

**Position Paper  
on  
Self-Represented Litigation**

*Conference of State Court Administrators*

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

## Position Paper on Self-Represented Litigation

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

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## I. Introduction and Issue Development

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. Recommendations

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

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

10. COSCA should identify strategies and protocols to assist trial court judges in managing cases and in conducting proceedings including self-represented litigants with special attention to cases in which only one of the parties is represented.
  
11. In that the actions above would be substantially enhanced by the support, involvement and leadership of CCJ, it is recommended that COSCA seek the involvement of CCJ in establishing and co-chairing a task force with representatives from the AJA, NACM, and ABA to develop a proposed action plan to address the above recommendations for consideration at the 2001 annual meeting of CCJ/COSCA.