

Access to Justice Requires Plain Language

By Hon. Bridget Mary McCormack

There have long been lawyers, judges, and others in the legal field working to ensure access to justice. And plain-language advocates, too, have been hard at work for decades. They even work together sometimes because each constituent group understands well its relationship to the other. As the chief justice of a state court system that adjudicates almost four million cases each year, many involving self-represented litigants, I see plain language as an enormous tool for achieving equal access to our courts. It is critical to empowering low-income individuals to navigate the legal system on their own, ensuring procedural fairness for all and legitimacy for the rule of law.

Why access to justice matters: the legitimacy of the branch and the rule of law

The rule of law is a defining feature of our constitutional democracy. It is perhaps the single feature of the American experiment that most defines us culturally; it is an idea and an ideal. This means that it is fragile; its continuation depends on the public's sustaining it. When people feel excluded

from our justice system, its fragility is most acute. Equal access to justice is fundamental.

But the number of people with legal needs who cannot afford lawyers in our country is staggering. Of course, in the criminal context, the U.S. Constitution requires that the government fund lawyers for people accused of crime who cannot afford to hire their own lawyers. That system has its imperfections, many of them significant. But that's not my focus here. Instead, I want to figure out how to make sure that the people in my state who have important civil legal problems can use the legal system to advocate for themselves and their interests regardless of income—that everyone can participate in our justice system and know they are listened to. Not everyone is going to like the outcome of a particular legal proceeding (by definition, usually only about 50 percent of the people like the result). But more fundamental than liking the outcome is believing that the process was fair. It is not fair when litigants cannot understand it.

The justice gap

In Michigan, an estimated two million people qualify for legal help according to the Legal Services Corporation, a national en-

tity that secures federal funding that states can use to support legal-aid clinics for an estimated 60 million people who live at or below 125 percent of the federal poverty line.¹ The State Bar of Michigan estimates that approximately 285 legal-aid attorneys in Michigan provide legal services for an estimated 1,961,687 people living at or below 125 percent of the federal poverty level.² This means that every 6,883 low-income Michiganders have one legal-aid lawyer who can help them with critical needs concerning housing, family, and safety.³

The lack of representation can be devastating. Take evictions, for just one example. In most eviction cases, landlords are represented, and tenants are not.⁴ And in most cases, pro se tenants are evicted. The opposite is also true: in most cases in which tenants are represented by counsel, tenants achieve favorable outcomes.⁵ Eviction is devastating to families, but also to communities and the local economy. In fact, the cost to communities is now understood to be so significant that some jurisdictions are funding a right to counsel in eviction cases.⁶ But that solution is unlikely to be a national one. Even in jurisdictions where indigent people facing eviction have a right to counsel, those same indigent people are likely to have other civil legal needs, which they will have

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to navigate on their own. The justice gap is more of a canyon.

And it's not only the people who show up to court on their own to try to navigate the legal process. There are others who do not understand that they have a legal problem with an available remedy. Think of a parent whose son or daughter has a right to special education but does not know that he or she qualifies. Or the consumer who has a defense to an unfair loan practice but lacks any information about her legal rights.

Faith in government is lost when people come to court and are not in a position to advocate for themselves—or they never bother to come at all because they do not believe there is any hope for them in our legal system. What's at stake in finding innovative solutions to allow all our neighbors to advocate for their interests in our courts is the very legitimacy of the system. Today's tenant facing eviction is tomorrow's witness in a personal protection order. The public's belief that the court system is one in which being right is more important than being powerful is fundamental to its future.

Plain language: the foundation on which to build all solutions

Plain language is a critical first step in any solution to our access-to-justice problem. Clear communication is fundamental to reaching people who do not come to court at all or come to court but cannot advocate for themselves. Plain language makes it easier for people to find the information they need to make decisions. It gives them agency in those decisions. And it allows them to communicate their concerns and

their views to judges and court staff who are in a position to give those concerns legal meaning.

Making sure that the people affected by our justice system understand what is happening to them while they are experiencing it is essential to access to justice. People who come to court, as litigants or witnesses or families of both, want to understand what is being said about them, around them, and to them. And they have a right to understand it.

Procedural fairness

Strong research supports the understandable view that people care more about how they experience justice than the particular outcome in any given case.⁷ That is, procedural fairness is as important as a case's outcome to the individuals in that case. Researchers identify four aspects of a procedurally fair process that matter most:

- (1) Voice: the ability to participate in the process and be heard;
- (2) Neutrality: the belief that the rules are applied in an unbiased and transparent way;
- (3) Respect: that people are treated with dignity and their rights are protected; and
- (4) Trust: that the decision-makers are benevolent and out to help the litigants—they listen to litigants' concerns and explain their decisions in language that is understandable.⁸

All of this is, on the one hand, sensible and unremarkable; anyone who has raised kids knows that fair process produces better outcomes for everyone. And yet it isn't

what judges or court staff are primarily trained to be good at, so it does not always come easily.

In law school, we all learned how to speak in code. That code became second nature and we can now speak it effortlessly. We do it without thinking, using legal terms of art that have common language equivalents, but those equivalents no longer roll off our tongues. Translating forms, court orders, and other official court communications into plain language could be easier than training ourselves to use it in the first place.

But our efforts to use plain language in our interactions with court users are at least as important as translating our forms, orders, and opinions. We can and should explain to litigants how and why we reached a particular decision. And we can explain to them what they can do as a result of our decision. The benefits of clarity to courts have been demonstrated: people who understand court decisions and orders are far less likely to violate those orders or come back to court because of confusion about them.⁹ Better communication improves compliance and reduces the chance of additional litigation.

That should be reason enough for people who work in courts to use plain language in our communications, but the benefits to access to justice are even more fundamental to the legitimacy of our work. We can give people the tools to advocate for their interests, a voice in the processes they are subject to, and the dignity of listening to their concerns and translating those concerns into legal claims and defenses. When we do, we build trust in our branch of government and the foundation for bridging the access-to-justice gap.

The rule of law is a set of principles that require buy-in for sustenance. Access to justice grows buy-in, and lack of access erodes it. ■

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(Continued on the following page)



Chief Justice Bridget Mary McCormack joined the Michigan Supreme Court in 2013 and became chief justice in 2019. As chief justice, she has promoted statewide initiatives devoted to improving the courts' service to the public and delivering on a promise that courts are independent, accessible, efficient, and engaged with their communities. Before her election to the Court, McCormack was a law professor and dean at the University of Michigan Law School, where she continues to teach. There, she launched clinics dealing with mediation, low-income taxpayers, international transactions, human trafficking, juvenile justice, and entrepreneurship. As a U-M Law School associate dean in 2008, McCormack cofounded the Michigan Innocence Clinic, which has exonerated more than 15 people to date.

ENDNOTES

1. *Documenting the justice gap in Michigan*, SBM in collaboration with Michigan's Legal Svcs Corp Funded Partners (2017), p 6 <<https://www.michbar.org/file/programs/atj/pdfs/JusticeGap.pdf>> [<https://perma.cc/X2FV-KXRK>]. All websites cited in this article were accessed February 5, 2021.
2. *Id.*, p 7.
3. *Id.*
4. Desmond, *Unaffordable America: Poverty, housing, and eviction*, Inst for Research on Poverty (2015), pp 4-5 <<https://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf>> [<https://perma.cc/W7LR-A58P>].
5. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 Seattle J for Soc Just 51 (2010), p 71, available at <<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1076&context=sjsj>> [<https://perma.cc/6SJN-BDNT>] (noting studies indicating that "tenants facing eviction for nonpayment of rent who were represented by lawyers were more than 4.4 times more likely to retain possession of their apartments than similar tenants who were not represented").
6. *Legal Services for Tenants*, NYC Human Resources Admin <<https://www1.nyc.gov/site/hra/help/legal-services-for-tenants.page>> [<https://perma.cc/5LCT-M73Z>] (noting that New York City became the first city in the country to ensure universal access to legal services for tenants) and *350,000 New Yorkers Receiving Free Legal Help to Fight Evictions*, *Through Right to Counsel*, Media Release, NYC Office of the Mayor (December 13, 2019) <<https://www1.nyc.gov/office-of-the-mayor/news/613-19/350-000-new-yorkers-receiving-free-legal-help-fight-evictions-right-counsel>> [<https://perma.cc/N8D6-WLZW>].
7. Tyler, Bradford, & Jackson, *Psychology of procedural justice and cooperation*, in Bruinsma & Weisburd (eds), *Encyclopedia of Criminology and Criminal Justice* (New York: Springer, 2013), available at <https://www.researchgate.net/publication/236004084_Psychology_of_procedural_justice_and_cooperation> [<https://perma.cc/SQ3V-VMRD>].
8. Leben, *Considering Procedural-Fairness Concepts in the Courts of Utah* (2011), p 3, available at <http://www.proceduralfairness.org/__data/assets/pdf_file/0020/8741/utah-courts-and-procedural-fairness-09-2011.pdf> [<https://perma.cc/5EKZ-TZ5H>] (exploring court programs that build on these four principles).
9. Finigan & Allen, *Evaluation of the Introduction of Plain Language Forms with a Spanish Translation in Two Family Court Settings*, NPC Research (2016), pp 23-26, available at <https://richardzorza.files.wordpress.com/2016/11/plain-language-report_10-24-16.pdf> [<https://perma.cc/693L-SXGI>] (noting a decrease in the number of violations of protective orders after the court began issuing orders that used plain language and contained a Spanish-language version for those with limited English reading comprehension).



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