

Self-Represented Litigants in the Courtroom

Judge Marilea Lewis
330th Judicial District Court
600 Commerce Street, Suite 340
Dallas, Texas 75202
MLewis@dallascounty.org



Code of Judicial Conduct

- The Code of Judicial Conduct requires a judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and to avoid conduct that would make an objective, reasonable observer question the judge’s impartiality even if the judge is not actually biased.



Objectives

- Creation of bias free courtroom
- Avoidance of appearance of impropriety
- Maintenance of judicial demeanor
- Encourage the introduction of admissible evidence
- Rendition of fair and impartial judgment



Judicial discretion

- The judge’s responsibility is to ensure a fair trial and a just rendition which is more than just “calling balls and strikes”.
- The judge’s responsibility is to protect the meaningful exercise of a litigant’s constitutional right of access to the courts.
- The judge’s impartiality does not require the judge to be passive.



- A judge may make procedural accommodations to provide diligent pro se litigants the opportunity to have their cases fully heard, and such an exercise of judicial discretion does not raise a reasonable question about the judge’s impartiality.

-- American Judicature Society
proposed change to the model code of
judicial conduct (2004)



Reasonable accommodations

- Liberally construing pleadings
- Explaining the basis for a ruling
- Refraining from using legal jargon
- Questioning of witnesses for clarification
- Allowing liberal amendment of pleadings
- Explaining general matters such as the burden of proof and hearsay



A judge should.....



- Explain policies and procedures
- Include the self-represented litigant for bench and/or chamber conferences
- Outline the order of trial
 - Bench notes
 - Administrative duties
 - Staff function

A judge should not.....



- Instruct the self-represented litigant in how to present a case
- Take over the questioning on behalf of the self-represented litigant
- Become an advocate for either side
- Assume a party has chosen not to have representation

Balancing interests



- When accommodations have been made for the self-represented litigant, the same accommodations must be made for a litigant in the case who is represented
- Admonish the party about the right to counsel
- Provide the self-represented litigant with information about resources available for self-represented litigants

Need for admissible evidence



- Follow the rules of evidence that go to reliability but use discretion in the sustaining or overruling of objections
- Be consistent with objections between self-represented litigants and represented litigants
- Ask questions only necessary for purposes of clarification

Pleadings



- Although judges should not assist a party in the preparation of pleadings, judges should not require such strict adherence to rules of pleadings in non-adversarial cases as to deprive a self-represented litigant of relief due to minor or easily corrected deficiencies in the litigant's pleadings.

Suggested admonishment



- Right to counsel and, when appropriate, the right to court appointed counsel
- Right to remain silent and the effect of waiver
- Right to jury trial, if appropriate
- Right to question witnesses
- Right to call witnesses
- Right to a record of the proceeding

Conclusion.....



- Each judge must find his or her own balance, bearing in mind that...
 - “Any conduct inconsistent with proper judicial demeanor, whether on or off the bench, subjects the judiciary as a whole to disrespect. Thus, even off the bench, a judge remains cloaked figuratively with the black robe of office, devolving upon him standards of conduct more stringent than those acceptable for others.” - In re Kuehnel, 49 N.Y.2nd 465, cited in In re Lowery, 999 S.W.2nd 639

Texas Code of Judicial Conduct

(8) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

- (a) communications concerning uncontested administrative or uncontested procedural matters;
- (b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;
- (c) obtaining the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond;
- (d) consulting with other judges or with court personnel;
- (e) considering an *ex parte* communication expressly authorized by law.

(9) A judge should dispose of all judicial matters promptly, efficiently and fairly.

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed

only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

(1) A judge should diligently and promptly discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

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Helping the Pro Se Litigant: A Changing Landscape

Paula L. Hannaford-Agor

For several years, judges, court staff, and a growing number of lawyers have recognized that at least one party is not represented by a lawyer in a sizeable portion of family law and smaller civil cases. Often both parties are self-represented. Two underlying factors associated with self-represented litigation—the relative scarcity of affordable legal services and an increased “do-it-yourself” attitude by many litigants—are fairly self-evident. What is less clear is how best to ensure that these litigants have sufficient access to the justice system to be able to resolve legal problems fairly and effectively.

Courts and legal service providers have tried a variety of approaches to address the needs of self-represented litigants. Some maintain that the best solution is to steer litigants back toward competent legal counsel and so have focused their efforts on promoting greater lawyer participation in pro bono programs and securing adequate funding for legal services agencies. Some provide self-represented litigants with basic materials and legal resources such as simplified forms and instructions to help litigants maneuver their way through the civil justice system. Still others champion the use of alternative dispute resolution programs, trying to divert self-represented litigants away from the more adversarial and procedurally complex venue of traditional court proceedings. Although each of these approaches can claim some measure of success, it is clear that none has been fully effective.

This article describes how the influx of self-represented litigants has forced many within the court and legal communities to reconsider some of the fundamental premises on which the civil justice system is based and to respond in new and creative ways to changing litigant demands on existing court and legal resources. It focuses on changes to the delivery of legal services to low- and moderate-income people, especially the emergence of “unbundled” legal services, and addresses the practical implications related to the distinction between legal information and legal advice. Finally, it describes how judges and court staff are rethinking the conceptual design of the civil justice system and addressing specific factors associated with legal

complexity and the inherent limitations of laypersons that create barriers to access for self-represented litigants.

SCARCITY OF AFFORDABLE LEGAL SERVICES

The major factor contributing to the increase in self-represented litigation is fairly obvious: a sizeable number of self-represented litigants proceed without a lawyer simply because they lack sufficient income to afford one. This trend has been well-documented for quite some time. In 1994, for example, the American Bar Association conducted an in-depth study of the legal needs of low-income Americans and found that 47% of low-income households experienced a new or existing legal need each year, but only 29% were addressed through the legal/judicial system and 38% went unaddressed altogether.¹ A second study of the legal needs of moderate-income Americans had similar findings. An estimated 52% of moderate-income households experienced a new or existing legal need each year, but only 39% of those needs were addressed through the legal/judicial system and 26% went unaddressed altogether.² Both studies indicated that the vast majority of legal problems encountered were relatively uncomplicated, both factually and legally. The Legal Services Corporation (LSC), which was created in 1974 to provide legal assistance to low-income Americans, estimates that four out of every five income-eligible people who apply for assistance are turned away because the LSC lacks the resources to help them all.³ Despite the best intentions of the legal community, two decades of pro bono recruitment efforts have not yet begun to fill the gap in legal assistance needs for these low-income Americans. Nor are they likely to do so in the foreseeable future.

The results of these unmet needs are two-fold. First, many people simply do without legal solutions. They give up on recovering damages from minor contractual disagreements or smaller civil claims, or fail to defend against claims asserted against them for which they would otherwise have a legal remedy or defense. Others delay filing for divorce until some unspecified time in the future when they or their estranged

Footnotes

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Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia, 23185 (telephone: [757] 259-1556, facsimile: [757] 564-2065; e-mail: phannaford@ncsc.dni.us).

1. American Bar Association, Report on the Legal Needs of the Low-Income Public: Findings of the Comprehensive Legal Needs Study (1994).
2. American Bar Association, Report on the Legal Needs of the Moderate-Income Public: Findings of the Comprehensive Legal Needs Study (1994).
3. Legal Services Corporation, Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress 14 (2000).

spouses might be able to afford a lawyer, and in the meantime muddle through with informal (and hence unenforceable) agreements for child support and the distribution of assets and debts. Most are unaware of the potential consequences of doing without legal assistance. Second, those who do not have the option to forgo a legal remedy are forced to navigate the civil justice system without a lawyer, becoming the ubiquitous pro se litigants that cause so much consternation for judges, court staff, and lawyers representing opposing parties or other litigants on the docket.

Judicial and legal policy makers have gradually come to the realization that there will never be enough affordable legal services to meet the demand for full legal representation for all eligible individuals. Given existing budgetary constraints, a 400% increase in funding for legal services is highly unlikely. Similarly unlikely is a dramatic increase in pro bono activity by lawyers, a dramatic decrease in legal fees, or a return to the barter system of an earlier era in which clients could pay for legal assistance with their own goods or services.

This new understanding has spurred two significant shifts in philosophy—one within the courts community about what constitutes the principal components of access to justice and another within the legal community about how best to deliver legal services. For judges and court staff, the initial concern was how to address the ethical and practical implications of increased numbers of self-represented litigants. The departure from the traditional model of litigants represented by competent attorneys posed enormous challenges for courts in terms of both increased staff time and administrative costs as well as perceived restrictions on the ability of judges and court staff to offer meaningful assistance.

An early response by many courts was to vigorously maintain existing barriers to self-representation—for example, by strictly enforcing “no legal advice” policies for court staff and holding self-represented litigants to the most exacting procedural standards—in hopes that these efforts would discourage litigants from seeking legal recourse in the courts without first obtaining competent legal representation. Over time, however, some courts changed their minds about the wisdom of this approach—in part, because it was largely ineffective and ultimately counter-productive. In spite of barriers, the number of self-represented litigants continued to rise, and the failure of courts to offer them any assistance not only exacerbated logistical problems but also undermined public trust and confidence in the courts as effective and responsive social institutions.

An even more important consideration was the growing realization that the majority of self-represented litigants had legitimate legal problems that could only be resolved through judicial intervention. The concept of access to justice has long been considered by the civil justice community as synonymous with access to a lawyer, largely out of recognition that the American justice system is an extraordinarily complex institution. This framework, however, has always been

premised on the assumption of an adequate supply of affordable legal services: judicial and legal policy makers had not contemplated how low- and moderate-income people would obtain access to justice if the cost of legal services increased beyond the financial means of

most households or, for that matter, of government agencies to provide to eligible individuals. As the new reality took hold, a growing number of judicial policy makers adopted the view that a fundamental requirement of access to justice is access to the courts and that access to lawyers, as articulated in the Sixth Amendment, is not sufficient by itself to ensure access to justice.⁴ This new outlook prompted a radical change in the willingness of courts to respond to the needs of self-represented litigants.

At the same time that the courts were grappling with the implications of growing numbers of self-represented litigants, the legal community, especially lawyers who regularly worked with low- and moderate-income individuals, was forced to confront how changing economic circumstances were affecting the delivery of legal services. The traditional view was that anything less than full-service representation was tantamount to unequal protection, in effect creating a lower or even non-existent standard of justice for the poor and near-poor. At first there was great resistance to abandoning this view. But recognizing the limitations of scarce resources, the LSC in the late 1990s adopted a dramatically different strategy for carrying out its mission to promote equal access to the justice system. Rather than insisting on full-representation for all of its clients, the LSC sought to increase the availability of legal services to eligible persons by providing legal information and limited assistance to those individuals with relatively uncomplicated problems. It could then reserve full representation for those individuals with more complicated cases, and those who, due to cognitive or emotional limitations, would be unable to pursue claims effectively on their own. This strategy was implemented by requiring local agencies to specify how they planned to meet the needs of self-represented litigants, and to document how effectively they had done so, as a condition of receiving federal funding.

A similar dynamic also took place in many local pro bono programs. Due to increased specialization within the legal profession as well as limitations on the amount of time and resources that individual lawyers could devote to full-representation on a pro bono basis, many local programs established legal hotlines and clinics in which lawyers could contribute a

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4. See Conference of Chief Justices and Conference of State Court Administrators, Final Report of the Joint Task Force on Pro Se Litigation (July 29, 2002).

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couple of hours each month for consultation on routine legal matters without undertaking ongoing responsibility for the case. Similar efforts include legal workshops or clinics that educate people about legal rights and provide minimal assistance in completing court documents.

Both the LSC and the pro bono approaches are the no-fee corollary of the “unbundled” model of legal services delivery

in which lawyers undertake discrete legal tasks—consultation and legal advice, preparation or review of legal forms, in-court representation—for a full or only slightly reduced fee. This model makes it possible for individuals to obtain access to competent legal advice and assistance on those aspects of their cases that they most desire help, without paying full legal fees for tasks that they feel comfortable doing themselves. It also accommodates the desires of many litigants to have a more active role in how their cases are managed, including the timeliness of a final resolution.

The unbundled services model has not been enthusiastically embraced in all parts of the country. Many lawyers express concerns about the ethical obligations of discrete task representation as well as the potential for professional malpractice liability. A secondary concern is whether the local judiciary will respect limited representation agreements. Recent changes to the Model Rules of Professional Conduct explicitly permit these types of arrangements, provided that they are reasonable under the circumstances and that the client gives informed consent to the agreement.⁵ Even with these assurances, this model poses challenges for lawyers. To be a cost-effective model for both lawyers and clients, for example, the lawyer must have the immediate knowledge required to provide competent legal advice and assistance in a timely manner: there is no opportunity for a lawyer to spend two to ten hours researching a legal question at \$100 or more per hour. Thus, lawyers must know the law very well and be fairly proficient with diagnostic interviews in order to provide competent legal assistance on an unbundled basis, skills that are generally not the province of younger, less experienced lawyers.

The rise in consumer demand for unbundled legal services has helped to draw a distinction between what are quintessen-

tially legal services—that is, the tasks that form the core of the ever-ambiguous phrase “practice of law”—and those tangential services that lawyers have traditionally performed for clients in the course of carrying out the representation. This then has become the starting point for how the court and legal communities address the second set of factors that impede access to justice for self-represented litigants: restrictions on the availability of legal information that litigants need to make informed decisions about how to pursue a claim or defense, including whether to retain a lawyer for some or all of the case.

LEGAL INFORMATION AND LEGAL ADVICE

Richard Zorza, lawyer, author,⁶ and consultant to many courts and legal organizations on access to justice issues, has a useful illustration to explain the distinction between legal advice and legal information: “If you ask a question of two lawyers, and get two different answers, and neither lawyer is committing malpractice, that is legal advice. But if there is only one right answer, that is legal information.” Legal information should be available to all people and from any source, including non-lawyers and even court staff (who are uniquely knowledgeable about legal information, especially local court procedure).⁷

Although obviously tongue-in-cheek, Zorza’s explanation is a useful one for thinking about what lawyers do for clients that clients are unable to effectively do for themselves. It also distinguishes those functions from those that individuals can do for themselves if given access to accurate legal information. A recent project of the National Center for State Courts, conducted in cooperation with the Chicago-Kent College of Law and the Illinois Institute of Technology’s Institute of Design,⁸ identified five categories of legal services, defining that term as the composite of legal advice and legal information that constitutes traditional legal representation in the civil justice system. These five categories—diagnosis, logistics, strategies, resolution, and enforcement—are the areas that self-represented litigants appear to struggle with the most. As we shall see, most of these categories have varying mixtures of legal advice and legal information, so identifying the aspects of each category that consist mainly of legal advice provides a preliminary template for the tasks that the legal community might provide through a model of unbundled legal services. Similarly, the specific aspects of each category that consist mainly of legal information can be the starting point for either the courts or the legal community to provide information services for self-represented litigants.

Diagnosis

The diagnosis category is premised on the assumption that most individuals, given the tools to do so, will attempt to

5. Model Rules of Prof. Conduct Rule 1.2(c) (“A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.”) and comments [6] – [8].
6. RICHARD ZORZA, *THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS* (NCSC, 2002).
7. John M. Greacen, *Legal Information vs. Legal Advice: Developments*

During the Last Five Years, 84 JUDICATURE 198 (2001); John M. Greacen, *No Legal Advice from Court Personnel! What Does That Mean?*, JUDGES’ J., Winter 1995, at 10.

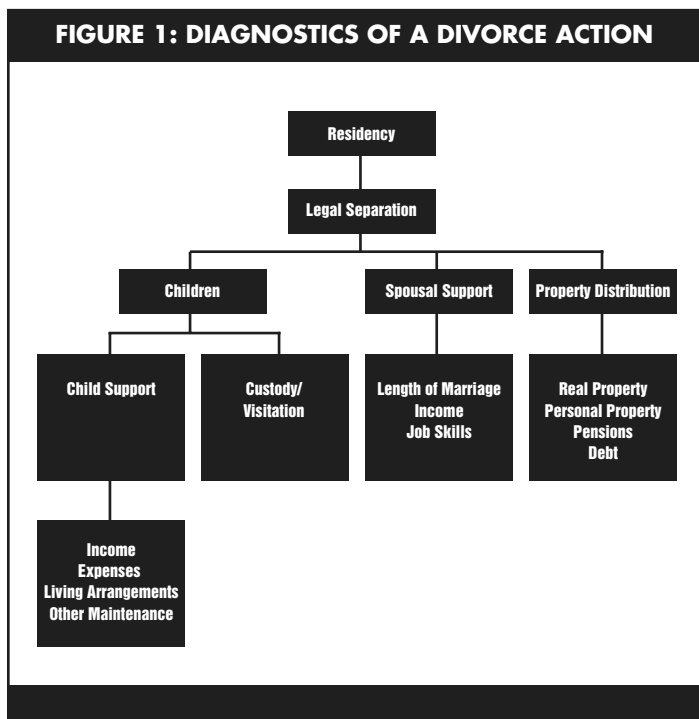
8. The project was funded by grants from the State Justice Institute (SJI-00-N-248), the Open Society Institute (No. 20001562), the Center for Access to the Courts Through Technology, and the Illinois Institute of Technology.

resolve problems in a rational and responsible manner—legally and effectively. So when confronted with a legal problem, the most important questions for which people seek answers are:

- What are my legal options?
- Are any legal, financial, moral, or other important implications related to those options?
- How are those options pursued?
- How much time, money, and other resources are needed to pursue those options?

To answer those questions, lawyers typically help guide their clients through a logical decision tree of varying complexity depending on the type of problem under consideration. Take, for example, someone consulting a lawyer about a divorce. Figure 1 illustrates the typical issues that would arise in the decision-tree analysis.

In most jurisdictions, the number of legal options available to a client is generally two, and at most three.⁹ The first option is to do nothing and stay legally married, which has obvious implications not only in terms of ongoing animosity (presumably the client is not seeking to dissolve an otherwise happy marriage) but also restrictions on future relationships (the client cannot remarry until the existing marriage is legally dissolved) and continued legal responsibility for the welfare and future legal obligations incurred by the spouse. The second option is to obtain a divorce from a court of competent jurisdiction. A good lawyer would first discuss with the client the requirements for filing for divorce, including residency in the jurisdiction and satisfaction of any statutorily-defined period of legal separation. Then the lawyer would discuss obvious implications of divorce including the need to decide on the disposition of children (custody, visitation, child support), spousal support, and property



9. Some jurisdictions, such as Virginia and Kentucky, permit divorce “from bed and board,” which operates to sever the spouses’ rights to property acquired after the divorce as well as legal responsibility

for liability incurred by the former spouse, but does not permit either spouse to remarry and does not affect inheritance rights (e.g., dower, curtesy).

It is only in the final step of providing advice based on the client’s facts that legal judgment and experience—the hallmarks of the practice of law—become more prominent

disposition. After explaining the available options and their implications, a lawyer would typically answer questions about how to pursue those options, such as where to file for divorce (forum selection) and what steps may be necessary before filing (such as legal separation, required in some states).

Finally, the lawyer would discuss with the client the time, money, and other resources that would be necessary to pursue each of these options. For example, the lawyer would advise the client about the probability of different outcomes of the divorce decree, such as the likely range of child or spousal support; the typical amount of time until the final divorce decree would be issued; the estimated costs including legal fees, court costs, and related expenses; the amount of out-of-court preparation required of the client for collecting relevant documents and affidavits for necessary witnesses; and the likely number of in-court appearances.

In this scenario, the initial steps are more accurately described as legal information. Typically they are stated as positive law in state statutes and court rules. It is only in the final step of providing advice based on the client’s facts that legal judgment and experience—the hallmarks of the practice of law—become more prominent and the intrinsic value of a lawyer becomes more evident. It is also precisely the kind of information and advice that people need to make an informed decision about whether they would be able to represent themselves effectively. Indeed, many self-represented litigants underestimate the amount of preparation needed for their cases and, if fully advised of the time and resources involved, might choose to seek assistance from a lawyer for some or all of the case. Obviously, this illustration is fairly straightforward. In other types of cases in which the positive law is less clear cut, the threshold where legal information blurs into legal advice might occur much earlier in the consultation.

Logistics

Once all the legal options have been explored and one option agreed upon, the next area of legal expertise for which clients traditionally rely on lawyers involves carrying out the myriad of logistical steps necessary to bring the matter within the legal jurisdiction of the court for consideration. Other than the choice of forum (where a choice even exists), knowledge of these steps mainly consists of legal information rather than legal judgment. But carrying out these logistics can involve a

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staggering number of individual steps: drafting pleadings, including all accompanying forms and affidavits; filing the pleadings with the court; paying the court fees or applying for a waiver for indigent litigants; arranging for service of process, either through the court, with the sheriff, or with a private process server; fulfilling any mandatory requirements to proceed,

such as attending a parenting class or mandatory mediation; filing supplemental papers (separation agreement, financial affidavits); and then taking any formal steps needed to set the case on the calendar. After becoming aware of how tedious some of the steps can be, litigants who can afford to do so may opt to have a lawyer carry out some or all of these tasks, but there is little about these steps that requires the level of legal judgment that clients would ordinarily only receive from an experienced lawyer.

Strategies

After arranging for the logistics of a civil claim, the next step involves deciding on a strategy with which to pursue or defend the claim. The two most common strategies are to negotiate the dispute and try to arrive at a mutually agreeable settlement or to prepare for formal litigation before a judge or other judicial officer. As a practical matter, this decision is strongly tied to the litigant's objectives concerning the case. The litigant obviously has superior knowledge of his or her own objectives, and those preferences should ordinarily be given great deference by the lawyer.¹⁰ But the decision also relies heavily on the lawyer's judgment about which course of action would best secure the client's objectives, so there is a great deal of added value from the information and advice a competent lawyer can impart.

One common misconception by many self-represented litigants is that, once they have filed their case, the court takes full responsibility for future decisions on the merits of the case. Few self-represented litigants realize that the vast majority of cases are disposed of through a bilateral agreement of the parties (settlement) or a unilateral decision by one of the parties (default judgment or dismissal for failure to prosecute), not by a trial on the merits. Indeed, it is somewhat ironic that the collective body of law referred to as civil procedure exists largely to prepare for trial, an event that very rarely happens. Judges, of course, are well aware that if full judicial review of the facts and the law was required to resolve each case, the civil justice system would come to a grinding halt in a matter of days. There is an implicit expectation that parties will continue to

negotiate with one another even after the case has been filed, hopefully arriving at some mutually agreeable arrangement that will alleviate the need for the court to expend time and effort deciding the case, or at least restrict that effort to a review of the agreement to ensure that it meets minimum legal requirements (e.g., child support, visitation).

Unfortunately, there are few mechanisms to inform self-represented litigants about this implicit expectation. Consequently, many self-represented litigants are unaware that they retain the ability to formulate their own resolution, and indeed that their resolution might be more advantageous to both parties than any that the court might impose. Although some courts have implemented mandatory mediation or other alternative dispute resolution programs that provide an opportunity to inform self-represented litigants about the possibility of a negotiated disposition, and even provide a structured forum for conducting the negotiations, not all do so.

If self-represented litigants are largely unaware that they can negotiate rather than litigate their cases, they are also uninformed of what they must do to prepare for litigation. Most self-represented litigants work under the misconception that a hearing is their first opportunity to tell their side of the story. The reality is that, for many, it is their last. Lawyers, of course, understand the importance of preparation, which involves the factual and legal documentation of the case. Exchanging interrogatories, conducting depositions to discover factual information under the control of the opposing party, and issuing subpoenas to compel witness appearances are all part of trial preparation. As a practical matter, however, most cases involving self-represented litigants do not generally require a great deal of discovery or legal preparation in that they tend to be factually and legally quite straight forward. Another component of preparation is learning the niceties of court presentation, such as court etiquette (e.g., how to address the judge and how to address the opposing counsel or party, if at all) and trial logistics (e.g., the order of trial, how to get documentary or demonstrative evidence admitted, how to frame questions to witnesses on direct and cross-examination).

Both negotiation and preparation for trial are skills that lawyers acquire with training and experience, but they are not solely dependent on legal judgment. Some self-represented litigants can represent their interests quite well in negotiations, perhaps even better than lawyers, if they are only informed of the benefits of doing so. Trial preparation is another thing entirely. Many self-represented litigants are understandably intimidated by the courtroom environment and are uncomfortable with the formality of trial procedure. Although some do reasonably well with coaching from a seasoned legal professional, limited representation for in-court proceedings is another task for which many litigants would be willing to pay reasonable legal fees.

Resolution and Enforcement

In spite of the complexity of the trial process, a commend-

10. See Model Rules of Prof. Conduct Rule 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of the rep-

resentation and . . . shall consult with the client as to the means by which they shall be pursued.")

able number of self-represented litigants prevail in their cases each year. Some of those cases are largely administrative proceedings that require little more than dogged determination and perseverance. In other cases, self-represented litigants demonstrate a remarkable degree of legal sophistication despite their lack of formal legal education and training. Even so, one of the biggest stumbling blocks takes place when the judge issues an oral judgment in favor of a self-represented litigant, and then turns to the litigant and requests him or her to commit the judgment to writing and submit it to the court for the judge's signature—which leads back to the logistical problem of drafting court documents. There are few templates or model court forms that a self-represented litigant can examine to get an idea of what a written order might look like, much less what should be included in it. Many self-represented litigants, even though they have won their cases, lack knowledge about how to translate the judge's oral statement into a binding and enforceable written instrument—if, indeed, they have thoroughly understood the judge's oral judgment.

Even for cases in which the court drafts its own final orders, self-represented litigants are rarely knowledgeable about how to enforce these judgments in any meaningful way. Thus perpetuates the myth of the self-enforcing judgment in which, magically, the judgment-debtor pays the full amount of the debt, mortgage and finance companies are notified that a newly divorced person is no longer obligated on a previously jointly-held note, etc. Some self-represented litigants believe that the court pays the judgment, then collects from the judgment-debtor. Rarely are self-represented litigants given any information about their options for enforcing a judgment (e.g., lien or seizure of assets, garnishment), which brings them back to the beginning of the litigation cycle again: diagnosis of their legal options and the associated implications, the logistics of enforcement, and the most effective strategies and resolutions.

From an examination of the specific legal tasks involved in pursuing litigation, it becomes clear that access to legal information is the most critical need of self-represented litigants in the vast majority of cases. Legal judgment—the reasonable inferences that an experienced legal professional makes based on available information—can be critical to litigants in more complicated cases in which the sheer volume and complexity of legal information requires more time than the average layperson can commit to preparing his or her own case. But in less complex cases, self-represented litigants are typically able to make reasonable inferences from legal information, and thus the need for access to legal advice can be very helpful, but is not absolutely necessary. The question then becomes who is best situated to provide accurate legal information to self-represented litigants, and to encourage litigants to seek legal advice in appropriate circumstances.

WHAT COURTS AND LAWYERS CAN DO

Ethical constraints on judges, court staff, and lawyers mandate some separation of the spheres of assistance that can be offered to self-represented litigants. Judges and court staff operate under requirements of neutrality and objectivity, and lawyers operate under requirements of competence and the avoidance of conflicts. But there is no inherent ethical restriction on cooperation between the courts and the legal community in providing services that would meet the needs of self-represented litigants in a more-or-less seamless manner.¹¹ So how can courts and legal service providers address each of the categories described above to improve access to justice for self-represented litigants?

Much of the decision-tree analysis that takes place during diagnosis relies on legal information, rather than legal advice, meaning that either the court or the legal community could ethically provide this information, and many do. A popular approach for many courts is to provide model court forms and instructions for the most common types of cases, such as divorce (with or without children), child support initiation and modification, and small claims. The biggest problem arises in the context of how to help self-represented litigants evaluate their legal options, including the option to proceed without legal representation. Some courts have addressed this dilemma through collaborations with the local legal community to provide consultation services for a nominal fee (e.g., \$25 for a half-hour consultation) on an unbundled basis as part of the courts' assistance programs for self-represented litigants. Self-represented litigants get the advantage of early consultation with a lawyer, and lawyers have an opportunity for future business if the litigant chooses to hire a lawyer to handle some or all of the case.

The Circuit Court for Baltimore County, Maryland, has taken this approach a step further. Part of the lawyer's consultation¹² involves an assessment of case complexity as well as the self-represented litigant's emotional and intellectual ability to represent him or herself, and a formal recommendation about whether to proceed without a lawyer or not. (The vast majority of litigants—well over 90%—are given the green light to proceed pro se.) The Maryland Legal Assistance Network has also developed a technology application that provides a self-assessment tool for would-be self-represented litigants.¹³

Even for cases in which the court drafts its own final orders, self-represented litigants are rarely knowledgeable about how to enforce these judgments in any meaningful way.

11. John Greacen has written most eloquently about how courts can provide legal information to self-represented litigants without transgressing established ethical boundaries. See Greacen, *supra* note 7.

12. Lawyers who participate in this program are hired under a con-

tract with the court and do not receive fees from the litigants.

13. It is located on the web at <http://www.peoples-law.com>. Use the website's search function to locate the "Checklist for Divorce Self-Representation."

[T]he way for courts to address the logistical problems of self-represented litigants is to stop thinking of common mistakes as “operator error” and to begin thinking about how to correct the system errors that frequently cause operators to fail.

The online questionnaire helps litigants determine the advisability of proceeding without a lawyer by focusing on litigants’ personality traits, motivation, organizational skills, knowledge of basic legal concepts, and knowledge of specific issues or problems that add complexity to otherwise routine cases. The litigant’s responses to questions are then evaluated, and the scoring measures indicate the likelihood of success as a self-represented

litigant in terms of ability to navigate the civil justice system (but not in terms of case outcome). For those who score low on the self-assessment test, the website includes links to a variety of public and private legal service providers who offer reduced fee and pro bono services on either an unbundled or full-service representation basis.

Finally, most courts would be reluctant (and rightly so) to make predictions about cases filed by self-represented litigants (e.g., how long before a final decision is made, what will the outcome be). But there is no reason why courts cannot make general information available that could help self-represented litigants gauge such things for themselves (e.g., average filing-to-disposition times for uncontested divorce cases, average number of court appearances). Many courts collect this information routinely for caseload management purposes, and there is no apparent reason that it could not be provided to the public.

Addressing the logistics of self-representation is more challenging, since the actual process of initiating and carrying out litigation in most courts is extremely complex for persons without training or experience in civil procedure. Although the purpose of court procedure is to preserve the rights of litigants and to manage court caseloads efficiently, procedures that were created to address new situations or types of cases often accumulate in ways that are internally inconsistent or that obscure the underlying purpose of those procedures. Take, for example, process requirements concerning who can serve court papers on litigants. In the early days of the U.S. Postal Service, when timely delivery of the mail was less reliable than it is today, most courts required service of process to be performed by law enforcement or professional process servers to ensure that litigants actually received notice of the suit and could testify to that effect if necessary. Since then, of course, postal service has improved dramatically and many courts now explicitly permit service of process by first-class or registered mail. Case

law in some states provides that actual notice is sufficient even if the litigant has not adhered to formal service procedures. All too frequently, however, statutes and court rules retain references to outmoded procedures and as a result, litigants are led to believe that the process involves multiple steps, multiple forms, and sometimes even multiple agencies (e.g., local sheriff and private process server).¹⁴

The first step, then, to reducing the level of logistical complexity involves evaluating existing procedures to identify the steps of the process that cause self-represented litigants the most trouble and to focus on simplifying those steps. Doing so, of course, requires judges and court staff to shift their frame of reference about the cause of problems encountered by self-represented litigants. An example from the glory days of the American railroad helps to illustrate how this frame of reference affects the efficiency of the overall system.¹⁵ In the early days of the American railroad, head-on collisions of locomotives were a common occurrence, ostensibly due to “operator error” by signalmen who failed to alert conductors of oncoming rail traffic on the next segment of track. At some point, however, the railroad companies changed their frame of reference from thinking about these accidents as operator error to thinking about them as system errors. To address the systemic problem, they began laying two sets of railroad tracks side by side, with each set dedicated to trains traveling in a certain direction, thus eliminating the potential for signalman errors. Miraculously, the number of operator errors associated with head-on collisions declined precipitously.

In the context of the civil justice system, the way for courts to address the logistical problems of self-represented litigants is to stop thinking of common mistakes as “operator error” and to begin thinking about how to correct the system errors that frequently cause operators to fail. Take, for example, the common complaint of court staff of having to reschedule hearings due to failure to arrange for service of process on the opposing party, either because self-represented litigants didn’t know that service of process was required or they didn’t understand how to go about doing it. Both Delaware and Virginia addressed this issue by having the court take responsibility for service of process at the time pleadings are filed. Court staff there take all of the information needed to perfect service of process from the filing party, collect the appropriate fee, and provide the information to the appropriate agency. In most Virginia jurisdictions, the local sheriff serves the papers; in Delaware, the court has a contract with a private process server. From the litigant’s perspective, filing the necessary papers is a one-step process—there is no need to contact another agency within the court (or down the street or across town, depending on the location) or to pay another set of fees.

Another common problem that can be addressed through system reform is the large proportion of cases that seem to languish indefinitely because litigants do not know how to move to the next stage of the litigation process after they have filed the initial pleadings. Ultimately, many of these cases are dis-

14. Moreover, many court procedures carry on long after the conditions that led to their establishment have disappeared because the costs involved in removing or reforming obsolete systems or pro-

cedures often exceed available funding, especially at the local level.
15. Thanks to Richard Zorza, who often uses this illustration in educational workshops on self-represented litigation.

missed for failure to prosecute (and are then refiled at some later date). Instead of requiring litigants to take some affirmative step to alert the court that the case can proceed, some courts have made the process self-perpetuating—as soon as the litigant completes one step in the litigation process, the court automatically schedules the next step on the court’s calendar (e.g., registration for parenting classes, mandatory mediation, pretrial conference).¹⁶ A detailed set of instructions about the next procedural event is given to the litigant with information about how to request a change to the schedule and the consequences of failing to adhere to the schedule.

As explained above, assessing the dual strategies of negotiation and preparation for litigation requires some degree of legal judgment, but ultimately must comport with the litigant’s reasonable objectives in pursuing the claim. Although the assessment itself tends to fall more appropriately to the legal community, the court can play a role by informing self-represented litigants that settlement of outstanding disputes is always an option available to them and by making institutional resources (e.g., mediation or arbitration services) available that encourage settlement. For litigants who opt to pursue litigation, a brief pretrial conference with the judge or another court official provides an opportunity to inform litigants about the court’s expectations for trial. Emphasizing the importance of subpoenas for necessary witnesses and bringing all relevant documentation can go a long way to alerting litigants of the importance of pretrial preparation.

The same lessons about using instances of “operator error” to identify system errors apply to the resolution and enforcement stages of litigation. Many cases involving self-represented litigants require fairly routine final judgments that can easily be drafted at the bench using preprinted forms or a standardized template. Doing so immediately at the end of the hearing will relieve litigants’ discomfort as well as the potential for delay and inaccuracy associated with forcing litigants to draft final orders. In addition to providing the written judgment, however, the court should explain the terms of the judgment and advise self-represented litigants of the procedure to challenge the judgment (e.g., appeals) or to modify the order if appropriate in the future (e.g., child support). Doing so in person at the time of the hearing further emphasizes the finality of the order and also provides an opportunity to clarify misunderstandings about specific terms.

Because satisfaction of civil judgments relies heavily on the cooperation of the judgment-debtor, many courts are reluctant to offer self-represented litigants assistance with enforcement. A Colorado magistrate, however, has found a way to provide self-represented litigants with information that can later be used to assess the likelihood of collecting on a judgment and the options for doing so. At the end of the hearing, he provides the litigants with his written judgment and advises the judgment-debtor of any procedural remedies to challenge the judgment. But before the judgment-debtor is permitted to leave the courtroom, the magistrate requires him or her to complete a brief set

of interrogatories including place of employment and the location and account numbers of any existing assets (e.g., bank accounts), which is then given to the judgment-creditor. If the parties are unable to come to some agreement about how the debt will be satisfied, the judgment-creditor already

has in his or her possession sufficient information to decide whether to pursue legal enforcement of the judgment as well as the best way to do so (i.e., garnishment, lien, or seizure of assets). If the judgment-debtor has no job and no assets, for example, the judgment-creditor is saved the time and expense of a probably futile future attempt to satisfy the judgment.

Some judges and lawyers, upon hearing of this practice, question the propriety of having a magistrate provide assistance to the judgment-creditor in collecting on the debt. But the judges in that court agreed with the magistrate’s explanation that the practice does not violate judicial ethics of neutrality because, as soon as he renders the final judgment, he is no longer neutral with respect to the parties—he has just ruled that one party wins and the other party loses. Moreover, the magistrate also found the practice to be a significant benefit to the court in that the amount of post-judgment proceedings to locate and attach the assets of judgment-debtors declined dramatically. Again, we see a court that has simplified its process—removing the necessity for judgment-creditors to seek substantial court oversight in the collection of debts—in response to the needs of self-represented litigants. Further, this change to meet the needs of self-represented litigants has had a secondary effect of making the court system itself more efficient.

[T]his change to meet the needs of self-represented litigants has had a secondary effect of making the court system itself more efficient.

COLLABORATION FOR SEAMLESS ACCESS TO JUSTICE

This article has focused on three distinct issues related to self-represented litigation. The first is that the demand for affordable legal services has vastly outpaced the available supply. Over two decades of efforts to increase access to affordable legal services has not appreciably improved the situation and is highly unlikely to do so in the foreseeable future. It should be no surprise, therefore, that increasing numbers of people choose self-representation as the only feasible option for securing necessary legal rights and remedies. In recognition of the reality of litigants’ needs, the courts and the legal community have slowly shifted from insistence on full-representation for every litigant as a fundamental requirement of equal justice to a more pragmatic approach, offering information and limited counsel for those litigants who are capable of managing their own cases and reserving full-representation for those with more complex cases or fewer personal resources.

The effect of this shift has been increased awareness of the

16. In addition to fewer unresolved cases on the docket, many courts find that their calendar management improves significantly as well.

distinction between legal information and legal advice that is inherent in the specific tasks that lawyers traditionally perform for clients under the general rubric of the "practice of law." Much of the value added by a lawyer's services is the efficiency derived from the lawyer's existing knowledge of legal information about available options and how to pursue them. With access to legal information, many laypersons are capable of performing these tasks for themselves, albeit less efficiently. Certainly one implication of this awareness has been a dramatic shift in lawyer-client relationships as clients become more informed and more insistent on taking an active role in the management of their cases. Indeed, a large body of academic literature has developed that applauds the shift away from a paternalistic relationship on the lawyer's part to one of greater respect for client autonomy. It is possible that many who support the evolution of a more coequal lawyer-client relationship failed to appreciate the implications that it might have in terms of the mechanics of how lawyers practice law, especially the increased demand for unbundled legal services, but it is clear that this model of legal service delivery is becoming more popular in many parts of the country.

There is one aspect of the needs of self-represented litigants that can only be addressed by the courts, and that is the complexity of the judicial system itself. We have seen, for example, that much of the complexity of the judicial system has been allowed to perpetuate because lawyers, who had already assimilated information about the underlying basis for court procedure, could navigate the system more deftly and sometimes even use that information to gain a strategic advantage in litigation. The influx of large numbers of self-represented litigants who are unfamiliar with court procedures, however, places unmistakable burdens not only on the litigants, but also on the courts themselves. Although many judges and court staff express resentment at having to "dumb down" the system to prevent "operator errors" by self-represented litigants, doing so clearly benefits all litigants regardless of their representation status as well as the courts themselves in terms of increased efficiency.

The remaining dilemma, then, is how best to provide self-represented litigants with access to accurate legal information, including referrals to sources of legal advice in appropriate circumstances. As a practical matter, who actually provides legal information is a relatively minor consideration, although the experience in many jurisdictions is that a collaborative approach by the courts and the legal community is more effective

than either one acting alone. In terms of convenience and a logical starting place for litigants, however, most of these efforts should be housed within the courts or at least in fairly close proximity, even if the legal community is the primary source of information. This model of collaboration has worked well in the context of other types of service provision, such as court-annex mediation or other alternative dispute resolution programs, so there is little reason to think that it would not work equally well in terms of assistance programs for self-represented litigants.

From the perspective of the litigant, such arrangements provide relatively seamless access to justice, and do so with greater efficiency and less awkwardness in preserving the legitimate separation imposed by ethical constraints for both the courts and the legal community. Undoubtedly, the transition from the traditional framework of full-service legal representation to new models of access to legal information and legal advice has been unsettling for the courts and for the legal community. In the long run, however, these models provide better access to justice for far greater numbers of people than was previously possible and promote better accountability of the courts and the legal community to the people they serve.



Paula L. Hannaford-Agor is a staff attorney and principal court research consultant with the National Center for State Courts. Her areas of expertise include access to justice for pro se litigants; jury system management and trial procedure; management of complex litigation; legal and judicial ethics and discipline; state-federal jurisdiction; and probate and guardianship procedure. Hannaford has directed several National Center projects on access to justice for pro se litigants. These include research on court procedures to remove barriers to pro se litigants, a series of Internet workshops for judges, court staff, and others on successful pro se assistance programs, and the development of reliable measurement criteria for the impacts of pro se litigation on court resources, outcomes, and litigant satisfaction. She received her J.D. degree from William & Mary Law School, and also has an M.P.P. degree from the Thomas Jefferson Program in Public Policy at the College of William and Mary.

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

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Savannah, Georgia
\$135 single or double
(joint meeting with NACM)

2004 Annual Conference

Oct. 24-29, 2004
Grand Hyatt Hotel
San Francisco, California

2005 Annual Conference

Sept. 18-23, 2005
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**Position Paper
on
Self-Represented Litigation**

Conference of State Court Administrators

August 2000

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The Conference of State Court Administrators (COSCA) was organized in 1953 and is composed of the principal court administrative officer in each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands.

Position Paper on Self-Represented Litigation

Note: A position paper was prepared by the Policy and Liaison Committee of the Conference of State Court Administrators (COSCA) for presentation at that organization's Business Meeting on August 3, 2000, in Rapid City, South Dakota. The purpose of the paper was to generate discussion and debate, preparatory to the membership being asked to take a policy position on "self-represented litigation". The membership amended the paper and the committee's recommendations. The amended position paper and recommendations, as approved by the membership, follow.

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I. Introduction and Issue Development

Self-represented litigants are by no means a new phenomenon in the courts. However, the recent surge in self-represented litigation is unprecedented and shows no signs of abating. While no single explanation can account for this national trend, the drastic reduction in funding for civil legal services has resulted in significantly fewer attorneys serving low-income individuals and is a significant contributing factor. For those with lower incomes, the impact of escalating costs of litigation can be presumed to encourage self-representation. In addition, the proliferation of information available through self-help books and on the Internet has fostered the perception that the legal process can easily be navigated without a lawyer. The impact of increasing self-representation on the courts--on court management and the administration of justice--cannot be overstated. For court managers, it manifests itself in additional demands on already limited employee time and resources, and less efficient case management. For judges, the increase represents more protracted and delayed proceedings, in addition to the fundamental dilemma of how to treat all parties fairly where one or more may be untrained in the law and court procedure. The potential impact on the public is diminished confidence in the courts, as self-represented litigants face real and perceived barriers in the pursuit of justice. The challenge facing the courts today is how to deal with this growing crisis in order to best serve the public, ensure equal access to justice for all citizens, provide for efficient case management, and maintain the integrity of the judicial process. Recognizing the significant impact self-represented litigants have on all court systems, COSCA and CCJ should assume a leadership role in both acknowledging the trend and the pursuing information to guide policymakers.

Most states have begun to recognize the magnitude of the self-represented population and its impact on their courts. The threshold question in determining how to respond is whether the courts have an obligation to address the needs of self-represented litigants at all. The answer should be yes. Not only do litigants have a constitutional right to represent themselves, but also the judicial system has the affirmative duty to ensure that all citizens have meaningful access to the courts. A court system that declines to respond to or makes access difficult for litigants without lawyers violates this duty and effectively renders the right to represent oneself meaningless, creating a two-tier system of justice. Moreover, given that many litigants appear without counsel out of necessity rather than choice--and that many do so in times of crisis, where home or family is at stake--fundamental principles of fairness and due process mandate that courts ensure meaningful access for redress.¹ And, as a purely practical matter, ignoring the trend only perpetuates the inefficiencies it creates in the system.

¹ For a complete discussion, see Jona Goldschmidt, Barry Mahoney, Harvey Solomon, & Joan Green, *Meeting the Challenge of Pro Se Litigation* 19-24 (American Judicature Society 1998).

It is in the courts' self-interest to acknowledge the issues and formulate a response that not only serves the litigants but also benefits court operations.

Acknowledging the obligation and devising appropriate responses to the increasing number of self-represented litigants is critical to the public's expectations of the judiciary as a meaningful third branch of government and to the efficient operations of the courts. A planned response ensures a more just and efficient process for both the litigant and the courts. An informed litigant, with more realistic expectations, can better navigate the court process on a more level playing field; nonjudicial court personnel can assist the self-represented in a limited yet appropriate fashion; judges will see better prepared and informed litigants; and cases will be processed more quickly. This approach also promotes the litigants'--and thereby the public's--trust and confidence in the judicial process.

This course of action is not without risk. Some stakeholders, including members of the bar, may be opposed to providing systematic assistance to self-represented litigants. However, by including all interested parties in the development of any program, policymakers can address opposition in a constructive manner. Another risk is that courts may be viewed as less neutral, deviating from their traditional role of impartial adjudicator of controversies by providing "assistance" to unrepresented parties. When a litigant is self-represented, the most critical and difficult issue is how to preserve the impartiality of the judge, both in terms of reality and perception. What is the judge's role where a self-represented litigant is involved? Can the judge "assist" the self-represented litigant without impacting on the court's ethical obligation to be neutral and impartial? Does the Code of Judicial Conduct adequately address the ethical considerations faced by judges presiding in cases with self-represented litigants? While courts must be mindful of these issues and strive to preserve their neutrality, they must also be cognizant of their obligation to ensure equal access to justice.

An often articulated consequence of providing assistance or resources is that people will be encouraged to represent themselves rather than retain an attorney. The reality, however, is that the self-represented population is a permanent fixture in our justice system; it will not go away simply because the courts decline to devise appropriate responses or provide assistance. Indeed, by making more information available about exactly what is entailed in pursuing an action--by providing more, rather than less, information--prospective litigants who have the ability to do so may be persuaded that they should engage an attorney. For courts philosophically or economically prompted to limit self-represented litigation, their response could focus not only on encouraging litigants to use the services of attorneys but also on playing an active leadership role to increase the availability of free or moderate-fee legal services. This expansion can be sought through the promotion of pro bono services, unbundled legal services and increased funding for civil legal services.

Determining an appropriate response for a particular state or court may vary according to the magnitude of the self-represented population, its impact on a particular court or court system, and the resources available. Court systems should begin to assess self-represented litigation in their state through the collection and analysis of data. Only with this information can appropriate responses be devised that best meet the needs of the litigants and the courts, and have the support of the bar. A significant factor in formulating a response will be identifying the kinds of cases most often brought by self-represented litigants. While some cases by nature lend themselves to self-representation (e.g., in small claims court, where only a small amount of money is at issue), others involve litigants without financial resources who must turn to the courts because their safety, home, or family status is in jeopardy. While the ultimate goal may be to provide information about all court procedures, and courts generally, these areas should receive priority attention in terms of responding to self-represented litigants. The following paragraphs briefly set forth the range of possible court responses--from the minimum to "best practices"--to the increasing numbers of self-represented litigants at the various stages of the litigation process.

At the initial stage of litigation, resources that inform the litigant about the particular court and its procedures, as well as the litigation process, are essential. It is also critical at this stage that information is available to prospective litigants regarding alternative, perhaps more appropriate, means to resolve their dispute or problem. The obvious example is providing information regarding the availability through the court or another entity of mediation or other forms of alternative dispute resolution. Other examples include information regarding the availability of consumer complaint agencies (disputes with merchants), landlord tenant agencies (disputes regarding housing conditions, payment of rent), or counseling services (child custody or visitation matters). These resources can take many forms; at a minimum they should include brochures and information sheets (including frequently-asked questions and a glossary of terms), user-friendly court forms with instructions, and appropriate signage throughout the courthouse. Courts should ensure that the public has access to a law library or at least to legal reference materials, particularly state statutes and rules. Automated telephone information and response systems are another means to provide a significant amount of generic information.

In conjunction with the provision of tangible resources, courts must have knowledgeable, trained court clerks who can respond to the inevitable questions from self-represented litigants. As the court clerks are generally the first point of contact for self-represented litigants, their interactions can greatly influence the course the self-represented litigant will pursue. Accordingly, at a minimum, clerks should be formally trained on how to interact with self-represented litigants, including the extent to which they can provide legal information. All guidelines and policies should be reduced to written form and be readily available to court staff. Additionally, court systems should affirmatively seek to remove the specter of unauthorized practice of law as a disincentive to court staff providing appropriate assistance.

Beyond these minimal measures, the “best practice” would be to re-evaluate the traditional role of court staff. Currently, court clerks are the primary in-person resource provided to self-represented litigants. While the clerical role will remain a core mission, courts need to consider whether new positions should be created to meet the changing needs of court users. For instance, self-help or resources centers, in the courts and/or in the community, whose primary purpose is to provide information about the court and court procedures, could be created. The work of the staff may be complemented by the establishment of lawyer referral programs, legal clinics and pro bono representation projects. Information can be offered in a number of formats, including technology-based assistance and video presentations. Developing these centers allows the courts to steer the self-represented litigant to a specifically-designed, user-friendly information center better equipped to address the needs of self-represented litigants than a clerk’s office.

Once in the courtroom, self-represented litigants confront further barriers as they seek to present their issues to the judge if they are unfamiliar with rules of procedure and evidence: they are even further disadvantaged when their adversary is represented by counsel. Again, at a minimum, courts should provide written information on hearing and trial procedures, including motion practice. Videos and technology-based assistance, like interactive programs, are alternative resources. These measures can go a long way in reducing frustration in the courtroom and in making courtroom proceedings more productive. A best practice of providing non-traditional court staff, such as case managers, should be pursued. Such staff can provide additional information to self-represented litigants about what is necessary to move the case through the court while at the same time helping efficiently move cases through the system.

The most critical and difficult issue, as previously mentioned, is the judge’s role when litigants appear without counsel. To assist judges, at a minimum courts should develop judicial training programs about the issues concerning self-represented litigants, including the judiciary’s ethical obligations. Court systems should recognize that the ethical concerns can actually be ameliorated somewhat by the effective implementation of self-represented litigant assistance. Litigants who are better prepared for what will transpire in the courtroom will require less intervention or assistance on the part of the court. Discretionary guidelines and protocols for considering the relaxation of rules of procedure and evidence to remove obstacles to a self-represented litigant from getting a fair hearing should be developed. Similarly, attention should be focused on increasing meaningful alternative dispute resolution programs that can divert cases from the courtroom to more informal yet equally effective settings. As a “best practice,” court systems should propose legislation and/or changes to the rules of court that would allow for simplified procedures in specific case types that routinely involve self-represented litigants.

Often overlooked, the enforcement stage is critical to self-represented litigants. In many respects, this stage of the litigation is the most frustrating--having prevailed in court, the tangible result is still elusive. At a minimum, courts need to provide information about the enforcement of judgments and the court procedures that are available for this purpose, including court forms and instructions. This information can be made available in clerk's offices, in the self-help or resource centers or in the courtrooms and can take many formats. As a "best practice," the courts could consider adopting simplified enforcement procedures for self-represented litigants. For example, in the child support area, a court can create a process that would automatically schedule an expedited hearing upon notice of delinquent child support payments.

II. Recommendations

1. COSCA and/or CCJ should consider an affirmative response to needs of the self-represented litigant as a means for further building trust and confidence in the courts. Specifically, COSCA and/or CCJ should endorse having state court systems develop information programs which will allow litigants to make more informed decisions regarding self-representation, and for those who elect to proceed self represented, an assistance program providing at least the minimum features discussed in this position paper to be defined by the individual state.
2. COSCA should assert its leadership in this area by raising consciousness and understanding both within the courts and the public generally. Specifically, COSCA should consider adding self-represented/pro se data elements to the annual survey and publication of *Examining the Work of the Courts*. This might include making self-representation a highlighted topic for a future edition, formulating uniform definitions to be used in the survey, and encouraging states to incorporate such data elements into their data collection systems. Yet another avenue for increasing understanding is encouraging the National Center for State Courts to seek grant funding necessary for conducting empirical research into self-representation.
3. COSCA and/or CCJ should devote time on the agenda of the upcoming annual or midyear conference to exploring this issue in depth. In addition, Chief Justices and State Court Administrators should be asked to encourage the education arm within their court systems to prominently feature a program on self-representation in their training programs for judges and staff; preferably, in a format that will lead to the formulation of a plan on how to most effectively respond to the self-represented.

4. COSCA should request that the National Center for State Courts use the Best Practices Institute as a means for highlighting and replicating particularly effective programs aimed at the self-represented and as a vehicle for providing information to the courts on how to effectively utilize the information produced by SJI-funded projects involving the self-represented.
5. COSCA should support the National Center for State Courts, State Justice Institute sponsored initiative to experiment with re-engineering the dispute resolution process for certain types of actions, so as to address this issue in the context for changing process, procedure, and rules for all parties, represented or not. COSCA should support an examination and evaluation of the traditional adversarial process and encourage experimentation with alternate models. In addition, alternative dispute resolution programs should be recognized as a more “friendly” forum for the self-represented and the availability of such programs should be promoted with the self-represented.
6. COSCA should sponsor an examination into the most effective use of plain language forms. Partnering with other legal and court-related organizations, develop model criteria or standards, which define plain language, forms and encourage their legitimization by rule, much as the 8-1/2 x 11 inch paper standard was adopted in many states. In addition, state Supreme Courts and Judicial Councils should be encouraged to use their rule-making authority to advance the use of standard forms for common procedures.
7. COSCA should encourage its membership to use the Internet as a primary vehicle for disseminating information to the self-represented. The Internet can also be a means by which the self-represented can receive direct online assistance in form preparation, as well as a link to other services, such as Bar referral programs. In addition, it can serve as an effective tool for individual states to learn what services are being provided in other jurisdictions for the purpose of replication.
8. It should be recognized that many of the self-represented are low income. COSCA and CCJ should look for opportunities to assert its leadership in advocating for increased funding for civil legal services, promoting pro bono services, and encouraging the consideration for ways to reduce lawyer costs, such as unbundled legal services.
9. COSCA should establish partnerships with the American Bar Association and the Legal Services Corporation to encourage the legal community at the national and state level to support these efforts and to identify areas where the legal community should provide direct leadership.

10. COSCA should identify strategies and protocols to assist trial court judges in managing cases and in conducting proceedings including self-represented litigants with special attention to cases in which only one of the parties is represented.

11. In that the actions above would be substantially enhanced by the support, involvement and leadership of CCJ, it is recommended that COSCA seek the involvement of CCJ in establishing and co-chairing a task force with representatives from the AJA, NACM, and ABA to develop a proposed action plan to address the above recommendations for consideration at the 2001 annual meeting of CCJ/COSCA.