

CHALLENGE TO JUSTICE

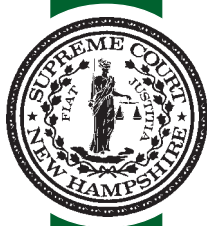
*A Report on Self-Represented Litigants
in New Hampshire Courts*



Findings and Recommendations of the
New Hampshire Supreme Court Task Force on Self-Representation

JANUARY 2004

STATE OF NEW HAMPSHIRE JUDICIAL BRANCH



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STATE OF NEW HAMPSHIRE JUDICIAL BRANCH

STATE OF NEW HAMPSHIRE
SUPREME COURT

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To Governor Benson, Senate President Eaton, House Speaker Chandler, members of the legislature and the legal community:

Every day, hundreds of New Hampshire citizens appear in court without lawyers, many because they cannot afford one, others because they want to represent themselves. Whatever the reason, the reality is that most self-represented litigants, despite their best intentions and commitment, are unable to handle their own cases.

The Supreme Court "Task Force on Self-Representation," of which I was pleased to serve as chairman, recently completed an extensive study of this issue. Our findings and recommendations are included in this report, which we have submitted to the Supreme Court and to its newly established "Committee on Justice System Needs and Priorities."

There is no doubt that pro se litigants make mistakes that result in the loss of their own important legal rights. Their need for guidance and their inexperience with the rules and formalities of the justice system inevitably slows down the operation of the courts, jeopardizing the rights of others who expect efficient resolution of their cases. Part I, Article 14 of the New Hampshire constitution entitles all citizens the right to seek legal remedies and it guarantees that access to the court system will be free, thorough and without delay. Unfortunately, this promise is often unfulfilled for citizens who decide to represent themselves.

The Task Force has concluded that widespread self-representation is here to stay and that innovative changes are needed to ensure that pro se litigants are treated fairly and equally in New Hampshire courts. We urge speedy implementation of our recommendations for the benefit of all New Hampshire citizens.

A handwritten signature in black ink, appearing to read "James E. Duggan".

James E. Duggan
Associate Justice

January 2004

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The work of the Task Force on Self-Representation could not have been completed without the help of many individuals whose skills and insights contributed to our final report. Staff Attorney Anne Z. Nuttelman at the New Hampshire Supreme Court helped assemble and edit sections of the report prepared by our subcommittees. Gary Fowler and Bonnie Cook from the staff at the Administrative Office of the Courts worked on developing the questionnaires and focus groups that provided invaluable, first-hand information from self-represented litigants around our state. The court public information officer, Laura Kiernan, consulted with us on the editing and presentation of our findings and helped us produce a report to be read not just by judges, lawyers and court staff, but also by citizens who are seeking justice, on their own.

Grafton County Superior Court Clerk Robert B. Muh, Dover District Court Clerk Joanne H. Sullivan, Manchester District Court Clerk Paula J. Hurley and the staff at the Legislative Office Building in Concord coordinated with us to host the citizen focus groups. Attorney Connie Boyles Lane Esq. led the discussions at all four locations and her skill as a facilitator produced observations and ideas from pro se litigants that became a vital part of our report. We are very grateful for financial support from the State Justice Institute, which so often assists projects in courts around the country. Our thanks also, of course, to the Supreme Court, for its support of our effort, and to Donald D. Goodnow, the director of the Administrative Office of the Courts, for his ongoing guidance.

Finally, we want to thank the self-represented litigants who answered our questionnaires and participated in our focus groups. This is their report.

The Supreme Court Task Force on Self-Representation

CHALLENGE TO JUSTICE

Introduction

In recent years, New Hampshire courts have experienced a dramatic increase in the number of citizens who choose to represent themselves. This population of self-represented or pro se litigants represents a cross-section of our community: a mother trying to collect child support, tenants upset with landlords, neighbors disputing a property line, a contractor with an unpaid bill, couples tangled in divorce, a family settling the estate of a loved one. They come into *their* court, on their own, with a conflict or change in their lives, and they expect a resolution. That is their constitutional right.

Access to justice is an abiding principle of our system of justice and the doors of our courthouses are open to everyone, whether represented by a lawyer or not. It follows that the obligation of the court system is to see to it that justice is as fair and efficient as it can be for those who arrive on their own. As the number of these pro se litigants continues to grow, and the strain on the court system increases, meeting that constitutional guarantee of *justice for all* will require changes, some of which we have proposed here.

Identifying the Issues

Our intent is not to decrease the number of persons who come to our courthouses without a lawyer, or to erect barriers that discourage them. We do believe it is preferable that litigants have the assistance of a lawyer, and we strongly recommend increased resources for low-cost legal assistance. At the same time, we recognize that pro se litigants are a permanent and growing part of our justice system and we have an obligation to determine what level of assistance we can provide to them. By providing help, we may be able to reduce the number of times these litigants must come to court and thus reduce the stress on the court system.

Self-represented litigants are either unwilling or unable to pay a lawyer. A sample of self-represented litigants in New Hampshire showed that most of them were in court on their own because they could not afford to hire or continue to pay a lawyer. In today's "self-help" society, many people believe they can handle simple legal matters themselves. More often than not, however, it quickly becomes clear that these pro se litigants lack the knowledge and skill to handle their own case and that they need significant assistance from the courts. The courts' resources cannot keep pace with the increasing need to manage individual cases brought by pro se litigants. As a result, New Hampshire courts today are overwhelmed by self-represented litigants and, with existing resources already under pressure, the entire case processing system is only further bogged down. Meanwhile, the needs of self-represented litigants are unmet.

What the Facts Show

Case statistics, and day-to-day experience in our courthouses, confirm the growing impact on the system. One party is pro se in 85% of all civil cases in the district court and 48% of all civil cases in the superior court. In probate court, both sides are unrepresented by lawyers in 38% of the cases. In superior court domestic relations cases, almost 70% of cases have one pro se party, while in district court domestic violence cases 97% of the cases have one pro se party.

The growth in self-representation, and the shortage of resources to deal with this new reality, is a serious issue not just for New Hampshire, of course, but for court systems nationwide. In 1999, at a National Conference on Pro Se Litigation, 95% of the participating courts, including New Hampshire, reported an increase in the number of pro se litigants.

The impact of this dramatic increase in self-representation has been profound. Today's legal system is structured for lawyers. Both the system's complex procedures and the law assume that qualified lawyers will represent both sides of a dispute. This assumption no longer holds true.

The brunt of this change in circumstances is felt by court staff and judges. Court staff literally spend hundreds of hours responding to inquiries from pro se litigants. Judges must explain fundamental procedures to the litigants. Both judges and court staff are often put in the difficult position of assisting a self-represented litigant without impermissibly giving legal advice.

The Work of the Task Force

In October 2001, the New Hampshire Supreme Court created a “Task Force on Self-Representation” to examine the phenomenon of the burgeoning number of self-represented litigants, identify the problems self-represented parties experience in accessing the court, address the difficulties self-represented parties present to courts, attorneys, and represented parties, and make recommendations to the court. The “Pro Se” Task Force set out to study possible approaches, including those implemented by other States that address this challenge.

To accomplish the goals of the Task Force, members were chosen who represent a cross-section of the legal system most affected by the increase in pro se litigation including judges, clerks, administrators, and case managers from all levels of courts. The Task Force also included the director of Legal Services for the New Hampshire Bar Association, a professor from Franklin Pierce Law Center, legal services attorneys and private attorneys.

Reaching out to the Community

The Task Force collected information directly from pro se litigants in New Hampshire through questionnaires that were distributed in the courts. The Task Force also reviewed materials from federal and other state courts, as well as materials from the American Judicature Society and the National Center for State Courts. The Task Force collected basic data concerning the number of self-represented parties in New Hampshire by court and case type.

The Task Force also held focus group sessions for pro se litigants in Dover, Manchester, Concord and North Haverhill to learn first-hand about their experiences. At these

sessions, pro se litigants expressed their frustration with the legal system, distrust of lawyers and judges, appreciation for assistance from court staff, and, in some cases, their unrealistic expectations of the legal system. Some pro se litigants, particularly those who are frequently involved in litigation, expressed a desire for easier access to information through computers. The Task Force would like to express its thanks to Connie Boyles Lane Esq. who conducted the focus group discussions and prepared a report, and to the State Justice Institute, which provided grant support for this important aspect of our work.

According to the Task Force survey, people choose to represent themselves mainly because they cannot afford a lawyer or believe that they do not need one. Studies from other States have identified other important factors that account for the huge jump in the number of pro se litigants, including a decrease in funding for legal services to low-income people, the impact of television courtroom shows, dissatisfaction with lawyers and an expectation in today's consumer-oriented society that when a "customer" needs something from the court system, they will receive clear direction about what to do, and how to do it on their own.

Taking Action

Many jurisdictions have responded to the rising tide of pro se litigants by devoting new resources to the judicial system. States have put in place specially trained personnel to operate resource desks and have designed web pages just for use by pro se litigants. Other less costly measures including guidelines for judges and court staff have been developed.

Many of these ideas have yet to be fully evaluated for their effectiveness, because they are so new. But experienced observers in judicial administration all agree that without innovative approaches, courts will only be further weighed down as the pro se population continues to grow.

The New Hampshire Pro Se Task Force selected seven categories of possible approaches to consider. A sub-committee was assigned to study and assess each of the selected approaches and report back to the full task force.

This report is the result of the work of the Task Force. For each of the approaches studied, the Task Force has a recommendation and a suggested plan for implementing the recommendation. The overall purpose of the recommendations is to improve access to justice for pro se litigants. This purpose is served by two basic principles – increasing the availability of legal assistance through more lawyers and limited representation, and making the system more user-friendly through case managers, technology, alternative dispute resolution and simplified rules.

SUMMARY

Findings and Recommendations

1. EXPANDED LEGAL SERVICES. Because low-income clients lack access to attorneys and are most likely to represent themselves, legal services should be expanded significantly. *(See page 8)*

2. LIMITED REPRESENTATION. To increase the availability of lawyers, current professional conduct rules should be revised to clearly allow lawyers to engage in limited representation of clients. *(See page 10)*

3. CASE MANAGERS. Every major court should have one or more well trained case managers to evaluate pro se cases entering the system for possible referral to mediation, the private bar, pro bono or legal services providers and to meet with pro se litigants before their court hearing to prepare the parties and the case for the court. *(See page 13)*

4. PUBLIC ACCESS TO INFORMATION. The Judicial Branch and State Office of Information Technology should launch a “Computer in Every Courthouse” project to establish public access computer workstations. *(See page 16)*

An online “Self-Help Center” should be established on the Judicial Branch Website to provide pro se litigants with forms, instructions and comprehensive, user-friendly information about court procedures and available legal services.

5. ALTERNATIVE DISPUTE RESOLUTION. The courts should designate a state-wide coordinator to oversee alternative dispute resolution programs at all levels of the court system. *(See page 19)*

6. PROTOCOLS FOR JUDGES AND STAFF. The courts should develop and promulgate written protocols for judges and staff that explain their duties and limitations in managing pro se litigation. *(See page 22)*

7. SIMPLIFIED RULES. Court rules, forms and procedure should be simplified, where possible, to accommodate self-represented litigants. *(See page 26)*

CONCLUSION. *(See page 27)*

1. Legal Services should be expanded significantly for low-income litigants.

The Task Force endorses increased public and private funding for legal services so that low-income persons will have better access to attorneys. Legal representation will enable low-income persons to protect their rights more fully and will ease the burden on the courts from pro se litigation.

The Need

Over the past two decades, the population of New Hampshire has grown and the number of lawyers has doubled, but federal funding for legal services has declined. When twenty years of increases in the cost of living are taken into account, the effect of decreased funding is dramatic.

Five organizations currently provide legal services in civil cases to low-income people in New Hampshire: New Hampshire Legal Assistance (NHLA), the Legal Advice & Referral Center (LARC), the New Hampshire Bar Association's Pro Bono Program (Pro Bono), the Disabilities Rights Center (DRC), and the Civil Practice Clinic of the Franklin Pierce Law Center. The number of staff attorneys in these programs combined is less than forty or less than 1% of the practicing attorneys in New Hampshire. Pro Bono relies upon a panel of 1,000 volunteer private attorneys. Law students staff the Franklin Pierce Law Center clinic, principally during the academic year.

Although these programs provide services to many clients each year, they are forced to turn away countless more or are limited to providing them with advice over the telephone or through a pamphlet. While no New Hampshire-specific survey has been done to gauge the unmet need for civil legal services, an ABA national study and surveys in other States have found that legal services and pro bono programs generally meet only from 15% to 25% of the overall need.

Some Examples

Experience in our courtrooms and recent statistics suggest that a large number of tenants, many of whom are likely to be low-income renters, have no attorney when they come to court. In New Hampshire, in 2001, approximately 7,000 landlord-tenant cases were filed in district courts, most involving evictions. Nearly 90% of the tenants in these cases had no lawyer and received no legal advice or information from NHLA.

Legal services programs in New Hampshire and elsewhere have tracked the outcomes of landlord-tenant cases in which clients received advice or a pamphlet but did not have a lawyer represent them in court or negotiate on their behalf. They found that the tenants are often unsuccessful in asserting defenses, presenting evidence, or making legal arguments that might have changed the outcome if a lawyer had represented them.

Having an attorney can be particularly important in cases involving domestic violence. A recent national study shows that the only public service that has reduced domestic abuse in the long term is legal aid. While hotlines, shelters, emergency transportation and counseling programs may help battered women in the short-term, this study found that legal representation helps battered women in the long-term to leave violent relationships permanently. Attorneys help battered women to obtain and enforce protective orders, retain custody of their children, and obtain child support and alimony. According to the study, women living in counties with legal assistance programs that help battered women are significantly less likely to suffer abuse.

Finding the Resources

To increase their capacity to serve low-income New Hampshire residents, NHLA, LARC, and Pro Bono have launched an ambitious joint fundraising campaign with the assistance of the New Hampshire Bar Foundation. NHLA also intends to renew its efforts to expand the State appropriation it has received for the past five years, and will consider seeking an appropriation for LARC. NHLA is also considering modifying its income guidelines to make its services available to individuals who are not income-eligible, but have urgent legal problems and no realistic means to pay for a lawyer. The Task Force vigorously supports these initiatives.

2. Professional conduct rules should be revised to clearly allow lawyers to provide limited representation to clients to reduce costs.

The Task Force recommends that a working group be appointed to draft changes in professional conduct rules to encourage lawyers to provide limited legal services to clients. The New Hampshire Bar Association Ethics Committee has provided some informal guidance on the issue and recognized the benefit of limited representation for poor and disadvantaged clients. The New Hampshire Bar Association has considered advocating limited representation to help those who cannot otherwise afford legal representation.

Many New Hampshire lawyers, however, are unaware of the acceptability of the relatively new concept of “*unbundled*” legal services, in which a lawyer carries out a designated task for the client, who will otherwise handle the case pro se. Limited representation can take many forms. Traditionally, attorneys have provided limited representation through legal advice hotlines or legal clinics for self-represented parties. In recent years, however, private lawyers have offered limited representation to clients as a way of expanding the availability of legal services to people of limited financial means.

Why Change?

Access to limited legal services potentially benefits clients, courts and the bar. Clients benefit because as legal services become more affordable, their access to the justice system increases. For those clients who cannot afford to hire a lawyer to provide full representation, limited representation is better than no representation at all.

For clients with financial resources, access to limited legal services allows them to choose the tasks they want to complete on their own, and those for which they would like to hire a lawyer. The California attorney who coined the phrase “unbundled

legal services,” Forrest S. Mosten, believes that this is empowering to clients. “They feel that they can control their own destiny with the comfort of knowing that the lawyer can be brought in for future full-service representation if the client so chooses.” Forrest S. Mosten, Unbundling of Legal Services and the Family Lawyer, 28 Fam. L. Q. 421, 430 (1994).

Litigants who receive limited legal services may be less likely to forfeit their rights because they have had legal representation for some part of the process. Lawyers providing limited representation can assist self-represented litigants with procedural and evidentiary rules, thereby reducing the demands on court personnel. Allowing limited representation may also provide members of the bar with an opportunity to reach litigants who otherwise would not seek legal services.

Helping Litigants

The value of limited representation is demonstrated by a case where a landowner is in a dispute with a neighbor over a property boundary. While the monetary value of the dispute may be low, the legal issues may be complicated. Under these circumstances, a lawyer could advise the landowner as to what legal theories have merit, draft a complaint and then have the landowner present the case in court. Similarly, a lawyer could advise a client in a divorce matter solely on the difficult issues involved in a property settlement and the calculation of child support, and not appear in court with the client.

Allowing limited legal services gives a client access to needed advice for an affordable fee. In the end, the client is more likely to obtain a fair result, the court is assisted by a lawyer’s review of the case, and opposing counsel benefits from dealing with a better-informed adversary.

Clear Rules

Providing limited legal services raises significant ethical issues, however. Many States are currently investigating whether to adopt the rule changes necessary to per-

mit limited legal representation. Colorado, Maine, New Mexico, Nevada, Washington and Wyoming have already modified their rules to permit lawyers to provide unbundled legal services. Maine's rules include a model limited representation agreement.

In August 2002, the American Bar Association adopted Model Rule of Professional Conduct 6.5, a new rule that would permit a lawyer to provide short-term limited legal services to a client, under the auspices of a program sponsored by a non-profit organization or court.

Model Rule 6.5 requires the lawyer to secure the client's informed consent to the limited scope of the representation. It also relaxes conflict of interest requirements so that they apply only if the lawyer knows that representing the client involves a conflict of interest or knows that another lawyer associated with the lawyer in a law firm is disqualified by the rules on conflict of interest.

The Task Force Proposal

The Task Force recommends that the Supreme Court appoint a working group to draft suggested changes to the current ethical rules to clearly permit and regulate limited representation. Among the rule changes that the working group should consider are: a rule expressly allowing a lawyer to place reasonable limitations on the scope of services to be rendered, a rule requiring a written agreement when limited representation is provided, a rule clarifying when opposing counsel can communicate directly with a client who has limited representation, and a rule concerning disclosure to the court of limited representation.

The Task Force also recommends that the working group be charged with considering and making recommendations concerning malpractice issues related to providing limited legal representation. Once the rule has been changed, the New Hampshire Bar Association, through its continuing legal education program, should make an effort to inform members of the bar about their ability to provide limited legal assistance and its parameters.

3. Courts should employ case managers to assist pro se litigants in domestic relations cases.

The Task Force recommends that every superior court have one or more case managers to assist self-represented litigants in domestic relations cases.

The Task Force recommends that, in the future, every major court, including all superior courts and the busiest probate and district courts, hire case managers to assist pro se litigants in other types of cases.

The Task Force believes that hiring additional case managers is one of the most important measures to meet the challenge of pro se litigation. Case managers assist self-represented parties by meeting with them to complete necessary paperwork, explain the court process, and clarify the issues in the case. Unlike other court personnel who assist these litigants, case managers specifically schedule time to meet with pro se litigants and provide one-on-one assistance to them.

Case managers are not substitutes for other court personnel. Their role is unique. Other court officials, such as judges, marital masters, and clerks, are simply unable to offer the kind of personal assistance to self-represented parties that case managers are able to provide.

How the System Works Now

The New Hampshire court system currently employs only four case managers. All of these case managers are assigned to the Family Division, which has used case managers for six years. After a pro se litigant has filed for divorce and served the other party, the case manager meets with both parties to explain the legal process, help complete the necessary paperwork, and identify the issues in dispute and areas of agreement.

Providing this kind of specialized assistance has helped to resolve domestic relations cases quickly and efficiently. In sixty to seventy percent of cases involving case managers, the parties have resolved their issues sufficiently so that the judge or marital master need only review and approve their agreed-upon resolution of the case.

Judges and marital masters who work with the case managers say that, without them, the volume of pro se cases would overwhelm court resources. Self-represented parties and members of the bar alike praise the case managers because they help to resolve cases fairly and effectively.

The Value of Case Managers

Studies show that self-represented parties in domestic relations cases, more than anything, want personal contact with court officials. They want an opportunity to have their side of the story heard, even if the facts they want considered are irrelevant to the outcome of their divorce. Because case managers meet individually with pro se litigants, they provide these litigants with an opportunity for the personal contact and validation they seek.

While hiring additional qualified case managers will increase expenditures, the Task Force believes that employing more case managers is a necessary change to the structure of the legal system to accommodate the volume of pro se litigants. Case managers have proven to be the most effective method of handling pro se cases. The Task Force recommends that there be at least one case manager for each superior court to assist self-represented parties in domestic relations cases. In superior courts with the heaviest volume of domestic relations cases, it may be necessary to have more than one case manager.

Having additional case managers will likely reduce the number of disputed domestic relations cases heard by judges and marital masters. Judges and marital masters must play an important role in supervising the case managers to ensure that they give self-represented parties accurate information and appropriate assistance.

Having additional case managers will not, however, reduce the number of case processors needed. While case managers help pro se litigants complete the necessary paperwork, they do not eliminate the need for the paperwork or the personnel to process it.

An Important Goal

The Task Force recommends that, in the future, additional case managers be added to assist self-represented parties in other courts for other types of cases. Case managers would be particularly helpful in district and probate courts with the heaviest caseloads.

4. The Judicial Branch and State Office of Information Technology should launch a statewide program to place a public access computer in every courthouse.

An online “Self-Help Center” should be established within the Judicial Branch website. For self-represented litigants, access to information means access to justice. Internet technology has been recognized as a way to help level the courthouse playing field for citizens who come to court without a lawyer. Electronic information about the justice system has no *real value, however*, unless it is readily accessible to *all* of our citizens.

To accomplish that goal, the Task Force recommends that the judicial branch, working with the State Office of Information Technology, develop and launch a statewide *“Computer in Every Courthouse”* project to provide at least one public access computer workstation at each court location.

Giving our citizens hands-on access to a computer in every courthouse is the most efficient, cost-effective way to make essential information available to self-represented litigants. It will allow self-represented litigants to take greater personal responsibility for the preparation of their cases, which research tells us is exactly what pro se litigants want to do.

To make sure that our citizens are aware that this new access to information is available to them, the court system’s public information office will develop posters, flyers and other public materials about the *“Computer in Every Courthouse”* project to be displayed in our courthouses and distributed by court clerks to courthouse visitors.

Self-Help Center

The Task Force also recommends that the Judicial Branch establish an online “Self-Help Center” within the Judicial Branch website, www.courts.state.nh.us. The “Self-Help Center, ” available to individual computer users and to the general public through court-house computer workstations, will offer users access to comprehensive information about court procedures, forms and instructions, mediation, legal services and assistance.

The Judicial Branch “Self-Help Center” would not provide legal advice. Rather, it would provide court users with a single gateway to comprehensive legal information including: court forms and instructions on their use, frequently asked legal questions, and information on specific legal issues including family law, domestic violence, consumer and housing issues and contacts for state and local agencies that may provide self-represented litigants with information they may need.

States across the country have developed online “self-help” centers targeted to self-represented litigants who need guidance to navigate their way through the judicial system on their own, or help in finding low-cost legal assistance. A list of state self-help websites compiled by the American Judicature Society is available at www.ajs.org/prose/pro_links.asp.

According to the National Center for State Courts, many court systems have modeled their self-help centers after Maricopa County, Arizona’s website, www.superiorcourt.maricopa.gov/ssc/sschome.html. The Maricopa County website provides, a clear, user-friendly guide to the legal process to “help individuals help themselves in court.”

Another model website exists in California, www.courtinfo.ca.gov/selfhelp. Developed by the California Administrative Office of the courts, the California self-help center has links to information covering a wide variety of legal issues, including guides to small claims and traffic courts, information on finding free and low-cost legal help, and alternatives to legal action. The California courts also distribute a printed card called “Your Court Connection” which lists the information customers can find on the online “Self-Help Center.”

In today's "do-it-yourself" society, as increasing numbers of people represent themselves in court, they are likely to turn to the Internet for information, just as they would for information about travel or health issues. (*Governing*, December 2002) For example, Waukesha County, Wisconsin's self-help website for family court issues reports that its website was accessed 6,300 times nationwide during its first eight months of operation. <http://courtsselfhelp.waukeshacounty.gov>.

Internet technology not only helps educate consumers about routine court procedures, it also helps self-represented litigants produce court documents that are organized, readable and complete. This reduces the work of clerks' offices, streamlines the filing process and diminishes the demands on court staff. With such assistance, litigants can move through the system more efficiently and obtain results based upon the merits of their case and not on their ability to navigate through complicated procedures.

Current Projects

Some efforts are already underway to develop a comprehensive website for New Hampshire litigants. In 2001, New Hampshire Legal Advice and Referral Center (LARC) received a \$25,000 Technical Innovations Grant from the Legal Services Corporation. LARC is using these funds to launch development of a "justice community" website that is primarily geared toward providing information about a range of legal services available to low-income citizens. The Administrative Office of Courts has endorsed the effort and has provided limited assistance in content development. The LARC website is predominantly targeted to citizens interested in low-cost legal assistance; it will contain extensive information about legal issues, forms and on-line brochures that will be a valuable resource to pro se litigants, or to citizens trying to decide if they need legal assistance.

The Judicial Branch this year secured a \$2,500 grant from the New Hampshire Bar Foundation's Justice Grants Program to begin construction of a "Self-Help Center" on the judicial branch website. A prominent icon on the court system home page will alert citizens to this ready source of information for self-represented litigants. The site will be the guide that links those citizens to additional electronic sources of information about the court system and legal services.

5. A statewide coordinator should be assigned to oversee Alternative Dispute Resolution programs in the courts.

The Task Force recommends the hiring of an individual to coordinate Alternative Dispute Resolution (ADR) programs in courts throughout the State.

ADR programs permit parties to resolve litigation outside of the courtroom. Mediation is one of the most popular forms of ADR. The mediation process is straightforward. The parties meet with a mediator who helps the parties reach an agreement that resolves their dispute. Because rules of evidence do not apply, parties are able to discuss topics in mediation that a court might deem irrelevant. The mediation process allows parties to express feelings such as anger, aggravation and distrust that they likely would not be able to voice in a courtroom.

Additionally, because the parties design the terms of their settlement, they are often able to draw upon a greater range of remedies than would be available in litigation. For instance, in mediation, parties can resolve their dispute by tendering apologies or trading property, in addition to agreeing to traditional remedies. The parties are thus able to design an outcome specifically tailored to their unique needs.

The Value of ADR

ADR, such as mediation, is particularly helpful to self-represented parties. ADR provides self-represented litigants with an opportunity to tell their side of the story, without having to comply with complex rules of evidence and court procedure. ADR offers pro se litigants a venue to express their feelings and resolve their underlying dispute in a low cost, informal setting.

There are positive benefits to ADR, even when it does not successfully resolve a dispute. In ADR, hostile parties talk with one another and share information, thus allowing them a better understanding of the issues involved. Further, through ADR, the parties become committed to creating their own solution to their dispute.

New Hampshire courts have made some use of ADR. Superior Court Rule 170 authorizes volunteer attorneys to serve as neutral evaluators, mediators and arbitrators to resolve disputes. ADR has resulted in early resolution of a significant number of civil and equity cases in superior court.

Not every superior court has been able to take advantage of Rule 170, however. Whether a court can implement and sustain court-sponsored ADR through Rule 170 depends upon its financial and personnel resources. Although Rule 170 ADR is a low cost alternative to litigation, it requires an adequate number of volunteers to act as mediators and sufficient court staff to schedule mediation sessions and oversee the process.

Because each court is left to design, implement and staff its own ADR program, ADR programs in superior courts tend to come and go. Because only a small number of attorneys currently volunteer as mediators and arbitrators, they often find themselves double-booked, scheduled to mediate disputes in two different courts at the same time.

A few district courts have used student volunteers to mediate small claims disputes. Manchester District Court abandoned its mediation program, however, despite its success in resolving disputes early, because the court lacked adequate staff to schedule mediation sessions.

Funding for ADR in the courts exists on a number of levels. For instance, the New Hampshire Department of Health and Human Services uses federal grants for mediation in child custody and child support disputes in Coos, Carroll, Cheshire and Merrimack Counties. Litigants participating in mediation in these counties have evaluated it favorably: 149 of the 150 people responding to one survey stated that they would use mediation to resolve future disputes.

The probate courts have a new program that uses paid mediators funded by increased filing fees. Legislation that took effect in July 2003 allows certified marital mediators to be paid in indigent cases out of the State fund for guardians ad litem.

Other New England States make better use of ADR than New Hampshire does. For instance, in Massachusetts, litigants in small claims, minor criminal, juvenile, and termination of parental rights proceedings may participate in court-sponsored ADR. The Massachusetts budget for court-sponsored mediation will total approximately \$1 million in 2003. Maine mandates mediation in all child custody disputes. Vermont has subsidized mediation for indigent litigants in child custody disputes. The Rhode Island Supreme Court, acting on a task force recommendation, recently expanded its ADR program to include an appellate mediation program.

The Task Force is convinced that ADR helps self-represented litigants resolve their disputes quickly, flexibly and efficiently. ADR provides cost-effective alternative to traditional court proceedings. Moreover, the Task Force learned in the focus groups with pro se litigants that many were unaware of ADR programs.

The Task Force believes that the best way to educate litigants about ADR and to make ADR available to pro se litigants and others statewide is to designate a statewide ADR coordinator. With centralized coordination, it is more likely that existing ADR programs will thrive and new ADR programs will be developed.

Why an ADR Coordinator is Important

The Task Force recommends that a statewide ADR coordinator be appointed. The statewide ADR coordinator would oversee existing ADR programs, help courts develop new ADR programs, cultivate use of volunteer mediators, and coordinate scheduling mediation sessions statewide. The statewide coordinator would also investigate new funding sources and do community outreach to increase the pool of volunteer mediators. One of the coordinator's responsibilities would also be to educate litigants about the benefits and availability of ADR and to train volunteer mediators. The success of any ADR program depends upon the caliber of its volunteers. Existing staff, already overburdened with their day-to-day responsibilities, is unable to take on these additional tasks.

6. Develop written protocols for judges and court staff that describe the type of information that can appropriately be provided to pro se litigants.

The Task Force recommends that a committee appointed by the Supreme Court seek input from judges, court personnel, the bar and self-represented parties to develop useful and comprehensive protocols to follow in pro se cases.

Efforts in New Hampshire and around the nation to make courthouses more user-friendly and consumer oriented demonstrate that court staff can successfully provide basic information to pro se litigants, and assist with their growing demands, without breaching their duty to refrain from giving legal advice.

While electronic sources for information also expand, it remains a reality of courthouse life that staff will continue to engage in face-to-face discussion with self-represented litigants who want answers about the legal process. At the same time, however, court staff is frequently cautioned against providing “legal advice” to the public.

Answering Questions

For court staff, however, determining exactly what constitutes “legal advice” often can be confusing and difficult. In fact, U. S. Bankruptcy Court clerk John M. Greacen of New Mexico, writing in the ABA publication “The Judges Journal,” argues the phrase “legal advice” has no real meaning and “its current use by courts has serious negative consequences for the ability of courts to provide full and consistent public service.” John M. Greacen, “No Legal Advice from Court Personnel” What Does That Mean?, 34 Judges’ Journal 10 (Winter 1995).

A fuzzy or incomplete definition of “legal advice” gives clerks and staff “unguided discretion” to decide which question to answer, or whether to answer at all. “The result, as with all unrestrained discretion, is the potential for abuse, favoritism, and undesired consequences.” *Id.* at 12.

Judges also face difficulties when dealing with self-represented parties. Judges hearing cases in which one or both parties are self-represented must walk a fine line, honoring a litigant's right to be heard while also demonstrating due regard for the rights of all the parties through impartiality and neutrality. There is a very real potential for conflict among these obligations.

For example, it may be difficult to give a self-represented person a fair hearing without providing some assistance either by instructing the litigant or asking questions to elicit crucial facts. Yet, to assist a self-represented party in this manner may violate a judge's ethical duty to remain neutral and impartial.

Create Clear Guidelines

The New Hampshire Task Force believes that judges and court staff have an obligation to assist pro se litigants where appropriate. We are committed to improving that effort. With that goal in mind, the Task Force recommends that the Supreme Court appoint a committee comprised of court personnel, self-represented litigants and other citizens, to develop new protocols regarding the appropriate level of help that the clerk's office can provide to pro se litigants.

The new protocols should:

- Clearly state the commitment of the clerk's office to provide good public service while remaining absolutely impartial so that all sides in a case are treated fairly.
- Define the type of help the clerk's office can provide by using examples. Such help could include: providing information from docket sheets and case files, showing pro se litigants where to find statutes or rules, reciting common rules or statutes, and providing forms that might meet a pro se individual's needs.
- Describe with examples the information the court clerk can provide such as legal definitions, procedural definitions, statutes, rules, ordinances, case status, deadlines, schedules and forms.

- Provide clear examples of the kind of information or “legal advice” that the clerk’s office should not provide such as opinions on whether a case should be filed, predictions on whether a judge might rule in a case, recommendations of specific lawyers and assistance in filling out forms.

Because judges, court staff and citizens, especially pro se litigants, will be engaged in developing the new protocols, they will have a stake in making certain that the protocols are implemented effectively. Service to the public will improve because court personnel will have concrete guidance regarding the help they can comfortably provide to self-represented parties. Pro se litigants will have realistic expectations about the kind of information and help the clerk’s office can appropriately provide.

The need for and the benefits of such protocols for judges was stated as follows in a recent American Judicature Society publication:

Judges are in need of guidance on the most effective and ethically permissible strategies for assisting self-represented litigants. The use of uniform court protocols to guide judges in the management of pro se litigation will serve to make case processing more efficient, and will assure uniformity and fairness in the treatment of self-represented litigants among all the judges of a given court.

J. Goldschmidt & a., American Judicature Society, Meeting the Challenge of Pro Se Litigation, A Report and Guidebook for Judges and Court Managers 111 (1998).

Promulgating written guidelines for judges would help them tackle the ethical dilemmas presented when people try to present their own case without any formal legal education or experience. Guidelines could enable judges to be more confident about what information to provide to self-represented parties and how to provide it. Guidelines would also result in more uniform treatment of self-represented parties throughout the State.

Court personnel, including case managers, need guidelines for the same reasons as judges. Court personnel need to know how much and what kind of information they may give self-represented parties. All court personnel have been instructed at one time or another not to give legal advice. This instruction alone is inadequate. The promulgation of guidelines would assist court personnel when giving information to self-represented parties.

Let the Public Know

Guidelines should also be made available to self-represented parties to give them a better idea of what information they can expect court personnel to provide them. Other States have reported good results from posting basic guidelines outside the clerk's office informing the public about the types of information the court personnel can and cannot provide.

The Task Force recognizes that developing written guidelines for judges and court staff will be challenging. Fortunately, other States have already drafted guidelines for their judges and court staff, and, thus, sample guidelines and protocols exist. Once the guidelines have been developed, the Supreme Court should approve them for implementation. Judges and court personnel should then be trained to use the guidelines. This training should serve as a basis for continuing legal education programs.

7. Court rules, forms and procedures should be simplified to accommodate self-represented litigants.

The Task Force recommends that courts continue to review existing rules, forms and procedures to make them more understandable to non-lawyers who are trying to navigate through the formalities of the court system.

Incomprehensible forms written in legalese rather than basic English as well as court rules of procedures written in complicated language impair the ability of self-represented parties to present their case. Because many existing court forms, procedures and rules were developed for adversarial proceedings in which parties have lawyers, many of these forms, procedures and rules are not readily understood by self-represented parties who have little, if any, legal training or experience. In many types of cases, no forms are available and there are no instructions to litigants as to how to proceed.

Many States, including New Hampshire, have already begun simplifying court forms, rules and procedures to remove unnecessary obstacles to self-represented parties. The Task Force recommends that New Hampshire courts continue this process. To benefit self-represented parties, court forms, rules and procedures should be written in plain English.

A Part of the Total Process

Those drafting the simplified rules, procedures and forms must take care to ensure that self-represented parties understand the limitations of these rules, procedures and forms, however. No rule, procedure and form, no matter how simplified, can take the place of having a lawyer in court. Nor can simplified rules, procedures and forms help a litigant present all of the information necessary for their case or instruct a litigant as to the substantive law governing their case. The Task Force thus recommends that simplifying court rules, forms and procedures be conducted thoughtfully so as not to mislead self-represented litigants.

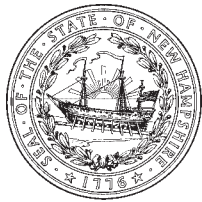
Conclusion

Each of the recommendations in this report reflects ideas and innovations tested by justice system leaders around the country in response to the tremendous challenge courts face from the surging population of self-represented litigants. Justice for all who come to our courts—with or without a lawyer—demands that we accept that challenge and meet it as best as we can. The work of this task force, initiated by the New Hampshire Supreme Court, is an important step toward that goal.

Suggestions for case managers, a self-help website, and simplified rules and forms have been made with efficiency and economy in mind. Other proposed changes, including limited representation and centralized alternative dispute resolution programs, reflect the need to broaden our approach toward management of pro se cases to assure fair and equitable results for all involved.

All of the suggestions within this report however, are grounded on the single principle that meaningful access to justice in today's world means a clear recognition by those involved in the system that many of our constituents want to go it alone when they come to court. Our obligation is to give these citizens the help they want, need and deserve.

The Task Force is grateful for the opportunity to assist the Supreme Court in meeting this challenge.



State of New Hampshire

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