navigate the legal system based on his or her skill at reading and writing, familiarity with the court system, experience with complex analysis, and/or mental health concerns, among others. In the triage context, litigant capacity is likely to be an important element of the algorithm designed to make recommendations, whether it contributes to the analysis of whether the person can complete forms, handle discovery, predict the vigor of a defense or gauge the appropriate level of representation.

⁸ Possible questions: How long is the non-payment period? Do you have proper proof of notice to quit, are there any code violations (and if so, what is their relationship to the amount owed)? Has the tenant a history of non-payment? Do you expect the tenant to get a lawyer?

⁹ The less sophisticated version of the calculator would simply give percentage data for each answered question. A more sophisticated one would rely on regression analysis. The most sophisticated version would use only factors validated by randomized studies.

assessing the risks of being evicted in the future. Some critical kinds of information are details about the terms of the lease, the landlord's allegations, actual defenses available, ability to cure, financial information, whether a public housing interest are involved and prior experience with courts or government agencies, as well as the ability to manage those experiences. Many legal services offices have well-developed intake protocols that could be adapted for a litigant portal.

General Analysis Concerning the Legal Complexity and Possible Outcomes

The protocol then analyzes legal complexity, litigant capacity and possible outcomes as informed by the court and provider protocols and provides the litigant with possible results, warning that they are only estimates based on statistics and possibly human judgments. If litigant service organizations can commit to providing services (assuming litigants pass eligibility screening) as determined at this stage, then the warnings may be weaker and reflect a smaller possibility of not getting counsel. Legal service providers already have well developed checklists that could be integrated into such a protocol.

Highlight of Special Considerations

Because the willingness of the tenant to fight the action is probably the most important criterion, followed by the tenant's capacity or representation by counsel, the portal should be clear in communicating the significance of these factors, especially if there is a significant interest such as a public housing interest or rent control. The tenant should also be made aware of the significance of a housing voucher. Legal services programs report that many tenants are unaware that an eviction could result in the loss of the voucher. Another special consideration in housing matters is whether the state law allows landlords to file a claim for damages within the same pleading for possession. In states that allow this, tenants often miss the fact that a civil case for damages is moving ahead on a separate timetable from the expedited possession case, resulting in defaults in the damages case because tenants believe the appearance on the possession matter addressed all issues.

Options & Choice

In addition to offering likely outcomes based on the facts, the *Options & Choice* stage should also include an assessment of the whether the legal complexity warrants unbundled or full legal representation, whether non-lawyer services could be helpful, and, if appropriate, offer an on-line resolution forum. Again, outcome statistics and possible judgment information can be provided. With respect to the court action, the tenant decides among the following options:

- Filing a pleading with the understanding that self-representation will be all that is available.
- Filing a pleading, anticipating that a non-profit organization will provide either unbundled or full service representation.

- Filing a pleading, planning to obtain legal services on their own.

What this approach might look like in practice is an interesting question. Tenants might want to ignore the statistics for negative outcomes if they highly value a good credit rating. Sometimes a tenant may wish to pursue the case to buy time. Delay is a good outcome because it enables them to come up with options. Those options may be affected by the lack of employment in some cases. If there is no ability to pay damages, then a landlord may be more willing to settle. Additional factors may include how much time is left on the lease, if the lease is rent to own, and if the tenant is in public housing.

B. Court Protocol

This protocol is designed to collect and share information so that courts can track cases and predict resource allocation based on well accepted indicators of complexity. The precise court paths available in an eviction case will depend on the state law and the court environment, and will be greatly influenced by the data collected through the pleadings, as well as the checklists and procedures used by the judge. For example, in some states a landlord can include a claim for damages in his or her initial pleading for possession, and in other states a landlord must file a separate action to pursue a claim for damages.

Parties have few incentives to plead their best offer, and in fact, would likely be advised against doing so. But with respect to certain dispositive factual points, pleading rules, and if permissible in a jurisdiction, form revisions could simplify the triage process by requiring the landlord to certify (and prove) in the complaint compliance with technical requirements. If the jurisdiction requires an answer, the tenant could be asked to indicate specific defenses or whether there a public housing or rent control interest is at stake. These are the sorts of data points that may be easy to gather and can substantially inform the triage process. In addition to assessing a tenants' defenses or a landlords' intent in actually ending the tenancy, judicial checklists should also strongly encourage parties to avail themselves of assisted settlement options.

For example in Hennepin County, Minnesota, Housing Court calendars are conducted with the availability of mediators and legal services and pro bono attorneys. At the start of the calendar, parties are encouraged to get unbundled assistance from the legal services attorneys if they are low income, and to make use of mediation services. Judicial officers reinforce use of the resources to attempt settlement and understand rights and responsibilities. The presence of the lawyers is believed to increase settlements, as parties are informed of the law, the likelihood of success asserting defenses, practical considerations and resources for emergency rent assistance. This court-assisted triage results in 90% of all cases filed settling. If clarification can be that effective in resolution, it is encouraging to consider that the litigant choice portal may in fact be successful in deferring cases from the court all

together, which underscores the importance of designing all triage resources in an integrated fashion.

Formalization

Within the context of the protocols, formalization refers to the situation in which no further action is necessary from the parties or court, and whatever document filed is complete and ready for signature. This is an unlikely option in the eviction setting, unless the tenant fails to appear and the court grants a default. Were a court to have a robust litigant portal that includes space for them to manage their case, parties could have the option of indicating through the portal, in advance of the court date, that they have reached an agreement and its terms, thereby creating a document for signature.

Finalization with Assistance

Formalization with assistance refers to the situation when the parties have reached an agreement, either to vacate or cure, and simply need the court to record the agreement. While it is unlikely that the court would be able to ascertain this from the pleadings, a judge can inquire at the beginning of a mass calendar whether any agreements have been reached, and if so those parties will be called first to memorialize their agreements. It is envisioned that the litigant choice protocol will have helped parties decide on the viability of their claims.

Decision Making with Assistance

- Track One: These are cases in which there are significant defenses, either through procedural defects or habitability violations, and the landlord's goal is other than actual immediate eviction. These need settlement assistance rather than trial services.
- Track Two: These are cases in which there are no significant defenses, but the landlord's goal is not actual immediate eviction. These need settlement assistance and income optimization services.

Intensive Attention / Full Litigation

- Track Three: These are cases in which there are significant defenses, either through procedural defects or habitability violations, and the landlord's goal is actual eviction. These need trial services. The nature of these trial services will depend on the representation status of the parties.
- Track Four: These are cases in which there are no significant defenses, and in which the landlord's goal is actual eviction. What court services are needed will depend on whether the tenant is represented, and possibly on other factors.

Triaging between the specific tracks is determined by the strength of the defenses and the determination of the landlord to obtain an eviction. In fact, settlement assistance may be useful in all four tracks.

C. *Provider's Protocol*

For providers assisting clients in eviction matters, we suggest a party-contrast capacity based model. In this model, it is assumed that online information and general self-help services are available to all litigants, although the precise nature of these services will depend on the court track to which the case is assigned. As previously mentioned, many legal service providers have developed comprehensive intake and screening tools to determine whether to take the case for representation, which will be enormously helpful in building integrated systems.

1. Negotiation track:
 - a. No lawyer, government agency, or repeat landlord is on other side:
 - i. The default assignment is self-representation.
 - ii. If there is a lack of litigant capacity, then the case requires unbundled representation.
 - b. A lawyer, government agency, or repeat landlord is on other side:
 - i. The default is unbundled representation.
 - ii. If the litigant is highly skilled, they may self-represent.
 - iii. If the litigant lacks capacity, then full representation is required.
2. Litigation Track (used only if the litigant has a strong defense and the landlord wants an eviction):
 - a. No lawyer or government agency is on other side:
 - i. The default is unbundled representation for trial preparation only.
 - ii. If there is a relative lack of litigant capacity, then a trial requires unbundled representation.
 - iii. A total lack of litigant capacity requires full representation.
 - b. A lawyer or government agency is on other side:

- i. The default is full representation.

VI. Family Law Protocols

This group of protocols is for divorce cases, including those with or without children, assets, or pensions, and custody and support cases for unmarried parents.

A. Litigant Choice Protocol

No protocol should tell someone whether or not to seek a divorce. It can, however, educate a user about what kind of cost-benefit analysis could inform his or her decision to pursue a particular form of relief – non-standard child support, non-standard custody or visitation orders or other special terms, and identify factors that create particular legal complexities. All family law matters are emotionally complicated, but a minority give rise to significant legal complexities.

Goal

The litigant is initially asked if standard results are acceptable, and to identify specific factual data points that are known to result in a variation, such as domestic violence, substance abuse, mental health concerns, long-distance living arrangements between parents and the like. Therefore the standard results for the jurisdiction need to be enumerated, as well as the factors that are special considerations. Project team members noted that identifying standard results and special considerations could become a controversial process, especially in jurisdictions that do not offer the “menu of parenting plan choices” approach. However, the coordinated triage planning approach recommended in this paper could ameliorate the controversy as courts, legal service providers and members of the bar hear the different ways standard results are summarized depending on the perspective of the stakeholder.

Information Gathering and Exchange

The litigant provides factual information about family composition, health, employment history, assets, and debts. In addition, the litigant is prompted to provide additional data concerning domestic violence, protective order history, a history of police attention, injury, or high expenses, children’s special needs, unusual employment, military status or tribal membership, all factors that can create a variation from standard results. The essential point here is that a litigant is asked to provide information, not conclusions about the information. The algorithm would then assess the data to determine whether the situation warranted a more detailed human review. For instance, in the child support context, obligors are often entitled to a deduction for prior born children. The litigant portal would ask for the dates of birth of all children and have the user indicate which children were part of the current case. If there were prior born children to this case, the deduction would be

automatically included, without the user ever having to learn the specifics of the law.

General Analysis Concerning the Legal Complexity and Possible Outcomes

The protocol then gives the litigant a general response that is designed to filter out what are seemingly unreasonable options.

Highlight of Special Considerations

The protocol highlights which particular considerations are of special concern, and which could have a dispositive impact on the case. In family law, team members thought it appropriate that litigants get a sense of whether they would benefit from a delay in filing. For instance, because of the extreme economic effect divorce has on people, it is often advantageous for there to be a planning period to permit an unemployed spouse to re-enter the workforce before filing so that he or she has an income stream and independent access to health insurance. Cases involving bankruptcy, immigration, domestic abuse, mental health concerns, and substance abuse should almost always be connected with a person for at least human review, as these are the types of factors that could impact whether a case can or should move forward.

Options & Choice

The litigant ought to be offered a selection of options, as informed by the court and providers protocols, that include delay for planning purposes, referrals to appropriate legal and non-legal resources depending given specific data points, and if immediate filing is desired, the litigant should be passed on to the pleading generator.

B. Court Protocol

When litigants use online document assembly programs, the court can partly automate the review. Court staff can identify cases appropriate for the Formalization and Finalization court tracks.

Review of the remaining cases may indicate to the court which cases are most likely to end up in the Intensive Attention Track. For example, protective order filings, child protective cases, prior divorces with multiple hearings may all be predictors of the likelihood of the need for such attention. Some states find that the only cases not resolved using guidelines and 50/50 property divisions are ones involving spousal support, attorney fees, child support, attorney disclosure, or moves. But state law varies tremendously in these areas, and therefore requires a custom design by each locality.

The residual cases will then go initially into the Decision Making Track. However, it will be important to design the tracks so that cases can be quickly moved from one track to another as circumstances change.

There is some disagreement about the need to separate the Formalization and Finalization tracks. It may depend in part on the availability of court resources.

Formalization

This track is for those cases in which all the work has been done by the parties and there is no significant disagreement. Forms are complete upon filing and the case is ready to close. It may be possible to do this by mail or online. The final court decree is then mailed or emailed to the litigants.¹⁰

Finalization with Assistance

In this track there is some need for resolution of minor matters. The lack of resolution is usually not because of any fundamental disagreement between the parties, but because of a lack of realization of what has to be done. It can often be resolved by a quick meeting between the parties facilitated by court staff.

Decision Making with Assistance

In this track, there remain significant decisions to make, but there is no indication that making these decisions will be particularly difficult, acrimonious, or rely on particularly complex evidentiary or factual decisions. While there may be a need for an appearance before a judge on limited matters, the hearing is likely to be a summary proceeding, and the parties are likely to accept the decision and its consequences. Settlement assistance services will be a major part of the processing in this track.

Intensive Attention / Full Litigation

The difficult cases go in this track. These are cases in which it is unlikely that a brief hearing or mediation will resolve the matter. Rather, the cases are likely to require extended hearings, contempt hearings, and modifications, or other follow-up activity. Some cases will require intense attention only until a decision is reached. Others may require it only after the decision. Still others may need serious attention throughout the life of the case. The main thing is that these cases will require judicial time, staff time, and compliance monitoring (if the court views that as within its scope).

C. Provider's Protocol

Provider triage in domestic relations matters is extremely fact intensive as is illustrated by the extensive list of data points to be collected in the litigant's choice protocol. And as in all case types, it is heavily influenced by client capacity. Nevertheless, providers can collect and share information in an interactive fashion with users so as to assign an appropriate mix and level of legal and non-legal assistance to include:

¹⁰ While this paper envisions a process supported by automation, it is worth noting that stakeholders do not need to wait for the deployment of sophisticated technological applications; they will benefit tremendously by initiating the process of designing coordinated triage protocols using existing tools, as this will inform future systems design.

- Self-Help
- Non-Attorney Professional Services
- Unbundled Assistance
- Full Representation

Provider protocols are also heavily influenced by which court track a litigant is on.

For instance, those in the *Formalization* and *Finalization* tracks will only need self-help assistance, even if there is a lawyer on the other side. Also, a human quick review should always be available to ensure that a litigant's lack of capacity to articulate the facts of the case have not inadvertently placed him or her on the wrong track. And in cases with an attorney representing one party, a human review of the SRL's position for reasonableness should be included in all circumstances.

Every litigant in the *Decision Making Track* will likely need an unbundled diagnostic interview to assess his or her capacity to present evidence and the strength of the opposition -- including whether the other side has counsel. There should be a presumption for continued unbundled assistance as needed, including unbundled counsel for unusually complex evidence or discovery. However, a technology based system of data accumulation at the pleading stage should reduce the need for discovery of third party documentary evidence because the parties can make data available directly, and once electronically submitted as a business record, the litigant does not need to wrestle with evidentiary rules of marking and entering evidence.

Full representation would be made available for those in the *Decision Making Track* who risked losing something to which they are entitled and lacked the capacity to proceed pro se or a serious imbalance was being caused by the presence of counsel on the other side. But again, robust data collection at the start of a case could reduce the need to provide full representation to the low functioning litigant if, for instance, the only interest he or she needed to protect were 50% of the spouse's retirement account. If the spouse had been required to transmit the information about the retirement account at the start of the case, and no facts were provided to vary from a standard division, the court could, in many jurisdictions, simply award the interests. In fact, once information about the retirement account was in the system, automated notices could go out about the necessity of Qualified Domestic Relations Orders (QDROs) if the retirement account were being split. The court could delay calendaring until the QDROs came in and litigants could seek provider services for unbundled assistance with that discrete task.

The *Intensive Action* Track needs counsel, with the presumption being for full representation. Unbundled counsel would be limited to situations where it is sufficient because of highly skilled litigants *and* because the case is on the *Intensive*

Action track because of underlying case complexity rather than a difficult relationship between the parties.

VII. Foreclosure Cases

Foreclosure cases differ significantly from Landlord-Tenant and Family matters because a third-party, in the form of government resources to assist homeowners stay in their homes through “work-outs,” can significantly impact the direction and outcome of a case. These alternative “work outs,” by which foreclosure can be avoided, are generally dependent upon the status of the underlying loan and the financial situation of the homeowner, rather than the legal defense. If homeowners get access to good information early on, they may be able to prevent the loss of their home. Foreclosure is a highly technical area, and whether homeowners have meaningful options can vary greatly on state law, as some states only allow judicial foreclosures, other non-judicial foreclosures, and still others have a mix of both. Therefore, decision trees will vary tremendously depending on the jurisdiction, although sorting concepts remain universal.

A. Litigant Choice Protocol

The litigant protocol follows the same analytic structure as in the other substantive areas. And while an on-line litigant portal is generally always a good starting point, the experience of a state like Ohio, which was particularly hard hit by the foreclosure crisis, is that early intervention by a highly trained housing specialist is an efficient and effective mechanism to match need with resources and options.¹¹

Litigant Goal

The litigant faces the initial choice of trying to obtain a workout, fighting the foreclosure, or allowing the legal process to go forward, with a separate decision as to when or how to actually leave.

Information Gathering and Exchange

In the information gathering stage, the litigants will have to provide economic data on income, assets, debts, and the current market value of their home. They will also need to have specific information about the terms of their mortgage, payment history, arrearages and what action, if any, the lender has taken. A systemic improvement, such as with full disclosure through data transfer, would be to require lenders to make a full disclosure to homeowners of the underlying mortgage facts, including a full history of ownership and lack of defects in making and servicing loan, and a full provision of required information about available workout options. This should be done not just at the time of initialization of foreclosure, but at any point that the lender provides notice of non-compliance with mortgage terms. While courts do not regulate the pre-court process directly, they can do so by requiring by rule that any ultimate foreclosure filings include certification that the information was provided in the above timely manner. If such a requirement is not in place, the details available for collection for the litigant choice protocol will be

¹¹ See *Save the Dream Ohio: Foreclosure Prevention Effort* at www.savethedream.ohio.gov.

much weaker. Litigants also need to provide information on the likelihood of any changes in the make-up of their household, such as divorce or the birth of a child that might reduce their income.

General Analysis Concerning Legal Complexity and Possible Outcomes

As in other substantive areas, the system should give general statistical predications, based on data provided by the litigant, and case outcome data from the courts. But ultimately, any analysis in foreclosure will turn on technical details of what has transpired so far. Details on the mortgages may make the likelihood of legal success easier to evaluate, as the stage of the foreclosure process is critical to the analysis.

Highlight of Special Considerations

Special considerations such as the potential availability of bankruptcy to stay the foreclosure, or the impact of a divorce on the options available should be brought to the homeowner's attention.

Options & Choice

As noted, the options available in the foreclosure context are driven by where a homeowner is in the timeline moving toward foreclosure, therefore referrals are very time sensitive, and it is critical that users can be connected with a human to confirm the options available and to assist with referrals. As previously mentioned, the processes and options will differ by state, as some states use judicial foreclosures, others use non-judicial foreclosures and others hybrids or both. Because of the highly technical nature of foreclosure, it is an area well suited to the use of non-attorney housing specialists that can counsel homeowners about their options, and an essential component of the litigant choice protocol is permitting the litigant to understand the likely outcomes in the court tracks and provider protocols, which serves as another example of the iterative and dynamic nature of these processes.

B. Court Protocol

Court tracks will largely be based on whether the litigant is contesting, and, if the rules require it, whether the lender has disclosed all necessary information and complied with necessary certifications. If such disclosure is not required, then a much more comprehensive assessment must be made of each case, and unbundled representation or detailed staff self-help – with court initiated discovery available to court staff – would be required.

Formalization Only

These are the uncontested cases, often by default.

Finalization With Assistance

These are the cases in which the homeowner is not contesting the actual foreclosure, but the lender and homeowner have negotiated a date the property will be vacated.

Decision Making With Assistance

This is the track for cases that require some form of court based settlement negotiations. The presumption is that there will be a settlement unless the court can find no appropriate workout path or there is an identified defect. Certified housing counselors are widely available nationally to facilitate settlements. Some courts may informally offer similar services.

Intensive Attention / Full Litigation

These are the matters that will progress as contested case, and are in reality very rare in all jurisdictions.

C. Provider's Protocol

As discussed above, this protocol is designed to collect and share information in a way to enable providers to assign an appropriate mix and level of legal and non-legal assistance and typically includes Self-Help, Non-Attorney Professional Services, Unbundled Assistance, or Full Representation. Because of the highly technical nature and time sensitive nature of foreclosure proceedings, pure Self-Help is rarely an option. At the very least, all homeowners ought to be given access to a human review that assesses whether they should be directed to non-attorney specialists, attorneys if they have a viable defense, or social service agencies if they are facing homelessness.

Cases on any court track other than litigation call for a mix of self-help, non-attorney specialists and unbundled legal assistance.

Cases on the litigation track will need unbundled assistance or full representation, depending on the viability of the defense, the complexity of issues and availability of resources. A simple defect and high capacity litigant should receive unbundled assistance, whereas complex defects and low litigant capacity should be provided full representation.

VIII. Credit Card Cases

From a systems standpoint, the significant question in credit card debt cases is whether the original creditor is suing on the debt or whether the case is brought by a debt collector (third-party creditor), who, if challenged, is often unable to prove standing because it purchased only an account number and therefore can neither show how the original records were kept, nor establish privity with the defendant(s). To raise this defense against third-party creditors, as well as the many

other technical defenses, litigants will benefit not only from a web portal, but also from the assistance of highly trained non-lawyer specialists to decide how to move forward.

A. *Litigant Choice Protocol*

This protocol follows the familiar progression:

Litigant Goal

The initial question is whether to defend or default, but as with other protocols, the litigants must be able to predict the consequences of each path, which includes an understanding of the Court Protocol and the Provider's Protocol.

Information Gathering and Exchange

In a debt matter, in addition to collecting information to assess defenses, information about the debtor's income, assets and other liabilities should be collected to determine whether the debtor is judgment proof. Examples of data to be collected to assess defenses include type of debt, amount, date incurred, creditor, who is collecting, payment history, and collection efforts to date. In many jurisdictions, consumer advocacy groups have developed detailed screening tools that could be very helpful to stakeholders as they develop the data points for their systems.

General Analysis Concerning Legal Complexity and Possible Outcomes

At this stage in the analysis, it will be important to confirm that the facts collected are accurate, assess the defenses and evaluate the time and resources that will need to be invested. Debtors should get information on the likelihood of success and consequences of failure, based on provided information and a checklist of possible underlying defects in the obligation.

Highlight of Special Considerations

In debt matters, after completing a personal cost benefit analysis, many consumers may decide not to defend and accept the default. However, for this to be an informed decision, they must assess whether they are judgment proof, and if not, what they risk losing.

Options & Choice

Because of the technical nature of defending a consumer debt matter, in addition to giving a debtor a basic sense of the options available, it is probably most appropriate for all debtors to be referred to a non-attorney specialist to review the options.

B. *Court Protocol*

In consumer debt matters, enriched and systematized litigant and provider protocols have the potential of substantially impacting the court protocol should defendants demand more particularity from the creditors in the process of

evaluating defenses. For instance, courts may want to treat original creditors separately from third-party creditors. One possibility would be to establish a court rule requiring plaintiffs to identify whether they are the original creditor or third-party debt collector in the initial filing document. While these concepts start to edge into re-engineering, which is beyond the scope of this project, one can certainly conceive of other changes in court process that could be considered.

The court tracks will fall into the following tracks:

Formalization Only

Cases set for default would be on the formalization track.

Decision Making With Assistance

Generally, matters on this track will have no defense available or there is a legal defense, but it is curable. Resolution is by negotiation and settlement, either with out-of-court settlement assistance (on-line or in person) or court based alternative dispute resolution.

Intensive Attention / Full Litigation

Matters on this track will have a legitimate legal defense.

C. Provider's Protocol

As discussed earlier, in consumer debt matters systems should be designed to move litigants onto the provider's protocol sooner rather than later because of the timing and technical issues involved.

Self-help is valuable insofar as it begins the process of collecting information and sorts cases by whether the plaintiff is the original creditor or third-party debt collector, but nearly 100% of debtors would benefit from non-attorney professional services, whether to verify viability of defenses, consequences of default. Given the aggressive nature creditors, it is generally accepted that negotiation and settlement efforts be coordinated through an attorney's office.

Cases set for decision making with assistance will require unbundled legal advice, unless the defense is very complicated in which case the litigant should get an unbundled attorney to prepare the case. Because these cases are so paperwork intensive, electronically produced and transmitted documentation has the potential of reducing the challenges of navigating courtroom procedures for the litigant, with the judge having the relevant documentation on-hand when the case is called, which creates less need for counsel in the courtroom. If the matter at stake is small, then self-help is sufficient.

Matters set for full-litigation will require unbundled representation, unless there is a significant interest at stake, or litigant capacity is low, in which case, full representation is needed.

IX. Issues Highlighted by the Project Team

A. Local Environment: Standardized Forms & Unbundling

As the team worked through the protocols, it became overwhelmingly clear that integrated triage protocols required standardized forms and access to an unbundled legal assistance network. Standardization of forms varies tremendously across the country, with some jurisdictions achieving nearly complete uniformity and others requiring a patchwork from courtroom to courtroom. Similarly, the unbundled practice of law is accepted in varying degrees throughout the country. However, market forces such as e-filing and re-tooling of law practices to make them economically viable are likely to encourage an increasing number of jurisdictions to create more fertile ground for these approaches.

B. Efficient Use of Staff Expertise

Triage protocols have the potential to enable both court and legal services staff to spend more time “practicing at the top of their licenses.” That is, tasks that can be performed by paralegals or other staff should be done by them. The key is to have formal protocols that ensure that non-lawyers do not overstep the bounds of what is appropriate for them to do. If done properly, lawyers should be able to spend more of their expensive and scarce time doing what can only be done by them.

C. Potential Reuse of Existing Executive Branch Portals

The internet offers an unlimited amount of information; the challenge in this scenario is to provide litigant information and create secure portals for data transmission on a secure site that provides information that comports with the high standards of the judicial branch but permits all stakeholders to ethically participate. Most state governments now host citizen portals with an array of services for the public. As these websites have matured, their design moved away from individual agencies and toward citizen-focused services that hide the organizational and process complexity required to provide those capabilities. One innovative approach would be to add a litigant portal to the existing state portals. Citizens might find it easier to locate and are unlikely to be concerned about whether a service appears to be provided by the executive or judicial branch. The legitimacy of government would be sufficient. It might even be possible for a litigant portal to reuse any functionality the executive branch portal already has for well identifying persons.

D. Portal Identification of Litigants

Some functions of the litigant portal are general and informational in nature. Project participants agreed that such services should be available anonymously. It is only when a litigant wants to transact some formal service with the portal that it is necessary to collect the information to well identify them. Such information should be used by the portal when necessary, but be managed by the litigants. In all cases the litigants must make an explicit choice to submit identification data. In pilots, any attempts to collect survey data about litigants should be voluntary.

E. Potential Dangers of Portal Advice

The project participants disagreed on the potential dangers of information provided to litigants. While there was universal agreement on the principle of “do no harm,” there was significant disagreement about when and how that should be achieved. Some participants felt that no help was worse than some forms of help. Others thought that self-help could be better than bad advice from a lawyer.

F. Unlicensed Practice of Law

Project participants struggled with issue surrounding the unlicensed practice of law. Some courts have mature and clear policies on what court staff and say and do. LSC organizations have lawyers on staff and policies about what paralegals can do. Litigant portals definitely cross into a gray area where advice may be given in ways that appear to violate state laws and court rules. Participants in the LSC Strategic Technology Summits also wrestled with this key issue without agreeing on a solution. The most promising ideas seem to be formal unbundling approaches and court rules that permit some forms of advice.

G. Importance of User Point of Entry

All project participants recognized the importance of the portal recognizing and adjusting to the point in the process when the litigant first interacts with it. The ensuing process and advice will be different, depending on where the litigant is in the process. Some options will be foreclosed. Others may change. There are analogies to similar portals in healthcare.

H. Information Sharing Agreements

Just as in other areas of the state and local justice world, any capability that requires data integration faces difficulties gaining permission to share information. Privacy and public access are perennial issues. Aligning organizational policies and guaranteeing both appropriate security and adequate enforcement of policies are significant concerns. Stakeholders should not underestimate the time and effort it might take to successfully complete the required policy agreements for required data sharing to support portal actions and services.

I. Implementation Information

All project participants felt that the triage protocols by themselves would not benefit anyone much without additional information about how to implement them. Topics might include resources required, sequential implementation tasks, governance, integration and information requirements, and how to best make litigants aware of the portal so they can use its services.

J. Stakeholder Challenges

One barrier to successful implementation of a litigant portal is the change it demands in the way various stakeholder organizations behave. Currently most organizations operate independently in the way they provide services to the public. The result is sometimes an overlap in information or services and occasionally there is a sort of de facto competition to serve the same litigants. Overcoming these very real and persistent problems will require several strategies. First, any portal implementation approach must make clear what the value is to each key stakeholder. Ideally, these value statements would take the form of formal cost/benefit analyses. Second, there must be agreement by all stakeholders in what the portal business processes will look like and how each organization will participate to make the portal work properly. To date this step has not been documented anywhere in the United States. Rigorous evaluation of early pilot portals may help other jurisdictions make the decision to cooperate.

K. Initial Value Proposition

A litigant portal with triage protocols cannot be created for all case types and legal problems from the beginning. To do so would be simply too complex and difficult a task for any jurisdiction. Instead, jurisdictions should select a few key case types and pilot protocols that apply a few simple rules for assistance. Portals can always be incrementally elaborated and expanded from that starting point. It is even more critical that portals provide significant value of some kind to litigants from the start or they will not be motivated to use it.

L. Standards of Care

Some project participants thought there were significant parallels to standards of care in the healthcare world. All healthcare practitioners treat particular problems in a specific and consistent way. The development of triage protocols implies some form of such standards of care, yet the justice world lacks most of the scientific research needed to identify and confirm standards of care. Thus, a litigant portal with triage protocols assumes a foundation of evidence-based practices that may not yet exist.

X. Conclusion

As readers will likely reflect, there are in fact many triage-like efforts underway within their local courts and service providers, however the challenge of integrating and coordinating these approaches among justice system entities is the opportunity facing us today. Shrinking budgets and technological advances provide the impetus for stakeholders to come together to develop a seamless system for the user that promotes trust and confidence in the courts, access to justice and improved efficiencies for all. The project team is hopeful that the protocols suggested herein will be useful to stakeholders as they create new systems to meet today's demands.

The project team also notes the critical role that triage protocols can play in the design and creation of litigant portals. Triage protocols should be identified for additional case types in support of such litigant portal projects now underway in various jurisdictions with the support of the SRLN, LSC, and NCSC.