Access to justice: The emerging consensus and some questions and implications

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An emerging consensus about how to solve the access to justice problem is laying the groundwork for dramatic progress in the next few years, notwithstanding the dire economic crisis facing federal, state, and local governments.

In the media there is often a fatalistic—if dramatic—attitude to the feasibility of solving the overall access to justice problem. Appalling statistics on access are combined with dramatic stories showing the dire consequences of lack of access and with news of new budget crises to paint a picture of an insoluble problem overwhelming heroic advocates. The story is all about the urgent need for more money, and all too rarely about the more comprehensive innovations that might transcend these dynamics.

> We must realize and leverage the fact that the consensus represents the foundation of a 100 percent access to justice system.

But the good, and not often recognized, news is that there is now a broad emerging general operational consensus (used here in the sense of a "common basis for moving forward")[1] within the relevant legal community—courts, bar, and legal aid—about the approaches needed for a comprehensive solution. The four key elements of the consensus—court simplification and services, bar

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1. *See*, generally, Wikipedia entry on *Consensus Decision Making*, http://en.wikipedia.org/wiki/Consensus_decision-making.

flexibility, legal aid efficiency and availability, and systems of triage and assignment, are drawn from the practical challenges that the constituencies face in doing their jobs, from the experiments that each has shaped in an attempt to respond to those challenges, and from the work that the members of the constituencies have done to help each other in these experiments.

This practical general consensus is reflected in the perspectives of the national leadership of the main segments of the community as well as those of the access to justice commissions now in place by court order or similar process in about half the states. Of course, actual views vary within the different segments of the justice community. It is encouraging, however, that the clearest support for the elements of the consensus tends to come from the portion of the community most responsible for implementing the changes. It is from the courts, for example, that the focus on court reengineering has come.

That the elements of consensus have grown from shared experience is one reason that improvements in one part of the system support and multiply the effect of changes in other parts. 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.[2] More generally one study found that up to $3 in court spending were saved by expenditures on self-represented services.[3]

It is particularly encouraging that this consensus is becoming clear in the moment of opportunity created by the fact that, for the first time, there is an entity within the U.S. Department of Justice tasked with addressing access to justice problems,[4] and that both the Legal Services Corporation and the State Justice Institute have new boards of directors open to a common direction.

Overview of the consensus

While any attempt to summarize the highly complicated interplay of views of a wide range of interested stakeholders is risky at best, virtually all constituencies recognize that the solution to the access to justice crisis rests on achieving improvement in three areas—although few have explicitly adopted all of them as a package, and almost all might differ with particular details.

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 reconsideration and 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. It is included here because as a practical rather than an intellectual matter, it is accepted on a day-to-day basis and because without it the impact of the others is greatly reduced.

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 obtain access most efficiently and effectively. In other words there must be some system of triage, including referral and follow up.

None of these insights are new. Indeed all of them, except the last, have been repeated in many contexts, although many have become more urgent as need has increased and available financial resources become more scarce. What is important to recognize is just how broad the recognition has become of their value as a comprehensive approach to reform. Professor Russell Engler, for example, has urged what he called a "context-based" strategy, with the prongs of the strategy being: revisiting the roles of judges, mediators, and clerks, use and evaluation of assistance programs, and an expanded right to appointed counsel.[5]

The court contribution

What court change looks like—making courts accessible through simplifying and providing services. Courts, bar, and legal aid are in general agreement that court processes must be made more accessible. This can be done in two broadly interrelated ways. First, the realignment of the court's processes can make them 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,

2. Not all agree. *See, e.g.* Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)* 62 Fla. L. Rev. 1227 (2010).

3. John Greacen, *The Benefits and Costs of Programs to Assist Self-Represented Litigants: Results from Limited Data Gathering Conducted by Six Trial Courts in California's San Joaquin Valley* (2009), available at http://www.courtinfo.ca.gov/programs/equalaccess/documents/Greacen_benefit_cost_final_report.pdf.

4. United States Department of Justice, Access to Justice Initiative, http://www.justice.gov/atj/. *See also,* Charlie Savage, *Laurence Tribe is Leaving Justice Job,* N. Y. Times, November 17, 2010, available at http://thecaucus.blogs.nytimes.com/2010/11/17/laurence-tribe-is-leaving-justice-job/.

5. Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives,* Clearinghouse Review 196 (2006), available at http://www.nesl.edu/userfiles/file/Center%20for%20law%20and%20social%20responsibility/engler-clearinghouse.pdf. *See also,* Engler, *Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis,* 15 Roger Williams U. L. Rev. 472 (2010) (discussing changes in court roles, discrete task representation and right to counsel).

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.[6]

Examples of such 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. These are springing up in many states and are more and more regarded as inherent to the system. Also inherent is far greater use of non-lawyers as information sources and/or finders, both in the courts,[7] and in outside institutions such as public libraries.[8]

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.[9] All of these changes have the potential to increase efficiency and reduce costs, even if they might take initial investments.

National state court leadership has long recognized the affirmative role of the courts in taking such steps to enhance access to justice. As far back as 2002 the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) jointly passed Resolution 31, which in addition to "[r]ecogniz[ing] that courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts," specifically "[s]upport[ed] the establishment of court rules and policies that encourage the participation of judges, court staff, legal services agencies, state and local bar associations, and community organizations in the implementation and operation of assistance programs for self-represented litigants."[10]

This resolution itself referenced and relied upon the July 2002 CCJ/COSCA Task Force Report, which included sections on self-help centers and one-on-one assistance for the self-represented,[11] and explicitly included in its recommendation section Designing court processes to work for self-represented litigants:

> Many courts that have implemented self-help programs have come to recognize that the court process itself is inherently unfriendly to non-lawyer users. This realization has prompted them to move toward greater reliance on sample/model forms, and to periodically revise those forms and their instructions to make them more comprehensible to laypersons. . . . In addition, state Supreme Courts and Judicial Councils should be encouraged to use their rule-making authority to advance the use of standard forms and uniform court rules for common procedures.[12]

The ongoing recognition of the state courts of the need for such initiatives has been reflected in their participation in the Self-Represented Litigation Network,[13] including attendance by teams from 30 states at the Judicial Conference on Self-Represented Litigation held at Harvard Law School in 2007,[14] and similar participation by teams from 25 states at the launching of the *Court Leadership Package* at the National Center for State Court's Court Solutions Conference in Baltimore in 2008.[15] The major focus of the Judicial Conference was changes in courtroom processes that would help ensure that the self-represented would be heard,[16] while the *Court Leadership Package* included a focus on process changes.[17]

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, including self-represented litigants; ensure fairness and due process; and provide for more effective and consistent family law rules, policies, and procedures."[18]

That report, accepted by the Judicial Council, and in the process of court and legislative implementation,[19] includes a broad range of

6. Self-Represented Litigation Network, Best Practices In Court-Based Self-Represented Litigation Innovation (2d ed., Williamsburg, VA: National Center for State Courts, 2008), available at http://www.selfhelpsupport.org/library/item.223550-2008_edition_of_Best_Practices_in_CourtBased_Programs_for_the_SelfRepresent. The www.selfhelpsupport website, operated by the National Center for State Courts in cooperation with the Self-Represented Litigation Network, requires registration, which is free.

7. John Greacen, *Legal Information vs. Legal Advice—Developments During the Last Five Years*, 84 Judicature 198 (2001), available at http://www.ajs.org/prose/pro_greacen.asp.

8. Richard Zorza, *Public Libraries and Access to Justice,* in Future Trends in State Courts 2010,126 (Williamsburg, VA; National Center for State Courts, 2010), available at http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=227.

9. *Best Practices, supra* n. 6, at "Part III, Practices in the Courtroom," at 54.

10. Conference of Chief Justices and Conference of State Court Administrators, *Resolution 31: In Support of a Leadership Role for CCJ and COSCA in the Development, Implementation and Coordination of Assistance Programs for Self-Represented Litigants,* http://ccj.ncsc.dni.us/resol31AsstPgmsSlfLitigants.html.

11. http://cosca.ncsc.dni.us/WhitePapers/TaskForceReportJuly2002.pdf at 6.

12. http://cosca.ncsc.dni.us/WhitePapers/TaskForceReportJuly2002.pdf at 12

13. http://www.srln.org (website of Network), http://www.selfhelpsupport.org. (resource website operated by the National Center for State Courts).

14. Self-Represented Litigation Network, *Judicial Education Curriculum Project Report and Evaluation* (2008), http://www.selfhelpsupport.org/library/item.259761-Judicial_Education_Curriculum_Project_Report_and_Evaluation. The curriculum products are collected at http://www.selfhelpsupport.org/library/folder.165143-Harvard_Judicial_Leadership_Conference_Nov_13_2007.

15. The *Court Leadership Package* is collected at http://www.selfhelpsupport.org/library/folder.208521-2008_Court_Solutions_Conference.

16. *Judicial Education Curriculum Project Report and Evaluation, supra* n. 14, at 3. The intellectual history of these changes is laid out in Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role,* 22 Notre Dame J. L. Ethics & Pub. Pol'y 367 (2008)

17. Descriptions of the Components of the Package are at: Self-Represented Litigation Network, *Introduction to the Leaderships Package* 2 (2008), http://www.selfhelpsupport.org/library/item.208576-Introduction. Particularly relevant are *Module 8, Caseflow Management for Access,* http://www.selfhelpsupport.org/library/item.208589-Power_Points_for_Module_8_Caseflow_Mangement_for_Access, and *Module 10, Courtroom Staffing and Services for Access*, http://www.selfhelpsupport.org/library/item.208591-Power_Points_for_Module_10_Courtroom_Staffing_and_Services_for_Access.

18. Elkins Family Law Task Force, Report To The Judicial Council 2 (San Francisco, CA; California Judicial Council, 2010), available at http://www.courtinfo.ca.gov/jc/documents/reports/20100423itemj.pdf.

recommendations, including, as appearing in the table of contents: "Helping People Navigate the Family Court Through Caseflow 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."

The most recent national leadership in this process from the National Center for State Courts particularly reflects the deep anxiety courts are feeling from budget pressures. "Reengineering a court system involves evaluating and adjusting any number of court operations—from the structure of the court itself to venue requirements, to its use of technology — to improve processes and save money while increasing efficiency and maintaining service levels to the public."[20] As of the end of 2010, The National Center was already working with, or had worked with, 10 states on these efforts.[21]

There is also general support for this process from state Access to Justice Commissions, as shown by their Mission Statements, Reports, and Charges.[22] The commissions are most frequently court creations, even if this process is not necessarily their number one priority. This is because, historically, many of the commissions were set up at the urging of legal aid programs, and have focused initially upon getting additional funding for those programs. Perhaps inevitably, their support for changes in the courts has been less specific and focused than their work on legal aid funding issues. Some of the more recently established or re-established commissions, such as those of Maryland and Massachusetts, have been among those that have focused more broadly. [23]

The Conference of Chief Justices, in July 2010, endorsed the spread of such Access to Justice Commissions,[24] doing so in response to the urgings of the potential of such commissions by Professor Laurence Tribe, at that point the Senior Counselor for Access to Justice at the Department of Justice.[25] It is also interesting that Professor Tribe urged accountability: "I would urge each of you to embrace . . . a sustainable institutional commitment to grading the state's legal system in terms of how well or poorly it is delivering justice to the state's people."[26]

These innovations not only save time and money for the courts (making them attractive to budget makers,) but 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 need 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.

How other stakeholders view the push for simplified access to the courts.

The bar's supportive perspective. The bar's general support for this approach is demonstrated by the ABA initiating and 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. Specifically, the ABA added a new Comment 4, "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard" to the (renumbered) Rule 2.2.[27] The Reporter's Explanation reads:

> Throughout the life of the Commission, some witnesses urged the Commission to create special rules enabling judges to assist pro se litigants, while others urged the Commission to disregard calls for such rules. This Comment makes clear that judges do not compromise their impartiality when they make reasonable accommodations to pro se litigants who may be completely unfamiliar with the legal system and the litigation process. To the contrary, by leveling the playing field, such judges ensure that pro se litigants receive the fair hearing to which they are entitled. On the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage [emphasis added]."[28]

The Conference of Chief Justices "commend[ed] the revisions [in the Code as whole] to its members as a foundation upon which states can build to improve and clarify the standards of conduct for the judiciary.[29]

This support is also more generally shown by the extensive participation of leaders and members of the

19. Elkins Family Law Implementation Task Force, http://www.courtinfo.ca.gov/jc/tflists/elkins.htm.

20. http://www.ncsc.org/services-and-experts/court-reengineering.aspx. However, it appears that many courts are focusing initially on short-term rather than long-term savings.

21. http://www.ncsc.org/services-and-experts/court-reengineering.aspx.

22. E.g. Massachusetts, http://www.nlada.org/DMS/Documents/1268921016.77/ATJ%20Commission%20reconstituted%202-10.pdf ("Working closely with the Chief Justice for Administration and Management and the Special Advisor to the Trial Courts on Access to Justice Initiatives to broaden access to justice within the court system."); Utah, http://www.nlada.org/DMS/Index/000000/000053/0000533/document_browse#topics ("Review service delivery methods, policies, and court rules as they pertain to access to justice issues"); Maryland http://www.courts.state.md.us/mdatjc/pdfs/interimreport111009.pdf (2009 Interim Report of Commission at v. ("Create innovative legal practices, court processes and services to enhance the ability of all persons, including the self-represented, to use the courts or solve a legal problem.")

23. *See, e.g.* those of Maryland and Massachusetts, *id.*

24. Conference of Chief Justices, Resolution 8 [:] In Support of Access to Justice Commissions (2010), http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol8Access.html.

25. Tribe, *Keynote Remarks at the Annual Conference of Chief Justices [by] Laurence H. Tribe Senior Counselor for Access to Justice, U.S. Department of Justice*, 27-29, July 26, 2010, available at http://ccj.ncsc.dni.us/speeches/Keynote%20Remarks%20at%20the%20Annual%20Conference%20of%20Chief%20Justices%20to%20deliver.pdf.

26. *Id.* at 27. The National Access to Justice Center at Cardozo Law School is also working on this concept.

27. Model Code of Judicial Conduct 16 (Chicago Il; American Bar Association, 2007), available at http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf.

28. Reporter's Explanation of Changes, Model Code Of Judicial Conduct 14 (Chicago Il; American Bar Association, 2007), available at http://www.abanet.org/judicialethics/mcjc-2007.pdf.

29. Conference of Chief Justices, *Resolution 4, In Support of Adopting the Format and Numbering System of the 2007 ABA Model Code of Judicial Conduct* (2007), available at http://ccj.ncsc.dni.us/JudicialConductResolutions/resol3AppearanceOfImpropriety.html.

state bars in the state Access to Justice Commissions. All state commissions include representatives of the state bar; typically they are either appointed directly by the bar or nominated by the bar and appointed by the supreme court. For example, the California Bar appoints 10 out of the 25 members of that state's Access to Justice Commission. Orders and rules creating and establishing the appointment process for state Access to Justice Commissions are collected at the web site of the ABA Resource Center for Access to Justice Initiatives.[30] At the service level, some states, such as the Minnesota bar's pro bono programs, provide direct assistance to litigants in cooperation with courts' self-help centers.[31]

Legal aid participation and support. The clearest evidence of the support of nonprofit legal aid providers for such changes in the courts is their participation in facilitating those changes. (This category of "legal aid" is intended to include traditional staffed legal aid programs, and the pro bono and related programs associated with them, as well as other nonprofit community organizations that play an access to justice role.)

In some states, such as Maryland[32] and California,[33] nonprofit legal aid programs provide direct informational services in the courthouse under contract to the courts, thereby participating directly in making the courts more accessible. As the California AOC put it in a Fact Sheet*: "*. . . each year the council and the bar distribute over $1.5 million to legal services programs for court-based services for low-income self-represented litigants. Thirty programs are currently funded and provide assistance to litigants in cases involving domestic violence, guardianships, family law, landlords and tenants, expungment of criminal records, and general civil assistance. The nation's first appellate self-help center has also been created through this program." 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.[34]

Most dramatic has been the involvement of the Legal Services Corporation 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, 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:

> . . . . Recognizing that not all indigent parties can be afforded representation, even when they have meritorious cases, the court partner shall, as a corollary to the services provided by the lead legal services agency, be responsible for providing procedures, personnel, training, and case management and administration practices that reflect best practices to ensure unrepresented parties meaningful access to justice and to guard against the involuntary waiver of rights, as well as to encourage fair and expeditious voluntary dispute resolution, consistent with principles of judicial neutrality." [35]

The Bar's contribution

What bar change looks like—unbundling and pro bono facilitation in the context of access obligations. As a general matter, the organized bar has long stated, at least formally, its obligation as a self-regulating public interest profession to promote accessibility. As the 2006 Report to the ABA House of Delegates accompanying the Resolution in support of a right to counsel in certain civil cases stated: "The ABA also has long recognized that the nation's legal profession has a special obligation to advance the national commitment to provide equal justice."[36]

However, the main recent new area of access innovation for the bar itself, as opposed to encouraging change in the non-bar components of the system as described in the other sections of this article, has been "discrete task representation," often colloquially referred to as "unbundling." With unbundling, lawyers and clients agree that the lawyer will perform only certain of the required tasks, with the client doing the remainder. The concept is explained in brief by two (since retired) chief justices, Ronald George of California and John Broderick of New Hampshire.[37] The approach makes hiring a lawyer financially feasible for many who would otherwise be unable to do so, thereby being particularly financially appealing in tough times to both lawyers and clients, and has the potential to save the court money by speeding cases.

Broad bar support for unbundling is highlighted by the inclusion in The Ethics 2000 version of the ABA Model Rules of Professional Conduct of two important changes. The ABA modified Rule 1.2 so that Rule 1.2(c) now explicitly authorizes unbundling: "A lawyer may limit the scope of the representation if the limitation is reasonable under

30. http://www.abanet.org/legalservices/sclaid/atjresourcecenter/commdevresources.html.

31. Andrea Nordick, *Leveling the Playing Field for Pro Se Litigants,* Hennepin Lawyer, December 28, 2009, available at http://hennepin.timberlakepublishing.com/article.asp?article=1389&paper=1&cat=147.

32. Maryland Access to Justice Commission, *Interim Report and Recommendations* 59-60 (2009), http://www.mdcourts.gov/mdatjc/pdfs/interimreport111009.pdf.

33. California Administrative Office of the Courts, *Fact Sheet, Programs for Self-Represented Litigants* 2 (2009), http://www.courtinfo.ca.gov/reference/documents/factsheets/proper.pdf.

34. The self-help centers established in Illinois under this model are listed at http://www.illinoislegalaid.org/index.cfm?fuseaction=directory.selfHelpCenterList.

35. California Assembly Bill 590, Section 6851 (b)(4) (2009).

36. ABA, *Report to the House of Delegates 112A*, 2 (2006), available at http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

37. Broderick and George, *A Nation of Do-It-Yourself Lawyers*, N. Y. Times, January 1, 2010, available at http://www.nytimes.com/2010/01/02/opinion/02broderickhtml?scp=1&sq=john%20broderick&st=cse.

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the circumstances and the client gives informed consent."[38] The ABA also added a new Rule 6.5 relaxing imputed conflict and conflict-checking rules when the lawyer "under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter."[39]

The ABA has supported the state-level adoption process, in part by providing information about appropriate additional rule modifications.[40] To the extent that there is continued debate in the bar, most of it is focused on the limits of the applicability of the concept, rather than the concept itself.[41] A recent ABA poll showed that only 29 percent of the public had any familiarity with unbundling, but that when told, 66 percent said that they were very likely or somewhat likely "to talk to a lawyer about the possibility of unbundling legal services," if faced with a legal problem. Similarly, 62 percent said that "[w]hen deciding to obtain a particular lawyer," it would be very or somewhat important "that the lawyer provides an option for unbundling legal services."[42] The webpage of the Standing Committee on the Delivery of Legal Services of the ABA maintains a "*Latest Developments*" section that includes the most recent news in the adoption of unbundling.[43]

In addition, the bar has continued its longstanding promotion of *pro bono*, and has supported rules changes that encourage maximum *pro bono* participation. State bars provide support programs for pro bono volunteers and often engage in recruitment campaigns and recognition programs. The ABA Standing Committee on Pro Bono and Public Service provides national support for state-based efforts.[44]

Certain components of the organized bar have also focused on access for middle-income individuals,[45] and encouraged innovations to facilitate this access, such as use of websites by practitioners.[46] A sense of the range of these innovations is given by the list of "Brown Awards" made by the ABA Standing Committee on the Delivery of Legal Services.[47] These include: to the CUNY School of Law Community Legal Resource Network for its "technical training and professional support to [over 300] CUNY law graduates in solo and small practices" who "receive low-cost continuing legal education that is focused on community-based lawyering, practice start-up assistance and skills training, peer mentoring, listserv participation and networking opportunities;" the New Hampshire Bar Association which "comprehensively addressed the need for revised rules of procedure and professional conduct to enable lawyers to provide unbundled legal services in the state;" and to Legal Grind for "offering easy access to 'coffee and counsel' for a $20 fee," in Santa Monica.

In addition the ABA's Law Practice Management Section annually awards the James Keane Award in Excellence in eLawyering, which emphasizes recognition of small law

38. 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.

39. ABA Model Rules of Professional Conduct, Rule 6.5, available at http://www.abanet.org/cpr/mrpc/rule_6_5.html. See also elaboration and explanation in Comments 1-5 thereto, http://www.abanet.org/cpr/mrpc/rule_6_5_comm.html.

40. ABA Standing Committee on the Delivery of Legal Services, *An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants* (2009), available at http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf.

41. *See, e.g., State Bar Cracks Down on Ghostwriting,* West Virginia Record, available at http://www.wvrecord.com/news/231876-state-bar-board-cracks-down-on-ghostwriting (reporting on opinion requiring disclosure of fact and identify of attorney assisting in drafting of document to be filed in court; underlying activity is not prohibited; Access to Justice Commission makes public its disagreement with decision).

42. ABA Committee on Delivery of Legal Services, *Accessing Legal Services: Public Opinions on Finding A Lawyer, Using Online Models, Seeking Unbundling Legal Services and Selecting Alternative Resources* (forthcoming, at http://www.abanet.org/legalservices/delivery/, late Feb. 2011)

43. http://www.abanet.org/legalservices/delivery/#LD.

44. See the website of the ABA Standing Committee on Pro Bono and Public Service at www.abaprobono.org, where many examples of state and national bar efforts encouraging pro bono work are described.

45. ABA Standing Committee on the Delivery of Legal Services, http://www.abanet.org/legalservices/delivery/.

46. ABA, Law Practice Management Section, E-Lawyering Task Force, *Best Practice Guidelines for Legal Information Web Site Providers*, http://www.abanet.org/elawyering/tool/practices.shtml

47. The full list of awards appears at http://www.abanet.org/legalservices/delivery/brown.html.

firms that offer legal services over the Internet to consumers of moderate means.[48] An example is Kimbro Legal Services, a solo practitioner based in North Carolina whose practice is an entirely virtual law practice that serves clients of moderate income using online unbundled legal services.[49] Moreover, over 140 solo practitioners and small law firms participate in a business network of virtual law firms that offer "unbundled legal services" for what they view as fixed and reasonable prices, targeting consumers of moderate means.[50]

The overall impact on access to justice and on budgets of these bar innovations is 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 the complex portions of the case are handled by lawyers.

How other stakeholders view bar innovations.

The courts' adoption and encouragement of bar innovations. The ABA's model unbundling-friendly changes have been adopted in one form or another in over 40 states, making clear the courts strong general support for the concept.[51] While the adoption process has varied by state, in some states such as Massachusetts the court has played a particularly strong leadership role in moving the actual practical usage of the concept forward.[52]

The Conference of Chief Justices has strongly endorsed judicial support of Pro Bono.[53] Moreover, state courts have approved a wide variety of pro-bono friendly rules including those relating to emeritus practice,[54] insurance for pro bono participation,[55] government attorney practice,[56] mandatory reporting,[57] major disasters,[58] etc. In several states, chief justices have convened statewide "Pro Bono Summits" to stimulate planning to expand pro bono service.[59] The specific language of the DC government attorney rule, which appears at Rule 49 (c)(9), requires referral by a free legal services program and supervision by a member of the DC bar. It is limited to federal government employees.

Non-profit providers' support and participation. As a general matter, not for profit access to justice legal aid programs have been strong supporters of bar regulatory reform and increases in *pro bono* participation. By LSC regulation, one-eighth of LSC grants must be spent on private attorney involvement,[60] and, as a practical matter, that almost always means spending a significant amount of money to administer pro bono programs. The exceptions are limited expenditures on judicare-type program, such as in Wisconsin.[61] The Legal Services Corporation has spent a significant portion of its advocacy resources between 2007 and 2009 on advocating additional private bar involvement.[62] This has resulted in passage of a significant number of resolutions in support of the concept.[63]

Legal aid programs have also strongly supported the concept of unbundling, often participating in the process leading to the adoption of the changed rules, and/or follow up, as in Maine,[64] although their formal support, as opposed to actual practice, is far stronger for the application of the concept to the private bar than it is to legal aid practice, in which it in fact frequently occurs.

Legal aid changes

What legal aid change looks like – increasing both availability and efficiency. There have been two recent major thrusts for efficiency and availability in the legal aid world. These have been the LSC Technology Initiative and, with respect to availability, the campaign for so called "civil Gideon." These are in addition to the well-known ongoing work seeking additional funding.

The LSC Technology Initiative Grants Program (TIG) has been funded by a congressional appropriation to LSC since FY 2000. While focusing in significant part on access tools for those without lawyers, the program has funded a wide variety of innovations such as phone hotlines, networking improvements, advocate websites, and document assembly.[65] The FY 2010 appropriation language for LSC includes the following: "$3,400,000 is for client self-help and information

48. http://www.elawyering.com
49. http://www.kimbrolegalservices.com
50. Listing at http://www.directlawconnect.com.
51. The status of adoption of changes is tracked by the ABA at *Status of State Review of Professional Conduct Rules,* http://www.abanet.org/cpr/pic/ethics_2000_status_chart.pdf.
52. Chief Justice Margaret H. Marshall, *Address to the Massachusetts Bar Association* (March 25, 2006), http://www.mass.gov/courts/press/pr032506.pdf (description of pilot project, since expanded).
53. Conference of Chief Justices, *Resolution VII [:] Encouraging Pro Bono Services in Civil Matters* (2007), http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/pro_bono.pdf.
54. The status of emeritus attorney rules is collected at http://www.abanet.org/legalservices/probono/emeritus.pdf.
55. See, with respect to senior lawyers, ABA Standing Committee on Pro Bono and Public Service, *Senior Lawyers,* http://www.abanet.org/legalservices/probono/senior_lawyers.html.
56. The first such rule, District of Columbia Court of Appeals Rule 49, can be found at http://www.dcappeals.gov/dccourts/docs/rule49.pdf.
57. The status of rules relating to *Pro Bono* reporting is collected at, http://www.abanet.org/legalservices/probono/reporting.html.
58. The model is the ABA *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* (February 2007), available at http://www.abanet.org/legalservices/probono/policies-rules.html. The status of state adoption is tracked, and links to state language are at http://www.abanet.org/cpr/clientpro/katrina_chart.pdf.
59. Examples are the North Carolina Pro Bono Summit held in October 2009 and the Virginia Chief Justice's Pro Bono Summit held in April 2010.
60. 45 CFR Section 161, available at http://www.lsc.gov/pdfs/1614CFR.PDF.
61. Wisconsin Judicare, Inc., http://www.judicare.org/.
62. Legal Services Corporation, *Resolution in Support of Enhanced Private Attorney Involvement with LSC-Funded programs* (2007), available at http://www.lsc.gov/pdfs/BoardRes_2007-003.pdf.
63. Such resolutions are collected by LSC at http://www.lri.lsc.gov/probono/board_pai_resolutions.asp.
64. Elizabeth Scheffee, *"Legalizing" Unbundling, the Maine Experience,* Dialog 9, 11 (Summer 2003), available at http://www.abanet.org/legalservices/dialogue/downloads/dialogue2003sum.pdf#page=9.
65. Legal Services Corporation, *Replicable [TIG] Projects,* http://tig.lsc.gov/TIG/Replicable_Projects.pdf.

technology"[66] These grants reduce the cost of providing assistance, thus making more realistic the possibility of universal availability for those in need.[67] As a general matter, these projects reduce the cost of assistance by making it more efficient, and by allowing access to many without the need to pay for counsel.

The "civil Gideon" campaign seeks a right to counsel in cases involving decisions about certain basic human needs.[68] While support for the concept is qualified in some legal aid quarters,[69] its main successes have been in persuading the ABA to come out in support,[70] and to pass a Model Act[71] and additional materials,[72] and to stimulate the launching of pilot projects,[73] including in Massachusetts with bar leadership[74] and in California through the passage by the legislature of the Shriver Pilot Project, which includes general language in support of the right of access to counsel, and will test the impact of the provision of additional counsel services.[75]

These successes are in contrast to general failure in the ligation arena.[76] 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, and in which that access can be provided in ways short of the provision of counsel.[77] Such a view is far more economically feasible, and therefore at least potentially explorable, even in tough times.

This and similar projects are often described as "civil Gideon pilots." To the extent that such pilots provide no guarantee of counsel for any class, this name is inapposite. Rather these projects test the impact of providing additional counsel (presumably in order to gain data to make the case for a system that includes a guarantee). A correctly named "civil Gideon pilot" would test the impact on the system as a whole of providing all within a class a guarantee of representation. Current projects, including those that might test systems of triage as to who needs counsel, might better be labeled "access to counsel pilots."

Finally, of course, the legal aid world, with the support of the bar, and the court, continues to seek security and expansion of funding. This currently includes expansion of the LSC budget, attempts to stabilize IOLTA funding, and miscellaneous filing fee and appropriation work at the state level.[78] The nonprofit legal aid world wants more money and puts significant effort into documenting need,[79] sharing innovations,[80] and obtaining support through the Access to Justice Commissions and beyond.[81] (As a general matter, the needs studies, while producing the anticipated dramatic evidence of need, are undercut in their effectiveness by their failure to be systematic in their analysis of the means and costs by which need might be met.)

In addition, the innovations listed above receive general support.[82] In particular, the TIG program is highly popular, with over 660 applications for grants seeking almost $80,000,000 having been submitted by the end of the 2009 cycle, and with 414 awards totaling over $32,000,000 in the same time.[83]

The increases in efficiency, and the work in support of availability, 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;

66. http://www.lsc.gov/laws/appropriations.php#FY2010.

67. In an audit critical of certain aspects of the management of the TIG program, the Inspector General nonetheless described the program as "consistently [having] been credited with achieving its end goal of increasing access to legal representation," Office of Inspector General, Legal Services Corporation, *Audit of Legal Services Corporation's Technology Initiative Grant Program,* i (2010), available at http://www.oig.lsc.gov/reports/1101/au1101.pdf.

68. The website of the coalition is http://www.civilrighttocounsel.org/.

69. Lonnie Powers, Jim Bamberger, Gerry Singsen and De Miller, *Key Questions and Considerations Involved in State Deliberations Concerning an Expanded Civil Right to Counsel*, Management Information Exchange Journal, Summer 2010, at 10.

70. http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

71. American Bar Association, *ABA Model Access Act* (2010), available at http://www.abanet.org/legalservices/sclaid/downloads/104_Revised_FINAL_Aug_2010.pdf.

72. American Bar Association, *ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings* (2010), available at http://www.abanet.org/legalservices/sclaid/downloads/105_Revised_FINAL_Aug_2010.pdf.

73. Information about pilot projects is collected by the Coalition at http://www.civilrighttocounsel.org/advances/pilots/.

74. Boston Bar Association Task Force on Expanding the Civil Right to Counsel, *Gideon's New Trumpet* (2008), http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf.

75. California Assembly Bill 590, Section 6851.

76. The litigation history is collected on the Coalition's website at: http://www.civilrighttocounsel.org/advances/litigation/.

77. *See, e.g.,* statutory language governing the California Shriver Pilot Program quoted in text reference at note 35, *supra.*

78. These efforts are documented at the *Resource Development* webpage of the ABA Standing Committee on Legal Aid and Indigent Defense, http://www.abanet.org/legalservices/sclaid/atjresourcecenter/resourcedevresources.html.

79. The legal aid community, often in cooperation with state Access to Justice Commissions, has attempted to document this through various so called "needs studies." Legal Services Corpor tion, *Documenting the Justice Gap in America*: *The Current Unmet Civil Legal Needs of Americans* (2009), available at http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf; the state studies are collected at *id*, Appendix A*: Other State Studies of the Legal Needs of Low Income People, id,* A-1 (studies published 2007-2009 only) and at Legal Services Corporation, *Documenting the Justice Gap in America,* (2nd ed. 2007) available at http://www.lsc.gov/justicegap.pdf, (studies from 2000 to 2005).

80. See website cited at note 78, *supra.*

81. *E.g.* Deborah Hankinson, *Stoking the Coals: Creating a Culture of Giving and Support for Legal Aid*, 47 Judges J. 39 (Fall, 2008), available at http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/stoking_the_coals.pdf.

82. See, generally, with respect to "civil Gideon," statement of Don Saunders, of National Legal Aid and Defender Association praising passage of 2006 Resolution, http://www.legalaidnc.org/public/participate/legal_services_community/Issues/ABA_Resolution112A_Aug_07_06.aspx, ("[y]esterday's action serves as a landmark day in the history of the ABA regarding access to equal justice,") and, with respect to the TIG program, National Legal Aid and Defender Association, *LSC Technology Experts Honored for Innovation,* NLADA Updates, May 22, 2009, (LSC staff given NLADA award at Equal Justice Conference), http://www.lsc.gov/press/updates_2009_detail_T246_R9.php, and *Memorandum to [LSC President] Frank Strickland from NLADA: Recommendations for FY 2009 Budget Mark for LSC* 2 (Sept. 4, 2007) ("NLADA has worked in partnership with LSC and its grantees in helping the civil legal assistance community make great strides in using technological innovation to expand the reach and quality of legal services. The LSC Technology Initiative Grants (TIG) have played a vital role in helping states improve their ability to use technology to better serve their clients and to develop a national infrastructure necessary to support state and local efforts. Therefore, we strongly support the continuation of the Technology Initiative Grant program. We recommend that the FY 2009 appropriation contain at least $3 million for TIG, even if the full appropriation we are recommending is not achieved.") http://www.nlada.org/DMS/Documents/1190394087.98/09%20mark.pdf.

83. E-mail communication from Glenn Rawdon, Program Counsel for Technology, Legal Services Corporation (Dec. 30, 2010).

- 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.

How other stakeholders view legal aid changes.

The court's perspective of strong support for additional resources. The Conference of Chief Justices has come out explicitly in favor of "State Supreme Court [l]eadership in [i]ncreasing [f]unding for [c]ivil [l]egal [a]ssistance,"[84] and for "[i]ncreased Federal [f]unding [f]or the Legal Services Corporation."[85] Supreme courts, as the frequent appointing authority, have been strong facilitators and enablers of the Access to Justice Commissions, all of which have provided strong support for legal aid funding.[86]

Many courts have participated directly with LSC's TIG program.[87] While state courts have not endorsed the specific "civil Gideon" concept, and indeed the concept has done poorly when tested in litigation,[88] the reluctance appears to come from the entitlement aspects and cost implications of the movement, rather than its goal of increasing availability of counsel.

The bar's role of strong support for additional resources and a "Civil Right to Counsel." The ABA is already well known for its support for legal aid funding, both through LSC and IOLTA.[89] In addition to the actions taken by the ABA itself, there have been significant state and local bar resolutions in support of civil Gideon,[90] including, in the case of Massachusetts, taking a leading role in the deployment of pilots.[91] This leadership role has been taken despite some anxieties, particularly from current providers of constitutionally mandated defense services fearful of competition for scarce dollars.

Triage and referral

Of the four propositions, this is the one as to which there has been least focused attention, and therefore there is least intellectual consensus. As practical matter, however, all the constituencies operate as if there were a consensus. The central idea is simple, perhaps even obvious; 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 generally includes the realization that while some 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. And indeed, the existing service systems, court, bar, and nonprofit legal aid have to operate systems of triage and referral or they would collapse under the weight of applicants and need.

As discussed below, courts that provide self-help services need 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. (This is in contrast to the early days of legal services, in which many courts considered it inappropriate to refer to legal aid programs, and in which bar referral services had not yet been set up.)[92]

Moreover, bar referral systems are organized to send low income people to legal aid programs, and, in a limited number of places, such as Contra Costa, California, make discrete task referrals to those who need that service.[93] Finally, legal aid programs, with their limited priorities and capacities, usually now maintain detailed referral systems.[94] 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).[95]

To some extent, these systems are already integrated, with the main impetus coming from the website network initially funded by LSC.[96] In some states, such as California, state access to justice funders require their grantees to keep information about their own programs up to date in the underlying state database.[97]

However there are now hints 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 provide another number to call, and would involve a research-validated questioning process to identify the level of services needed by a particular individual, and which organization would both be able and have the capacity to actually provide those services. In other words, it would

84. Conference of Chief Justices, *Resolution 7 In Support of State Supreme Court Leadership in Increasing Funding for Civil Legal Assistance* (2010), http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol7ProBono.html.

85. Conference of Chief Justices, *Resolution 11 In Support of Increased Federal Funding For the Legal Services Corporation* (2009), http://ccj.ncsc.dni.us/resol11LegalSvcs.html.

86. The Commissions (or equivalents) are listed at ABA Resource Center for Access to Justice Initiatives, *Guidance on State Access to Justice Commissions and Structures,* http://www.abanet.org/legalservices/sclaid/atjresourcecenter/atjmainpage.html.

87. Examples of TIG/court cooperation include many of the document assembly programs and the websites. See, e.g., those listed at *Replicable [TIG] Programs*, *supra* n.65.

88. *See supra* n.76.

89. For example, the ABA organizes a large lobby day at which LSC is a very high priority, *ABA Day in Washington draws nearly 300 bar leaders to Capitol Hill,* May 2010, http://new.abanet.org/calendar/abaday/pages/highlights.aspx.

90. These are collected in the website of the Coalition for a Civil Right to Counsel at http://www.civilrighttocounsel.org/advances/bar_efforts/.

91. Boston Bar Association Task Force on Expanding the Civil Right to Counsel, *Gideon's New Trumpet* (2008), http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf.

92. For a general discussion of the tension between some segments of the bar and legal services, see, Earl Johnson, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 94 (New Brunswick, NJ, Transaction Books,1978)

93. Contra Costa Bar Association, *Establishing a Limited Representation (Unbundling) Lawyer Referral Service Panel*, http://www.abanet.org/legalservices/lris/clearinghouse/unbundlingmaterials.pdf.

94. www.lawhelp.org.

95. California Assembly Bill 590, Section 6851 (b)(7) (2009).

96. www.lawhelp.org lists the sites for all the states.

97. E-mail communication from Bonnie Rose Hough, Managing Attorney, Center for Families, Children and the Courts, California Administrative Office of the Courts, Jan 11, 2011.

be not just a topic-driven list, but an assessment process that involves the specific individual's needs in the context of their case.[98]

The court's experiences with forms of triage. 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.[99] Since this approach has emerged from 25 years of caseflow management work that has focused on the needs of the courts, it starts with the court rather than the litigants. But it very much has the potential to get to the same place, because if the needs of the litigant are not met, then the court cannot provide access to justice. This is illustrated by the *Report of the Elkins Task Force*,[100] which highlights the need for a "continuum of services," in which a variety of services are needed to ensure access for all, and by implication, the need for a process to identify who needs what.

> To meet the needs of litigants in as cost-effective a manner as possible, it is critical that a continuum of services be available from providing legal information, assisting with forms and explaining legal processes, giving legal advice, and providing mediation or settlement assistance to representing a litigant on a portion of a case, providing full representation in the trial courts, and providing representation in appellate matters. All these resources should be expanded in order to address the needs of family law litigants in our legal system.

The bar's perspective on assessment and referral. 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 available.[101] Indeed, the ABA's Lawyer Referral Clearinghouse includes a section on unbundling.[102] On the pro bono side, there have been, of course, a number of efforts to optimize attorney-client matching.[103]

The legal aid perspective. Legal aid providers engage in a wide variety of triage, assessment, and referral processes. They have limited budgets, and are able to turn down clients. They publish their priorities. Most are not so transparent about how those priorities are actually implemented, although LSC grantees are required by regulation to establish such written priorities,[104] and LSC itself both requires certain factors to be considered in establishing priorities, and suggests substantive priority areas.[105]

Some, perhaps many, programs, manage the disconnect between the huge area of demand and the relatively scare resources by establishing highly limited times for intake in priority areas.[106] Many also make use of the brief service and advice hotlines as a safety valve to which the majority of callers are referred, and within which selection and referral decisions are often made, with significant advantages for the rationality of the system. As Joan Kleinber, Director of CLEAR, of the Northwest Justice Project put it, "A hotline results in systematic rather than random choices about what issues are pursued because it applies priorities to a large pool of client requests, rather than to those who are lucky enough to get in to a severely limited intake system."[107]

The author's personal and speculative belief (supported mainly by the lack of written materials as to how legal aid intake is actually managed)[108] is that many programs continue to have informal and discretionary systems for the selection of those clients who will receive full representation. At least one geographic service area, Western Massachusetts, is attempting to rationalize its processes, starting by breaking out functions as Intake/Client Access, Client Education/Pro Se Resources, Extended Legal Assistance: Routine Cases, and, Systemic Advocacy).[109]

LSC has made a number of grants through the TIG program to encourage innovation in the intake area. One, to Iowa Legal Aid, is for an online tool to direct users to the most appropriate information.[110] Another, to Legal Aid of Western Ohio, was for an online intake system.[111]

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

- The courts can operate more efficiently since each case is optimally hand led;

The bar spends its time on the cases in which it can have the most impact;

98. For descriptions of the concept, and related implications, see, Zorza, *Courts in the 21st Century: The Access to Justice Transformation*, 49 Judges's J. 14 (2010); Zorza, *An Overview of Self-Represented Litigation Innovation, Its Impact, and an approach for the Future: An Invitation to Dialog*, 43 Fam. L. Q. 519, 541 (2009)

99. See, for an example of this approach written with sensitivity to cases without counsel, Graecen Associates, Developing Effective Practices In Family Caseflow Management: A Manual Prepared For The California Administrative Office Of The Courts, Center For Families, Children And The Courts (San Francisco CA; California Administrative Office of the Courts, 2005).

100. Elkins Family Law Task Force, *Report to the Judicial Council*, (2010), http://www.courtinfo.ca.gov/jc/documents/reports/20100423itemj.pdf.

101. Roseann H. Hiebert, *A How to Guide for Adding A Brief Advice Panel to your L[awyer] R[eferral] S[ervice]*, http://www.abanet.org/legalservices/downloads/lris/guidetostartbriefadvicepanel.pdf (Kansas); Charissa R. Rickets, *Adding a "Legal Advice Hotline" To Your Lawyer Referral Service,* http://www.abanet.org/legalservices/downloads/lris/hotlineind.pdf (Indianapolis).

102. http://www.abanet.org/legalservices/lris/clearinghouse/discrete.html.

103. *E.g.* http://www.probono.net/oppsguide/.

104. 45 C.F. R §1620.3 (a), available at http://www.lsc.gov/pdfs/1620CFR.PDF. For examples of adopted priorities, *see, e.g.* Legal Aid of San Diego, *Priorities*, http://www.lassd.org/priorities.htm, Southern Arizona Legal Aid Inc, *2005 Legal Needs Assessment*, http://www.sazlegalaid.org/lna.html.

105. Legal Services Corporation, *Suggested List of Priorities for LSC Recipients Adopted by the Board of Directors of the Legal Services Corporation* (1996), http://www.lsc.gov/foia2/Spriority.php.

106 *See, e.g.* Iowa State Bar Association, *Legal Assistance in Iowa,* http://iabar.net/displaycommon.cfm?an=1&subarticlenbr=132 ("Some offices may have pre-set times and days in which new intakes are conducted.")

107. Joan Kleinber, *An Invitation to a Serious Conversation About Hotlines*, Hotline Quarterly (No. 27, 2003) http://www.legalhotlines.org/files/2003summer.pdf.

108. *See, e.g.* Legal Services Corporation, *Basic Elements of Effective Centralized Telephone Intake and Delivery Systems,* (1996), http://www.lri.lsc.gov/pdf/02/020067_beofectids.pdf.

109. Legal Assistance Corporation of Central Massachusetts, Western Massachusetts Legal Services and Massachusetts Justice Project, *Considerations For A Fully Functioning Legal Services Delivery System* (2009) (document on file with the author).

110. Iowa Legal Help Finder, https://lawhelpinteractive.org/login_form?template_id=template.2010-06-01.0439392430.

111. Description: http://lri.lsc.gov/intake/systemsprojects_detail_T212_R28.asp. Link: http://www.ablelaw.org/index.php?option=com_content&task=view&id=1980&Itemid=1076.

• Legal aid spends its resources on the cases most in need; and

• Litigants get the services they actually need to obtain access.

Reciprocal leveraging

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 total revenue for lawyers. 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. 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 focus 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.

This integrated perspective should be the guiding one when open questions such as those below are considered.

Open questions

The broad range of the consensus described above must not be allowed to obscure the fact that there are many questions as this integrated agenda moves forward.

How is triage to be done? Because there has been so little focus on triage, assessment, or assignment, there is little agreement about how 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.

Possible triage factors. This writer thinks about the triage process as being like a Rubic's Cube, with each dimension representing a different set of issues. Doing the assessment means lining up the individual cubes so that an access-friendly pattern is found. 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.

In particular, we know that procedurally complicated areas are much harder for the self-represented, and that it turns out that counsel make more of a difference in procedurally than in substantively complicated areas of law.[112] We also know that facts and circumstances can have a huge impact. It is critical to look at the parties themselves. This is both a matter of capacity, and a matter of the relationship and orientation of the parties. A person with linguistic or intellectual challenges is far more in need of help (although not necessarily of legal help). A violent or threatening opponent, or even one with the power of government on his or her side, will be much harder for litigants to deal with on their own.

The California Shriver Pilot Project governing statute lists the following factors in deciding whether counsel is needed:

> Case complexity [, w]ether the other party is represented[, t]he adversarial nature of the proceeding[, t]he availability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case[, l]anguage issues[, d]isability access issues[, l]iteracy issues[, t]he merits of the case [, t]he nature and severity of potential consequences for the potential client if representation is not provided[, and w]hether the provision of legal services may eliminate or reduce the need for and cost of public social services for the potential client and others in the potential client's household.[113]

In part because of its entitlement structure, the ABA Model Act includes no equivalent provision.[114]

Finally 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.[115] One powerful individualized way of thinking about how to triage was suggested by a California self-help center in which the person doing the triage would think through the particular steps and tasks that the litigant would have to do, and then assess what help they would need to complete these tasks, or whether they would need someone to complete them.

Who performs the triage? There has been substantial private debate on this matter. 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. This appears to be driven, at least in part, by a fear that judicial engagement in the decision-making process will undercut judicial neutrality. However, there is an alternative argument that placing the decision in the court would give the system greater credibility and make funding easier. Of course, there are ways that

112. Rebecca Sandefur, *The Impact of Counsel: An Empirical Study*, 9 Seattle J. Soc. Just. (forthcoming) (meta study shows impact of counsel greater in cases of more procedural complexity); Sandefur, *Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes* (under review) (expanding analysis to conclude that impact of counsel is greater in cases of procedural than of substantive complexity). But see, as to statistical validity of studies of the impact of counsel, Greiner and Pattanayak, "What Difference Representation?" available in draft online at Social Science Research Network at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708664. See, more generally, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 Fordham Urb. L. J. 37 (2010).

113. California Assembly Bill 590, Section 6851 (b)(7) (2009).

114. http://www.abanet.org/legalservices/sclaid/downloads/104_Revised_FINAL_Aug_2010.pdf.

115. See, generally on modes of judicial engagement, Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 Geo J. Legal Ethics, 423 (2004).

decision making can be placed in the court without putting it directly in the hands of judges. One fear about judges is that they will punish counsel for being too zealous. That concern goes away if a judge makes the decision about need, but not the decision about what attorney fulfills the role, or how much they are paid.

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,[116] agreement that court self-help services assist the middle income,[117] some agreement that unbundling is of particular help to this population,[118] some increasing flexibility in the legal aid income threshold,[119] but 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 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. A counter example is the system of co-payments at Harvard Law School's Hale and Dorr Legal Services Center.[120] There are huge potential political advantages to building the system as a whole for all who need assistance to obtain access.

Should the private bar be subsidized for participation in the provision of access services? To state that middle-income people must be served is not the same as saying that they should be served by the same components of the system as currently serve the poor. It may well be that middle income litigants would best be served by systems of vouchers and co-payments, with the services 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. [121] Such a system might well be coupled with a structure of incentives to encourage efficiency.

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:

- The current incremental strategy has not met the challenge of need. While funding for legal aid has slowly increased, the whole system remains vulnerable to political winds and economic downturns and the total budget is not increasing much relative to inflation.
- The funding issue remains the Achilles heel of the "civil Gideon" movement. Regardless of the particular factual and procedural lineup, state courts are deeply reluctant to mandate expenditures on counsel, and have been refusing the opportunity to do so.[122]
- Funding components must be counter-cyclical, rather than cyclical. In this sense, IOLTA is the opposite of what it should be, since income goes down as interest rates and the number and scale of transactions go down in economic downturns.
- 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.
- The interests of the private bar as well as middle-income people cannot be forgotten.
- 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.
- 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.
- The combination of cost effectiveness and broader political alliances that the consensus described above facilitates makes possible much more rapid progress on an overall systemic solution.

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.

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It is critical to recognize the breadth of the consensus that we now enjoy. We must realize and leverage the fact that the consensus represents the foundation of a 100 percent 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 no less, and the future will not forgive us if we achieve any less.

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116. *See, e.g.* Broderick and George, *supra* n. 37. ("Litigants who cannot afford a lawyer, and either do not qualify for legal aid or are unable to have a lawyer assigned to them because of dwindling budgets, are on their own — pro se. What's more, they're often on their own in cases involving life-altering situations like divorce, child custody and loss of shelter.")

117. *See, e.g.* Kathryn Alfisi, *Access to Justice: Helping Litigants Help Themselves,* Washington Lawyer, January 2010, http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/january_2010/access_justice.cfm.

118. Broderick and George, *supra* n. 37.

119. 45 C.F.R. 1611.5 allows, under certain circumstances, LSC grantees to serve those up to 200% of the poverty level. http://www.gpo.gov/fdsys/pkg/CFR-2009-title45-vol4/pdf/CFR-2009-title45-vol4-part1611.pdf.

120. Washington Watch, 26 NLADA Cornerstone, 3, 14 (Spring 2004), available at http://www.nlada.org/DMS/Documents/1123680555.53/CornerstoneSpring2004.pdf (report of testimony by Jeanne Charn to Subcommittee on Commercial and Administrative Law of the House Judiciary Committee.)

121. Maryland is testing the use of private lawyers to provide individual case services. http://mlsc.org/grants/judicare-family-law-project/.

122. The litigation history is collected on the Coalition's website at: http://www.civilrighttocounsel.org/advances/litigation/.