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Self Represented Litigation Network

Working Paper on Concepts and Vocabulary in Access to Justice Assessment

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Part One. Introduction

This Working Paper is an attempt to create a uniform vocabulary to enable programs to discuss how to assess the need for and make decisions regarding the provision of services to those seeking access to justice. The manner in which program staff: a) assess a person's problem and b) choose a strategy for assistance, can have a significant impact on the effectiveness of the program.

In most states, several separate organizations play a role in providing access to justice. These organizations have different goals, requirements, and constituents and their problem assessment methods and terminologies vary. Self help centers, for example must serve all, while legal aid programs have complicated eligibility and priority rules. Hotlines operate in yet another environment, and bar referral services in yet another. All have many lessons to teach, as do those performing similar tasks in other environments such as medicine and social services.

Creating a common language and understanding of problem assessment is a step toward greater coordination between programs, greater efficiency, and greater assurance that proposed spending will be effective in enhancing access to justice. Perhaps most importantly, they help create the foundation upon which can be built a one hundred percent access system

In particular, we should all be thinking about questions such as these:

- What methods of problem assessment work best in what situations?
- What rules and resources are already being applied, how can we understand these rules better, and, when appropriate, change them?
- Are there in fact common understandings about who should get what services, and when, and if so, how should we make broader use of those understandings?
- How can we make sure that resources are made available so that the problem assessment process is given the time and care it needs?
- How can we operate these processes to make sure that people get service, rather than are turned away, or bounced between programs?
- How can data from problem assessment be used to obtain additional service resources so that case assignments can be optimum?

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- How can data be used to develop additional service modalities?

But it may be impossible to have these discussions without a clearer set of concepts and vocabulary, and an understanding of the different ways that decisions might be made.

Part Two. Ways of Thinking and Suggestions

A. Types of Problem Assessment/Decision

One observation is that we are in fact talking about several types of problem assessment and decision.

- Sometimes service providers have to make yes/no decisions – are they going to provide any services to an individual. This might be called *acceptance-rejection*. Obviously, not all programs have the freedom to make rejection decisions.
- Sometimes they have to make internal assignment decisions – which of a variety of services within the program are they going to send someone to. This might be termed *internal assignment*.
- Sometimes they are including in both these decisions whether to make an assignment to a different program. This might be called *referral*.

B. Context of Assessment and Assignment.

It is also the case that these decisions occur in a variety of decision making contexts.

- Some occur within a particular program, and might be named *program-internal* decision or assignment and referral
- Others occur within a cluster of programs or services, but within which the program performing the intake can make an ultimate decision about whether a service is to be provided. These might be called *cluster service* decisions.
- Others occur as referrals to programs over which the referring agency has no control. These might be called *external referral* decisions.
- Finally, we also think about analytic decisions about what services are needed, regardless of whether these services actually exist, or whether, even if they exist, there is capacity to provide the service to the particular decision. These might be called *needed service* analyses, rather than referrals or decisions. This analysis is critical to estimating overall need.

C. The Stages of Assessment and Assignment

It may also be useful to think about the stages that occur in assessment and assignment.

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- The first real step is the decision of the individual to request service. This itself is a function of perceptions which are themselves shaped in part by the way the organization presents itself, and its reputation in the community based on prior actions.
- Regardless of how it is done, there is initially a *data gathering* step or steps performed by the program from which services are sought. (Sometimes, there is an initial collection of minimum data to determine eligibility that is followed by more detailed data gathering before any final acceptance.)
- Then there is some form of *analysis* in which the data is set against some formal or informal, explicit or intuitive system of eligibility, priority, and services availability.
- Then there is a *decision* of some form, derived from the data and the analysis.
- Finally there is some form of *action*, which could be acceptance, rejection, and/or internal or external referral.

D. Types of Assessment and Assignment Mechanisms

It might also be useful to separate the forms of analysis that are used to make assessment and assignment or referral decisions.

- One such type is *triggers*. Under a trigger system, a person is accepted, rejected, or assigned based on one and only one particular attribute – mentally ill, over 65, under the poverty line.
- Another is *pattern analysis (multiple triggers)*. A person is accepted if they are meet a particular pattern of facts, such as they have a particular type of case, AND they have a particular personal attribute. This is also like multiple triggers.
- Another is *scoring*. In a scoring system, each answer results in a score, and a particular decision is made when the score gets above, or below a threshold number.
- A frequent mode of analysis is by the *intuitive trained decision maker*. In such a system the decision maker is trusted to make the most appropriate decision based on his/her knowledge of the underlying systems and sense of what is most realistically appropriate for the person seeking service.
- In other cases, the system is simply intuitive, without training. Someone in the system is trusted to make the decision, regardless of guidelines or training.

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- It should be noted that with both scoring and triggers, there are systems for selecting in and for selecting out. It might be that everyone who meets a particular criteria or pattern or score gets a particular service, or they might be rejected for a particular service, or they might be rejected from all services.
- There is also a difference between branching systems in which, for example, an initial yes-no decision about service is made, based on one set of criteria, and then a different one about which service to provide, based on other criteria.

E. The System as a Whole

In our analysis, as above, we tend to focus on individual programs and decision makers. It may be useful to think about the system as a whole. In other words, how, as a whole, do all of these decision makers end up taking the input – the individual seeking service, and producing an output – the individual actually obtaining a service.

Some of the ways of describing possible such systems are below:

- Single Decision. In a single decision system, there is an integrated intake system that makes a final decision to which the individual is bound. (Some parts of the legal aid system and some service clusters in courts function this way.)
- Multiple Referral and Decisions. In a multiple referral and decision system, people can get lots of referrals, in which there is no screening, and can seek multiple decisions from those parts of the system to which they are referred. Such systems highly favor the very motivated and energetic.
- Selective Referrals. In such a system, referrals decisions are selective, in other words the referrer does not refer all who seek referral and thus the final outcome is a product of both the referral decisions and the intake decisions by the services to which referral is made.
- Individual Choice Systems. In individual choice systems, the individual makes the choices, based on information and resources -- which might be provided in the form of vouchers or other support.

F. Reasons for Non-Optimum Assignment or Rejection

One of the reasons the discussion is hard is that given limited resources decision makers are making decisions based on scarcity and so are providing services which are other than the optimum, or are refusing to provide services even when there is need. These pressures can lead to endless referral loops, or services that provide the appearance rather than the reality of assistance.

There is need, therefore, for a vocabulary that describes the relationship between what is needed, and what is offered or provided. Here are some that may be useful.

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- *Resource-based rejection.* “We would like to serve you, and could help you, but we do not have the resources.” The classic legal aid rejection/referral.
- *Resource-based non-optimum assignment.* We would like to provide a better service, but this is all we can do for you, because of resources.”
- *Universal Service, Resource Limited, service structure.* “Because of resources, we provide this limited service to all, rather than offer a more comprehensive service to some or all.”
- *Universal Service, Role Limited Rejection.* We provide services to all, but because of our institutional role, the services we provide would not be useful to you.
- *Service-Capacity Based Rejection.* “We do not have the skills/services to provide what you need.”

G. Referral and Capacity

Many systems survive by providing referrals that are essentially “phony,” in that the chance of acceptance is very low. A typology of referrals may be useful.

- *Universal service referrals.* These are referrals to services that must provide services to all. That is a classic referral to a court program.
- *Eligibility-checked referrals.* These are referrals in which the referrer has at least checked formal eligibility.
- *Eligibility and Availability Checked Referrals.* These are referrals in which the referrer has checked both eligibility and that the service is open and taking cases.
- *Unchecked Referrals.* These are the typical “why don’t you call this number.”
- *Checked Referrals.* In these the individual makes the referred contact, but the referring agency checks to see that there has been contact.
- *Managed Referrals.* These are when the referrer makes the call, and follows up.

H. Reasons for Non-Referral

There are many reasons that a program may choose not to, or may simply fail to make a referral.

- *Lack of knowledge.* The program does not know about the other service.

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- *Belief that individual would not be served.* Program thinks that other service would not be provided.
- *Belief that individual should not be served.* Program thinks that individual is not worthy of service in any way.
- *Belief that the individual does not want a referral or will not follow through on a referral, due to the individual's statements or representations they've already asked for help at other agencies.*
- *Lack of faith in quality of program.* Program thinks that the service to which there might be a referral is poor.
- *Belief that referral would be a waste of program resources.* Program thinks that the individual would waste resources.

Part Three. Triggers

This Section lays out some initial ways of thinking about the triggers described above, in the hope that it will foster future analysis of how decisions are actually made.

A. Trigger Types

i. Litigant Triggers

Litigant triggers are triggers defined by a fact about the litigant.

Potential Examples:

- Litigants over a particular age
- Litigants demonstrating mental capacity issues
- Litigants with a particular health issue

It should be noted that many funder-driven triggers are litigant triggers. Examples are funding for seniors served by certain legal aid programs, foundation funding for the HIV positive, etc.

ii. Opponent Triggers

Opponent triggers are triggers defined by a fact about the other party.

Potential Examples:

- Abusive partner
- Government as opponent
- Lawyer as opponent

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Much of government funding is actually already driven by this kind of trigger. Thus in some states child custody disputes that involve the state trigger a right to counsel, whereas custody disputes that do not involve the state do not trigger the right to counsel. These triggers seem to be particularly about the relative power of the parties – a theme that runs through much of this analysis, although one that is often not made explicit.

iii. Case Type Triggers

Case type triggers are those driven by general case type.

Potential Examples:

- Domestic Violence Restraining Order
- Child Custody
- Public Housing Eviction

Much governmental and private sector funding is already driven by such triggers.

iv. Case Facts Triggers

Case fact triggers are those driven by particular types of facts in the underlying case. They should be distinguished by facts about the opponent, or general facts about the case type. They will be more complicated to analyze and track.

Potential Examples:

- Long prior litigation history
- Complicated legal issues
- Complicated factual issues
- Hostility between the parties

These factors may well be used in intuitive assignment systems. But they are little documented.

v. Decision Making Environment Triggers

Relatively little attention has been paid to the fact that a case that might easily be handed in a self represented manner before one judicial officer might be impossible before another.

Stated more generally, these therefore are triggers relating to particulars of the decision making environment that would impact on what mode of service would be required.

Note that these triggers can cut both ways. An access-oriented judicial officer or an extensive self help program might make a case more appropriate for self representation.

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Potential Examples:

- Judicial officer
- Court services
- Availability of interpreter or mediation services

It may well be that legal aid and pro bono services are making informal and undocumented use of such triggers.

B. Application of Triggers to Process

As discussed above, trigger systems can take several forms. These are outlined below

Single Trigger Systems

In single trigger systems, one form of service is triggered when one fact is found.

Multiple Trigger / Trigger Pattern Systems

In multiple trigger systems, such a form of service is chosen when a group of trigger facts is found.

Scoring Systems

Scoring systems are much more complicated, with the trigger resulting in the addition to a running score. Each kind of service is chosen when the score reaches a threshold.

Part Four. Conclusion

The processes of providing legal services involve complex decisions about whether people get any service (in some cases), about what service they get, and about who they get that service from. It is not just about getting a lawyer or not getting a lawyer, but about a much more complex continuum or matrix of service.

It is hoped that these ways of thinking and describing what is going on will facilitate a broader discussion of the underlying dynamics of problem assessment and its importance.

In the long term, it is hoped that this discussion will make possible not only systems of better assignment to services, but enhancement both of the services and of the resources that support these services.