

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American Judges
Association

American Judges Association

January 2003

Court Review: Volume 39, Issue 4 - Helping the Pro Se Litigant: A Changing Landscape

Paula Hannaford-Agor
National Center for State Courts

Follow this and additional works at: <http://digitalcommons.unl.edu/ajacourtreview>



Part of the [Jurisprudence Commons](#)

Hannaford-Agor, Paula , "Court Review: Volume 39, Issue 4 - Helping the Pro Se Litigant: A Changing Landscape" (2003). *Court Review: The Journal of the American Judges Association*. 120.
<http://digitalcommons.unl.edu/ajacourtreview/120>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

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

The research on which this article was based 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. The points of view expressed are those of the author and do not necessarily represent the official positions or policies of the State Justice Institute, the Open Society Institute, the Center for Access to the Courts Through Technology, the Illinois Institute of Technology, or the National Center for State Courts. For additional information about the project, please contact Paula L. Hannaford-Agor, National

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

[T]he majority of self-represented litigants had legitimate legal problems that could only be resolved through judicial intervention, but could not obtain affordable legal assistance.

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).

The rise in consumer demand for unbundled legal services has helped to draw a distinction between what are quintessentially legal services . . . and those tangential services that lawyers have traditionally performed

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.

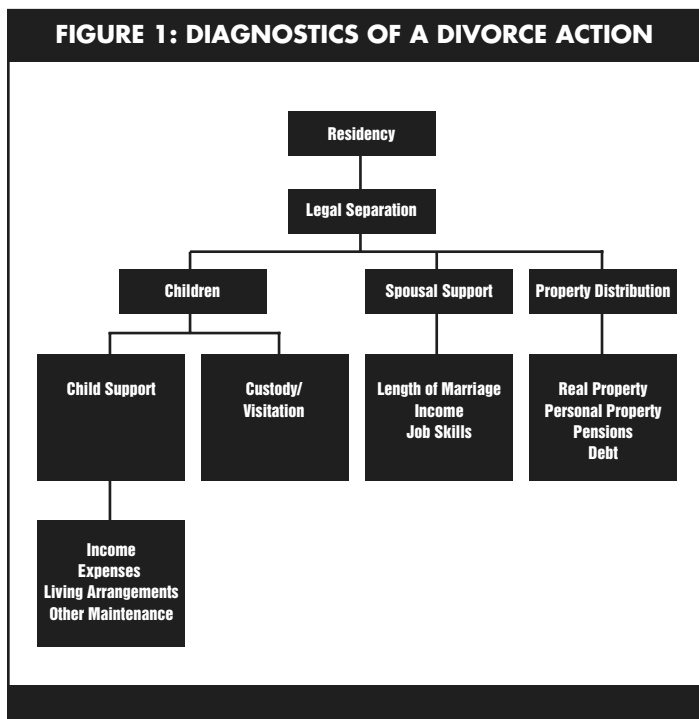
8. The project was funded by grants from the State Justice Institute (SJI-00-N-248), the Open Society Institute (No. 20001562), the Center for Access to the Courts Through Technology, and the Illinois Institute of Technology.

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

Few self-represented litigants realize that the vast majority of cases are disposed of through a bilateral agreement of the parties (settlement) . . . , not by a trial on the merits.

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

2004 Midyear Meeting

Jan. 30-Feb. 3, 2004
Hyatt Regency Hotel
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
Hotel Captain Cook
Anchorage, Alaska