

Accessible Justice: Resolving Procedural Complexity with Process Improvement¹ Renee Danser (*Harvard A2JLab*) & Melissa Moss (*CatalystZone*)

13 years ago, *The Court Business Process Enhancement Guide*² was published. On page v. of The Foreward it reads:

"The business processes employed in clerks' offices, court administration offices, courtrooms, and judges' chambers were first developed to accomplish specific tasks when courts had few staff and a relatively small number of cases and customers. Processes and procedures were developed to respond to needs as they arose, and were rarely updated to keep pace with changes in the court environment, or were modified principally to respond to the needs of the court staff rather than the public. As courts grew and responsibilities were divided among different offices and departments or divisions, processes and operations became more bureaucratic. Courts rarely stepped back to address the impacts of changes or to analyze the business processes to determine how to operate most efficiently or effectively. Along the way, customer service became a luxury rather than a priority. Business processes became less effective, more labor-intensive, and more time consuming."

While the procedural complexity documented in *Trapped in Marriage*⁴ is mind-boggling--it is not an isolated case.

Despite the best of intentions, over time, regardless of policies, protocols, checklists or flow charts:

- processes get quick fixes or add-ons to accommodate new rules or requirements,
- people take shortcuts,
- people train their successors to take shortcuts,
- there is no training at all,
- things have changed since the last time anyone took a good look at a process from beginning to
- no one has ever tried to imagine how a process might feel to the person who was having to wade through it without a lawyer.

If procedural complexity flies in the face of 100% Access, "where the presence or absence of traditional attorney representation should not make too big of a difference to the litigant experience", if the obstacles are so numerous and onerous as to give off the unmistakable air of judicial policy, if it is dehumanizing to our friends and neighbors who have no choice but to go to court to escape abuse, have a roof over their heads or keep their children--why is it so hard for us to do something about it?

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² SEARCH, The National Consortium for Justice Information and Statistics, and the National Center for State Courts, Court Business Process Enhancement Guide: An Aid to Process Improvement and Process Reengineering for Judges, Court Managers, and Court Information Technology Directors, http://www.search.org/files/pdf/CourtBPEGuide.pdf (2003).

³ *Id*. at v.

⁴ Ellen Degnan, Thomas Ferriss, Daniel James Greiner, & Roseanna Sommers, Trapped in Marriage, https://ssrn.com/abstract=3277900 or https://dx.doi.org/10.2139/ssrn.3277900, (2018).



We're very busy. It's all we can do to keep up with what is already on our plates. We're underfunded. The judge won't like it.

But...what if? What if it wasn't that hard?

In this article we are going to build on the NACM conference session we presented at the annual conference in 2019 titled *Reconciling Accessibility: A Case Study*. In that session we spent time understanding the *Trapped in Marriage*⁵ study and began developing a path forward utilizing process improvement in user-centered way. In this article, we will pull out key themes from the study that are important for court managers to consider in process design, development, and iteration, and then we will discuss process mapping and user-centered design as tools to aid in the process of change.

Trapped in Marriage⁶

The study itself was not designed to review court process. But, in the end, it highlighted some important process issues that are valuable for the court to review and think about iterating. We're going to go into a little more detail about the study itself in a few moments. But for now, we would like to talk a little bit about the methodology so you have some frame of reference.

The Methodology: Randomized Control Trial

You may have heard other presentations for NACM and other court stakeholders about the Access to Justice Lab at Harvard Law School ("A2J Lab" or "the Lab") and its exclusive methodology. The Lab employs the randomized control trial ("RCT") which can be seen as A/B testing, a lottery, or random assignment to one group versus another.

Why is the Lab so wed to this methodology? Randomization tends to create experimental groups that are identical up to statistical noise on observable and unobservable characteristics. This creates a huge advantage over other study methodologies. It allows us to conclude with statistical certainty that the treatment caused the outcome when two groups are identical but for the treatment. Observational studies, on the other hand, usually produce dissimilar treatment and control groups, in part because study participants self-sort into these groups. The self-selection leads to systematic differences in background variables that are difficult to disentangle from causal effect of a treatment. But with randomization, as study population size increases, discrepancies or differences in background variables tends to even out. This is similar to how, with repeated coin tossing, the proportion of times the coin lands on heads starts off skewed but eventually approaches 50% as you toss more and more.

The Study

What the Lab wanted to do with this study was to learn the effects of a pro bono lawyer matching service.⁷ The case type was divorce.⁸ The field partner was a non-profit entity that recruits volunteer

⁵ *Id*.

⁶ *Id*.

⁷ *Id*. at 5.

⁸ Id.



attorneys to assist with cases for low-income individuals.⁹ The Lab looked at the field partner's divorce attorney matching program.¹⁰ Legal aid does not help with divorce, often not funded to do this. So the field partner was the only service for low-income individuals in divorce matters in this jurisdiction.

The Lab did find the service to be effective but also uncovered a really problematic truth. And that is that with a lawyer individuals are nearly 90% more likely just to reach the courthouse in 18 months and also nearly 90% more likely to actually divorce in 36 months than those without a lawyer.¹¹

Are we achieving access to justice with this? Or rather, have we succeeded in making a system so complex that only those who have a lawyer to navigate it can actually finish what they started? Or even start what they hoped to start? Why have we done this? What we learned about the process evaluated in this study shows there is something amiss and presents an important opportunity for process improvement

One might look at these statistics and easily think, "so all we need is more lawyers." And yet the corollary conclusion is that the system does not work for self-represented litigants. The point of the 2015 Conference of Chief Justices 100% Access Resolution¹² is that in a 100% accessible system, the presence or absence of traditional attorney representation should not make too big of a difference to the litigant experience. Shouldn't this be particularly true when the matter at hand is the simple transition from the state of being married to the state of being unmarried? In a simple dissolution proceeding, absent every other substantive complexity, such as custody, child support, etc., it had to be the procedural system that trapped the participants in marriage. And indeed, after reviewing the barriers highlighted in the report, a reader can pick out at least twelve discernable steps with caveats and subparts that are not happening in a linear order or sequentially.

All of this leads one to wonder: how many self-represented litigants would there be in our court systems if they were more accessible? How many self-represented litigants should there be in any system? It could be that we already have a lot of self-represented litigants notwithstanding anything we identify as a needed improvement, but would an even larger number of self-represented litigants engage with the system if they could figure out how to do so, or how to do so in a way that did not impose an undue burden on their time, mental bandwidth, and self-esteem? Or rather, is obtaining a lawyer the price of admission to they system?

Now we will shift focus to some key themes of the study and expand on their connection to process improvement.

What is 100% Access

Lots of statistics are bandied about regarding the volume of self-represented litigants in civil matters. Perhaps it is the case that too often unsubstantiated statistics are bandied about and, as court

https://www.ncsc.org/~/media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20Al final.ashx (2015).

⁹ *Id*.

¹⁰ *Id*.

¹¹ *Id.* at 6.

¹² Conference of Chief Justices and Conference of State Court Administrators, Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All,



managers, it both places pressure on your work and is inconsequential. However, more recently, scholars have dedicated efforts to really understanding the extent of this transformation of the stereotypical justice system actors and settled on an estimate of about two-thirds of litigants in state courts are considered self-represented with a fair majority of civil proceedings occurring with at least one party unrepresented.¹³

Many are quick to say that provision of counsel is the answer to this, oft termed, crisis while skipping over entirely the idea that it is the complexity and mystery in process that requires a lawyer, not the individual themselves. ¹⁴ Court simplification efforts are perhaps the most obvious and indeed the most cost effective solutions to ensure access to justice and court leaders are perfectly poised, in fact solely responsible, to direct these initiatives. ¹⁵

Unfortunately, courts and court managers continue to receive criticism that indicates antiquated procedures designed for a clientele of a bygone era and more specifically not for those attempting to represent themselves¹⁶, despite the right to do so, and often the need to do so. Is this criticism warranted or justified? When we think more broadly about what is at stake, rather than thinking simply about individual instances of difficult users, then yes, the criticism is warranted. Consequences of allowing users to flounder in a sea of complex legal systems, often made complex intentionally, can result in reductions of liberties such as loss of family, loss of income, and loss of shelter. Access to justice should not be defined by stamina – ability to muster all one's wherewithal to navigate and endure processes seemingly designed to separate the wheat from the chaff. That is not access to justice. The justice system and the third branch of government should not strive for this goal of exclusion through process, consciously or unconsciously. It is important that court leaders, specifically, take responsibility for equal and meaningful access to justice in their jurisdictions.¹⁷

Procedural Complexity as a Barrier to Access to Justice

As courts develop and modify process, regardless of the setting or subject matter, access to justice and providing equal access to justice should be on the checklist of concepts to consider. Social values can be communicated through laws, embodied as social norms expressed through the law.¹⁸ Processes often embody the individual values of each person in the group of people that are creating the process to the extent those individual values are modified by group consensus.¹⁹ They then become group values and find themselves embedded in the final process created.²⁰ Thinking through procedure to understand

¹³ Deborah L. Rohde & Scott L. Cummings, Access to Justice: Looking Back, Thinking Ahead, 30 Georgetown Journal of Legal Ethics 485, 486 (2017).

¹⁴ Erika Rickard, The Agile Court: Improving State Courts in the Service of Access to Justice and the Court User Experience, 39 W. NEW ENG. L. REV. 227, 237 - 8 (2017).

¹⁵ *Id*. at 238.

¹⁶ *Supra* n.12.

¹⁷ Supra n.13 at 236.

¹⁸ Jasper O. Kenter; Liz O'Brien; Neal Hockley; Neil Ravenscroft; Ioan Fazey; Katherine N. Irvine; Mark S. Reed; Michael Christie; Emily Brady; Rosalind Bryce; Andrew Church; Nigel Cooper; Althea Davies; Anna Evely; Mark Everard; Robert Fish; Janet A. Fisher; Niels Jobstvogt; Claire Molloy; Johanne Orchard-Webb; Susan Ranger; Mandy Ryan; Verity Watson; Susan Williams, What are Shared and Social Values of Ecosystems?, 111 Ecological Economics 86, 88 (2015).

¹⁹ *Id*. at 90.

²⁰ Id.



the message or values it conveys and how that affects access to justice for specific communities and stakeholders is part of that consideration. Ensuring there is a vetting and iteration process that is inclusive of all user groups and stakeholders is important to shaping values imputed through process.²¹

In an article concerning courtroom structures and the implicit messages they convey, Nedim Novakovic identifies that even just the physical structure and layout of a courthouse can implicitly communicate to certain communities, vulnerable persons, or stakeholders that they are unwelcome.²² Creating an implied sense that one is unwelcome becomes a barrier to access to justice, making it more difficult than other similarly situated users that are not in the impliedly excluded group to choose to engage with the justice system.²³ In this article, we ask you to extend this idea beyond just the physical structure of the courthouse but also to the court processes and procedures users are asked to undergo to seek a legal remedy to a problem. If a process impliedly excludes a group of users or stakeholders merely because of their inclusion in that group, whether self-identified as such or artificially categorized, are courts creating a barrier to access to justice and, in extreme cases, denying access to justice, merely by association with that group?

Novakovic applies the concept of social identity threat to court structures²⁴, and similarly, we will suggest its application to the decision to create procedural complexity where complexity is not required. Social identity threat exists when a perception of marginalization or hostility associated with a user's identity exists.²⁵ Please take note, this does not require that there be actual intended marginalization or hostility embedded in process, but merely that the user themselves perceive that there is or could be, or that the user unconsciously performs differently as a result of implied marginalization or hostility²⁶. The existence of this threat is thought to reduce one's ability to perform within the confines of the process and ultimately choose to disengage or, essentially, give-up or quit.²⁷ When applied to the tax setting, procedural complexity was shown to divert attention and distort objectives leading to a disassociation with tax completion or compliance.²⁸

Social identity threat may exist consciously or unconsciously in the user but the cause stems from overt cues that indicate a devaluing of the user's identity.²⁹ Such overt cues can exist in process. For example, locating the only help center for divorce matters in the law library that is ten blocks away from the courthouse, where one logically begins their search for information about a legal matter, may be an overt cue that representing oneself is devalued in the justice system. All that said, this concept has only been applied in the legal setting by Novakovic and only to the physical structure of the courthouse (and even then only to the physical structure of a federal courthouse)³⁰, allowing readers to discount the

²¹ *Id*. at 92, 97.

²² Nedim Novakovic, Access to Justice: Reducing the Implicit Pushback Burden on Working-Class Pro Se Plaintiffs in Employment Law Cases, 104 CALF. L. REV. 545, 547 (2016).

²³ Id.

²⁴ *Id*. at 549.

²⁵ Id.

²⁶ *Id*. at 550.

²⁷ Id. at 549.

²⁸ Sharon P. Cox; Robert J. Eger, III, Procedural Complexity of Tax Administration: The Road Fund Case, 18:3 J. of PUBLIC BUDGETING, ACCOUNTING & FINANCIAL MANAGEMENT 259, 275 (2006).

²⁹ Supra n. 21 at 550.

³⁰ *Id*. at 553.



relationship between social identity threat and complexity in process. But we caution you to at least consider the perspective of the user as they navigate the, perhaps unnecessarily, complex processes developed to achieve an entitled legal remedy. Unnecessary complexity in process, and the messages conveyed whether explicitly or implicitly therefrom, must be at least endured, if not overcome, by the self-represented court user in order to receive access to justice.

Adding Compassion to Process

If court leaders are to take responsibility for access to justice, a call to action indeed waged here but waged by a number of leaders in the field before us, it requires a recognition of the needs of the users to achieve an entitled legal remedy.³¹ This may require radical change in process, systems, and behaviors which can only be achieved by contemplativeness and willingness to view trying, evaluating, and iterating as deliberate and continuous.³² Recognizing the existing imbalances within the justice system created by societal norms and the inherent demands placed upon those who try to engage with the justice system requires court leaders to develop interventions responsive to these challenges.³³

These interventions should embody clear and evident empathy for imbalances, inherent challenges, and altered emotions resulting from the stress associated with legal process developed around high-stress and high-emotion life events. Further, interventions should strive to transcend the access/non-access binary that we are accustomed to using to define access to justice, but rather allow for nimbleness that can be responsive to individual needs of individual users.³⁴ If we are not able to get to this state of nimbleness, we risk thwarting the efforts of users attempting to engage with the justice system. When we thwart those efforts, albeit consciously or unconsciously, we risk allowing users to disconnect cognitively and practically from the justice system and choose not to attempt to resolve legal issues with legal remedies.³⁵ We potentially unwittingly deny justice to those who enjoy a right to it.

But how do we meet the call of 100% access, avoid procedural complexity, and add compassion to a process now? Courts and court managers are already working with processes and procedures deeply entrenched in traditions and years of slight changes and modifications to keep pace with changing laws and rules. Before letting panic take hold, let us turn to discussing process improvement and give some tools to begin the journey.

³¹ *Supra* n.12.

³² Id

³³ Rebecca Kunkel, Rationing Justice in the 21st Century: Technocracy and Technology in the Access to Justice Movement, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 366, 380 (2018).

³⁴ *Id*. at 384.

³⁵ Lis R. Pruitt; Amanda L. Kool; Lauren Sudeall; Michele Statz; Danielle M. Conway; Hannah Haksguaard, Legal Deserts: A Multi-State Perspective on Rural Access to Justice, 13 HARV. L. & POL'Y REV. 15, 127 (2018).



Improving Public-Facing Processes

Process improvement is the proactive task of identifying, analyzing and improving upon existing business processes³⁶ within an organization. A variety of methodologies are available for process improvement, including Six Sigma, Lean Management, Lean Six Sigma, Agile Management, Reengineering, Total Quality Management, Just-In-Time, Kaizen, Hoshin Planning, Poka-Yoke, Design of Experiments, and Process Excellence.³⁷

Other than wondering what Poka-Yoke might be³⁸, this would be the point in our process improvement research we would likely begin feeling overwhelmed or get stuck altogether--too busy to take on an entire process improvement project --doing nothing instead of doing something.

Process Mapping

One of the first steps in process improvement is process mapping. It's also something you can undertake, in a simplified way, in a single day for minimal cost and still begin to make a difference.

We are not suggesting that process mapping is a substitute for full blown process improvement facilitated by experts. We are suggesting that taking one positive step in the right direction is better than taking none at all. We are also suggesting that your first foray into process mapping is highly unlikely to be perfect. It won't be. As we describe it here, it requires a room with lots of wall space, banner paper, sticky notes, access to caffeine or chocolate (or both) and someone willing to facilitate or coach a bit. We're not suggesting you memorize business process notation³⁹ or run out and buy process mapping software. Do not let the perfect be the enemy of the good⁴⁰.

Why do process mapping? As we've mentioned, any process accumulates variations in its practices over time. That's where process mapping shines: everyone discovers how the process actually happens, not how it is supposed to happen or how it happens on paper. You uncover where those discrepancies between the ideal and the reality have crept into your process.⁴¹

³⁶ What is Process Improvement in Organizational Development? https://www.appian.com/bpm/process-improvement-organizational-development/

³⁷ Mark Gershon, Choosing Which Process Improvement Methodology to Implement http://t.www.na-businesspress.com/JABE/Jabe105/GershonWeb.pdf Gershon, M. (2010). Choosing Which Process Improvement Methodology to Implement. Journal of Applied Business and Economics, 10(5), 61-69.

³⁸ https://en.wikipedia.org/wiki/Poka-yoke

³⁹ Business process modeling and notation (BPNM) is a graphical representation for specifying business processes in a business process model. Like flowcharts, BPMN diagrams use a set of standard symbols. Each shape has a specific meaning and business context. https://en.wikipedia.org/wiki/Business Process Model and Notation
⁴⁰ Perfect is the enemy of good, or more literally the best is the enemy of the good, is an aphorism which is commonly attributed to Voltaire, who quoted an Italian proverb in his *Dictionnaire philosophique* in 1770: "*II meglio è l'inimico del bene*" (In his writings, a wise Italian says that the best is the enemy of the good).

⁴¹ 7 Hidden Benefits Of Process Mapping <u>www.bigskyassociates.com/7-hidden-benefits-of-process-mapping-more-than-graphic-appeal</u>



Having every key team member in attendance improves morale on several levels. They see that a frustrating, complex problem is being addressed. They have a part in creating the solution and the opportunity for immediate feedback.⁴²

A process map provides a clear vision of the future. It's one thing to map how the process works in the present, but after pinpointing problems and proposing solutions, you have the ability to re-map the process to what it should be.⁴³

Now, with the big picture in hand, employees are able to carry out improvements with a shared vision in mind. It also makes employees more aware of how their work affects everyone else's. 44

To make a process map even more powerful, ensure it "lives" past the time spent creating it. Make it accessible, easy to understand and accurate and share it across the organization. By repurposing your process map in this way you can leverage your investment in making it. Use it for orientation and training. It can even be the basis for helping the public understand how services are delivered to them.

45 Knowing where they are in a particular process, how far they have to go and how long it will take them is often very helpful feedback to court system users.

An ultimate step in process mapping reuse is showing the trend of continual improvement over time by building a history of changes to processes. This also helps ensure you don't inadvertently revert back to 'old ways of working' as there is evidence as to why and when and by whom the process was changed in the first place.

User-Centered Mindset

While the process of process mapping has innumerable internal benefits, to bring compassion into your public-facing processes, we suggest adopting an user-centered mindset.

Many court system users are afraid, intimidated and stressed, often carrying intense emotional burdens and facing significant logistical challenges of which we are totally unaware. Engaging your empathy is an absolute must. "Empathizing with the people you're designing (a service or process) for is the best route to truly grasping the context and complexities of their lives. But most importantly, it keeps the people you're designing for squarely grounded in the center of your work."⁴⁶

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶Human-Centered Design Mindsets https://challenges.openideo.com/content/human-centered-design-mindsets See also Hagan, Margaret D. (2018) "A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Intervention to Make Courts User-Friendly," Indiana Journal of Law and Social Equality: Vol. 6: Iss. 2, Article 2. Available at: https://www.repository.law.indiana.edu/ijlse/vol6/iss2/2





"Most people naturally design for themselves simply because they don't have a process to help them to "get out" of their own head. We are inherently biased and this creates many problems... people get very attached to their ideas, whether they work or not.

There are three meaningful ways to develop empathy for others. One way is through interviewing, where you have conversations with your end users.

Another way to develop empathy is through observation; we find that what people say, and what people do, don't always line up. Through observation, (you) can pick up on these discrepancies. A third way to develop empathy is by immersing yourself in other people's' experiences⁴⁷

Immersion means, literally, to walk in the shoes of your users, experience the process as they experience it. You may be surprised by what you notice. "We make a lot of assumptions about day-to-day living; we don't notice a lot of details in our surroundings."⁴⁸

When you map your public facing processes, map the user's journey as well. Think deliberately about those "spot(s) where we can intervene, either in the public facing "stage" (of a process) or behind the scenes, to make the system work more smoothly, with greater support for the user, and more efficiency for the service provider. Note everywhere there are interactions, where there are failures, where there are opportunities. "50

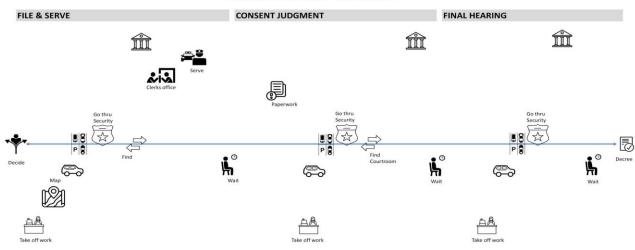
⁴⁷Empathy is a Design Mindset – part 1 https://loreamartinez.com/2016/02/13/empathy-is-a-design-mindset-part-1/ Interview with Melissa Pelochino, Director of Professional Development at the K12 Lab, Stanford University ⁴⁸ Id

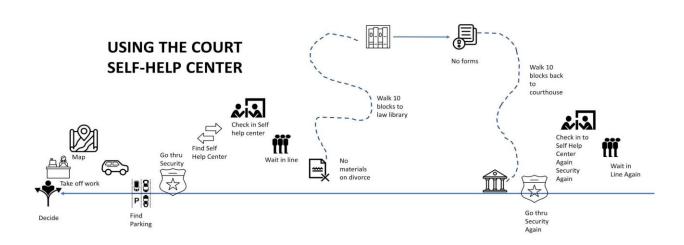
⁴⁹ http://www.openlawlab.com/2017/01/20/a-service-design-approach-to-the-legal-system-mapping-user-journeys/

⁵⁰ Id



DISSOLUTION OF MARRIAGE





Tagline: These draft process maps were developed using "Trapped in Marriage" and incorporate parts of the user's journey. This can help us visualize where some of the user-centered design opportunities might be.

You can also incorporate a user persona. "Personas are fictional characters, which you create based upon your research in order to represent the different user types that might use your service...creating personas will help you to understand your users' needs, experiences, behaviours and goals. Creating personas can help you step out of yourself. It can help you to recognise that different people have different needs and expectations, and it can also help you to identify with the user you're designing for."51

⁵¹ https://www.interaction-design.org/literature/article/personas-why-and-how-you-should-use-them



Here are examples of two fictional user personas we developed for a user-centered design thinking sprint at the 2018 National Association of Administrative Law Judiciary (NAALJ) conference⁵². Imagine how Sara and Thanh might react to or struggle with some of your public-facing processes. How might you look at your processes differently if you were looking at them through their eyes?



Persona Summary - Sara is a single mom with two children under the age of 5. She shares a 3-bedroom apartment with her sister and her sister's son, age 4. Sara can't afford daycare, so she works days while her sister stays home with the three children. She watches her kids and her sister's son at night, while her sister works as a waitress at a nearby nightspot. Neither she nor her sister have a car and they don't live within walking distance of a

metro stop. Sara has to take a bus to a metro stop then change metro lines in order to get to work.

Persona Summary - Thanh is in his 60s. He is first generation Vietnamese and though he came to the U.S. in his early teens, he struggles to speak English. Thanh is very proud of his 12-year-old grandson Huy who helps him. Huy is especially proud of the smartphone he worked and saved to buy and amazes his grandfather with all the things it is able to do. Thanh lives next door to his daughter, her husband and Huy. Several of the family patriarchs who serve as elders in their neighborhood, including Thanh, were sent here as children by fearful parents. Thanh is still quite anxious about dealing with "the authorities" in any way.

Process improvement and design thinking are fields of expertise. But you don't have to be an expert to deploy some of the tools and mindsets that each of these methodologies embrace. You can make a positive difference in your work, that of your colleagues and *especially* for the people attempting to understand and access the services of the court.

Conclusion

The goal of this article is to give readers an opportunity to think about court process in a different way. Are courts and court managers sending messages, albeit without intention, to users devaluing their presence in the justice system? Are these processes effectively denying access to justice? And if so, what tools do we have to remedy this issue? What we hope is that readers will read this article and take a moment to think critically about their own court processes and begin the process of systematic and continuous improvement considering simplification and compassion as essential components to redesign each time iteration occurs.

⁵² 2018 NAALJ Annual Conference

[&]quot;Waves of Change, Oceans of Opportunity" October 14-17, 2018 https://naalj.memberclicks.net/assets/NAALJ%20schedule%2007.18.2018.pdf Access to Justice/Innovations to Assist Pro Se Litigants, Co-presenters: Renee Danser & Melissa Moss