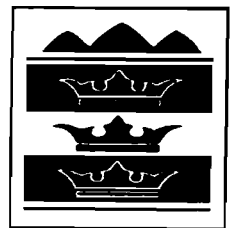

***BOSTON BAR ASSOCIATION TASK FORCE
ON UNREPRESENTED LITIGANTS***

***REPORT ON
PRO SE LITIGATION***



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Additional supporting materials have been separately bound in an Appendix to this Report. Copies of the Appendix are available from the Boston Bar Association.

ACKNOWLEDGMENTS

On behalf of the Boston Bar Association, I want to thank the many people whose efforts have contributed so greatly to the work of the BBA Task Force on Unrepresented Litigants (“Task Force”) and to this report. I begin with Edward (“Ned”) Notis-McConarty, who graciously agreed to chair the Task Force, even knowing that the challenge of completing any meaningful examination of the issue of unrepresented litigants in our Massachusetts courts within the time allotted was a daunting task. Without his leadership and commitment the Task Force would not have accomplished all that it has.

I must express my gratitude for the unstinting support of the courts for this undertaking. Any effort to systematically consider the issue of unrepresented persons in our justice system requires a strong partnership between the courts and the bar. I am immensely grateful to Chief Justice Wilkins, Chief Justice Mulligan, Chief Justice Dunphy, Chief Justice Zoll, Chief Justice Daher, and Chief Judge Tauro, who all met with me early last fall and agreed to name representatives from their courts to serve on the Task Force, as well as to Chief Justice Irwin, with whom I also met to discuss the work of the Task Force, and to Chief Judge Kenner for her assistance. The cooperation and support of the courts and the judges and court personnel involved in this task was critical to fulfillment of its mission.

Every member of the Task Force has made a significant personal contribution in terms of the time, experience, thoughtfulness and insight that each has contributed to the Task Force’s work. Particular acknowledgments must be made of the efforts of Jayne Tyrrell and Martha Koster, who not only served as committee chairs but who also, together with Ned, constituted themselves as the final drafting committee. Allison Allen, Christine Burak and Allan Rodgers, along with Joseph Borsellino, Peter Zupcowska, Judge Fernande R. V. Duffly of the Probate & Family Court, Jeff Wolf of the Community Legal Services And Counselling Center in Cambridge, and Andrew Nathanson from Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, also drafted sections of the report. In large part, the Report is based on the reports drafted by the various committees, chaired by Toni Wolfman (who also ably served as Vice Chair of the Task Force), Judge Peter Anderson, Jane Hawkes, Pauline Quirion and Angela Syrbick.

In addition to the Task Force, many others contributed to the work presented in this report. Northeastern University demonstrated its continuing commitment to the issue of justice in the community through the efforts of David Hall, then Dean of the Northeastern University School of Law and now Senior Vice President and Provost of Northeastern University, who facilitated the participation of the students in the Law, Culture and Difference Community Project in researching pro se materials throughout the country and interviewing judges and pro se litigants. The Northeastern students under the able supervision of the Hon. Susan Maze-Rothstein, their faculty supervisor and an administrative law judge at the Division of Industrial Accidents, contributed immeasurably to the work of the Committee. The participating students were Tiffany Austin, Jennifer Bell, Daniel Berman, Rosemarie Boyd, Meegan Casey, Michael Crowley, Emily Durand, Celine Jackson, Alisa Kreger, Heather Medwick, Aden O’Neill, Brian Patten, Amy Rodriguez, Svetlana Shvartsman, Tamara Theiss and Nicole Voigt.

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Jenney, Assistant Register, Probate and Family Court Department, Norfolk Division; Barbara Morgan Fauth, Director, Judicial Conduct Commission; and Sandra Caggiano, Clerk Magistrate pro tem for the Charlestown Division of the District Court.

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Finally, I want to extend my gratitude to the staff at the BBA, particularly Frank Moran, the Executive Director, and Doug Havens, the Assistant Executive Director, who greatly facilitated the work of the Task Force as our staff liaison.

*Mary K. Ryan
Boston, Massachusetts
August, 1998*

INTRODUCTION

In the Strategic Plan 2001 just adopted by the Boston Bar Association Council, the BBA has reaffirmed that part of its core mission is to enhance the profession of law by promoting equal access to justice. Twenty-first century America is indeed a nation of laws, but far too many of our fellow citizens cannot meaningfully exercise their legal rights in courts, administrative tribunals, or legislative bodies because they cannot afford an attorney and the legal system is foreign territory to an unrepresented litigant.

There is no single way to achieve equal access to justice. Since 1971, staff legal services programs have comprised the front line for delivery of legal services to the indigent, with substantial financial support from the federally funded Legal Services Corporation ("LSC"). In the last four years, however, there have been substantial reductions in LSC funding for staff legal services programs, along with restrictions which hinder LSC recipients from providing legal services equal to those available to private litigants. Pro bono work by individual attorneys continues to be an important part of meeting the challenge of equal access to justice. The BBA Action Committee to Promote Volunteerism had as its goal this year mobilizing the resources of the private bar to that end. In addition, the bar has actively lobbied for increased public funding of legal services programs, has worked for the continuation of the Interest on Lawyers Trust Account program, and has taken a leadership role in stimulating private financial support for legal services through the Boston Bar Foundation.

But these efforts, alone or together, cannot insure equal access to justice. Those who spend time in the courts of Massachusetts report a dramatic increase in parties appearing without lawyers. The BBA Task Force on Unrepresented Litigants ("Task Force") was established to consider the question of what should be done in response. The Task Force studied all existing data in Massachusetts, collected additional data, and looked at information available nationally concerning the growth in numbers of unrepresented litigants and the various ways in which the justice system is adapting to meet the needs of those who go it alone.

We discovered that nationwide much effort has gone into investigation of "pro se" or "unrepresented litigants." However, there have been no prior efforts in Massachusetts to study unrepresented litigants in an organized way, looking at all Massachusetts courts. Individual courts, judges, bar associations and lawyers have experimented with programs to assist unrepresented parties, but there has yet been no organized, system-wide response. In 1996, the Massachusetts Commission on Equal Justice expressly recommended a study of pro se litigation in Massachusetts.

Clearly the best response is to ensure that each litigant has a lawyer, and that there are sufficient courthouses, judges and personnel to hear cases quickly. Such an enormous commitment of financial and other resources would be required to provide full representation to all needy parties in civil matters that full representation is not likely to occur any time soon. We must provide representation for as many as possible, but we also must accept and accommodate litigants without lawyers.

No useful purpose is served by stereotyping unrepresented litigants. While we found that most unrepresented litigants simply could not afford lawyers, others were unrepresented for a variety of reasons. The Task Force does not seek to encourage pro se litigation. As noted by the Minnesota Chief Judges Committee,

Pro Se litigation should not be encouraged but must be accepted. The state court system has an obligation to assist pro se litigants in order to provide meaningful access to the court system, ensure confidence

in our justice system, and make use of staff resources.²

Justice Posner of the 7th Circuit put it another way: “It is unfair to deny a litigant a lawyer and then trip him up on technicalities.” *Merritt v. Faulkner*, 697 F2d 761 (7th Cir. 1983). Simply put, unrepresented litigants are here to stay, and if our justice system is to have credibility or public support, we must find a way to ensure that justice is available and understandable.

Just as there is no one type of pro se litigant, there is no one step which will best accommodate all pro se litigants. Educational materials such as brochures, videos, websites and recorded telephone services help, but follow-up advice from a “lawyer for the day” or a telephone hotline is often crucial. Helpful court personnel not only lead to fairer results, but also create a sense that our public courts are accessible to the public. The problem is not one dimensional.

Judges, court personnel, lawyers, and their clients all benefit when disputes involving unrepresented parties are resolved efficiently. If no assistance or information is provided until the party appears alone before the court, the judge ends up taking more time with the matter. Everyone else waits, or simply does not get reached. Judges and court personnel are caught between a duty to be impartial and a desire to see justice done. Tensions rise, and unrepresented litigants get frustrated and angry. The justice system, intended as a constructive channel to resolve disputes, instead exacerbates them. The response must be a series of steps which, taken together, will lead to an efficient, fair resolution of cases involving parties without lawyers.

This Task Force Report is but one stage in a process of facing the challenge presented by unrepresented litigants. We have tried to gather in one place a comprehensive analysis of the prior efforts, and to advance the available knowledge by interviews, surveys, focus groups, and research. We hope that this Report will serve as a solid basis for the next stage. Our goal is to present an overall evaluation of the issue of unrepresented litigants in Massachusetts, encourage an organized, consistent response, and foster ongoing experimentation and implementation of change on a system-wide basis.

We invite all who share our goal of a fairer, more accessible justice system to read our report and join in meeting the challenge of insuring equal access to justice for unrepresented litigants.

Mary K. Ryan
President,
Boston Bar Association

Edward Notis-McConarty
Chair, Boston Bar Association Task Force
On Unrepresented Litigants

EXECUTIVE SUMMARY

The Boston Bar Association Task Force On Unrepresented Litigants (“Task Force”) was established to consider what should be done to respond to the dramatic increase in parties appearing without lawyers in the Massachusetts courts. The Task Force studied all existing data in Massachusetts, collected additional data, and looked at information available nationally concerning growth in numbers of unrepresented litigants and the various ways in which the justice system is adapting to meet the needs of those who go it alone.

TASK FORCE FINDINGS

- Litigants without lawyers appear in striking numbers in all Massachusetts courts;
- Unrepresented parties present new challenges which the current judicial system cannot handle adequately;
- In some types of matters unrepresented litigants do not obtain results as favorable as those with counsel;
- Unrepresented litigants are a concern to judges, who seek guidance in handling pro se matters;
- Court personnel find unrepresented litigants a particular challenge;
- Financial constraints cause many parties to proceed pro se;
- Responses to unrepresented litigants have not been consistent or organized;
- Unrepresented litigants benefit most from a combination of approaches;
- Further information is needed to assess the pro se issue; and
- The changes required to accommodate unrepresented litigants will only occur if there is an ongoing institutional commitment with clear responsibility.

TASK FORCE RECOMMENDATIONS

1. THE AVAILABILITY OF LAWYERS MUST BE INCREASED.

In view of the importance of representation by a lawyer, the first and most important recommendations of the Task Force are to increase funding for legal services programs for those who cannot afford to hire a lawyer; to increase the pro bono services available from members of the bar, including representation on a reduced fee basis depending on the ability of the client to pay; to make information about available lawyer referral resources readily available to courts and administrative agencies; and to support and encourage the unbundling of legal services so that litigants can pay for and receive advice or discrete services.

2. COURTHOUSES MUST BE MORE ACCESSIBLE AND USER-FRIENDLY.

Our courthouses must be designed and operated to welcome, educate and provide justice to the public. Use of an information booth and signs in English and other languages with directions and schedules are

recommended. Court schedules must be designed to accommodate not just lawyers, but also the general public. This should include scheduling hearings at specific times and in some categories of cases, such as summary process, scheduling hearings at different times so that the volume of cases will not interfere with their fair, orderly, and efficient disposition.

3. EDUCATIONAL AND EXPLANATORY MATERIALS SHOULD BE PRODUCED AND EFFECTIVELY DISTRIBUTED.

Educational materials for the use of unrepresented parties should be prepared and made available in a systematic way. Channels of communication which must be utilized to their fullest extent include websites, brochures, videos, telephone hotlines, recorded telephone information, seminars/self-help workshops and clinics. There are a number of existing brochures and videos which should be catalogued. Judicial approval of any materials to be distributed to pro se litigants would ensure their acceptance, use and accuracy. It is also essential that there be community outreach to let unrepresented citizens know of the resources available to them.

4. COURT STAFF MUST BE TRAINED AND ASSIGNED TO DEAL EFFECTIVELY AND DIRECTLY WITH THE PUBLIC.

The court staff at all levels of the court system believe that unrepresented litigants represent particular challenges and call for special attention. Each clerks' office should consider how it can assist unrepresented litigants. There should be at least one staff member designated as the primary resource for unrepresented parties. All court staff should be trained to respond with special sensitivity to unrepresented members of the public. Court staff must also be assured that they can assist unrepresented parties without violation of any ethical prohibitions.

5. ALTERNATIVE DISPUTE RESOLUTION SHOULD BE EXPANDED FOR UNREPRESENTED PARTIES.

Alternative dispute resolution can be very effective and efficient for unrepresented parties in many circumstances since it can be adapted as necessary to encourage the unrepresented parties to voice their concerns. The speed with which an arbitration, mediation, or conciliation hearing can be concluded is a big advantage to an unrepresented party. There are notable exceptions, however, where there is a severe imbalance in power or a history of violence between the parties, such that some types of cases — including domestic violence cases specifically — are not appropriate for mediation. Alternative forms of dispute resolution should be made available in the community before either party gets to court. For matters that do reach the courts, mediation or conciliation should be the first step for most types of disputes where such efforts have not already been made. Mediators or others who preside at alternative dispute resolution proceedings must be trained to decline to handle those cases which are not appropriate for mediation (for example, domestic violence), and to elicit a full story from each side.

6. JUDGES SHOULD NOT ALLOW LACK OF REPRESENTATION TO RESULT IN A MISCARRIAGE OF JUSTICE.

Where one or more parties to a matter is unrepresented, a judge has a heightened responsibility to ensure that the proceedings are fair. Whenever appropriate, judges should explain the proceedings in simple terms and consider granting a recess or continuance to allow the unrepresented party to obtain counsel. Where unrepresented parties are involved in a case, a judge should review any settlement which could lead

to severe consequences, such as eviction or imprisonment (in cases involving a contempt or abuse complaint). If there appears to be a language barrier, the agreement should be translated or explained in the parties' primary language, and there should be a certification to that effect. In certain types of cases, case management conferences in which judges or magistrates can set out clear deadlines and expectations for unrepresented parties should be mandatory. In general, judges should be offered support and training in dealing with unrepresented litigants. To assist judges, the Task Force recommends development of guidelines for what a judge should tell a pro se litigant.

7. THE DISTRICT COURT AND BOSTON MUNICIPAL COURT SHOULD HAVE EXPANDED EQUITY JURISDICTION.

Existing equity jurisdiction for abuse prevention, housing matters, or small claims should be expanded. For many people, the District Courts are physically located close to their homes. At present, these courts lack the equity jurisdiction which is needed in many cases to deal effectively with those types of matters in which parties without lawyers are common. These courts should be given equitable jurisdiction so they can resolve such matters in practical, efficient ways.

8. SOME CHANGES REQUIRED TO ADJUST TO UNREPRESENTED PARTIES ARE FUNDAMENTAL AND WIDESPREAD, REQUIRING COMPREHENSIVE SYSTEMIC CHANGE.

Each court should strive to make standard forms in simple, straightforward language available to the general public for as many matters as possible. Directions or explanations should be made available with the forms. Courts must recognize and accommodate the growing population of litigants with linguistic, cultural, or physical barriers. Signs, forms and directions should be made available in a variety of common languages. Interpreters and bilingual personnel must be recruited. Printed materials must be made available in alternative formats for those with visual disabilities. Providing adequate funding for interpreter services is a basic responsibility of our court system. Finally, court procedures should be as simple, straightforward, and self-executing as possible.

9. IMPLEMENTATION.

The Task Force recommends that the Supreme Judicial Court establish a standing committee to address issues relating to unrepresented litigants. The Task Force should include representatives from each of the departments of the Trial Court, a representative from the office of the Chief Justice for Administration and Management, and representatives of the bar.

I. THE CHARACTER AND DIMENSION OF PRO SE LITIGATION: THE NATIONWIDE PERSPECTIVE

The Latin phrase “pro se,” which means on behalf of one’s self, is generally used to describe litigants who appear in court without lawyers to represent them.³ Indeed, the term is apt, for uncounselled parties are truly on their own, left to navigate through a seemingly alien and uncharted country without a map or compass. Rules of court developed, to paraphrase Justice Holmes, not from logic but from experience, seem arcane and irrational to one unschooled in the language of the law and unfamiliar with its customs. One anecdote reported to the Task Force speaks volumes of the gap that unrepresented litigants must attempt to bridge: pro se litigants have repeatedly complained that judges were biased against them because their cases were dismissed “with prejudice.”

In order to understand pro se litigation, the members of the Task Force divided themselves into committees, each of which studied a different facet of the issue. The courts of the Commonwealth, state and federal, at all levels, were the subjects of the study, which sought to gather and assess the views of the people who encounter unrepresented litigants every day: judges, clerks, lawyers and pro se litigants themselves. The findings of these committees, the data they collected, the responses to their surveys and interviews are set out in Section II of this Task Force report. This section of the Report is intended to provide a broader context for those observations.

A. PRO SE LITIGATION IN THE DOMESTIC ARENA

During the last decade, courts throughout the United States have reported consistent and significant increases in the number and proportion of pro se litigants. Although some growth in pro se litigation is reported in all categories of civil litigation, the most drastic and consistent increase appears to be in domestic litigation. Research around the country confirms this trend. A 1995 study sponsored by the California State Bar Committee on Courts and

Legislation observed that, while pro se litigation has increased generally, “family law appears to be the most impacted by the growing trend to ‘go it alone.’ This has created serious problems for judges in family law matters, for court staff, for attorneys when the other side is unrepresented, and for the pro pers themselves who are often ‘at sea without a compass.’”⁴

In some jurisdictions, self-representation in domestic cases has become almost commonplace. The August 17, 1993 *Wall Street Journal* cites statistics from Washington, D.C. and Des Moines, Iowa, indicating that 88 percent and 53 percent respectively of litigants in domestic cases are pro se.⁵ These figures are a far cry from the earliest pro se survey available to this Task Force, a study of two Connecticut courts in 1974-1976, which found that only 2.7 percent of litigants in domestic cases were pro se.⁶

In 1991, the Washington State Bar Association conducted a survey of County Clerks concerning the frequency and proportion of self-representation in civil litigation involving domestic relations, and learned that of the more than 10,500 domestic relations cases filed in 1991 in one Washington county, nearly three quarters (7,670) involved at least one pro se party.⁷ In the civil area generally, survey results from another Washington county show that pro se filings had doubled from 1980 to 1990, so that by 1991, approximately 40 percent of all civil cases involved at least one self-represented individual.⁸ Similarly, a September, 1997 article in *The Chicago Lawyer*, reported that 5,816 pro se filings were recorded in the Cook County Domestic Relations Division in 1996, up from 4,320 in 1995, and 3,200 in 1994.⁹

In addition to compiling statistics, a number of studies have addressed the attitudes of judges and court personnel to pro se domestic litigation. For instance, the Washington State Bar Association survey yielded a number of general observations from the court clerks about pro se domestic litigants, including that:

- Many pro se litigants experience difficulty completing forms and following basic court procedures;
- Court staff members are required to spend significant time assisting pro se litigants;
- Inadequately prepared pro se litigants often tie up courts with continuances and modifications; and
- Lack of appropriate services for pro se litigants results in unfavorable outcomes as well as in frustration and disillusionment with the legal system.¹⁰
- Litigants with unskilled jobs were significantly more likely to handle their cases pro se than professionals or individuals employed in upper management;
- People with no children were significantly more likely to represent themselves than those with children;
- People with little or no real estate or personal property were significantly more likely to represent themselves; and
- Individuals with newer marriages were significantly more likely to represent themselves than those with older marriages.¹³

The most definitive look at pro se litigation in the domestic courts to date was a study of the Superior Court of Maricopa County, Arizona sponsored by the American Bar Association. Looking closely at almost 1,900 domestic cases, the ABA found that in over 88 percent of the divorces filed in this county in 1990, at least one of the parties was pro se. In 52 percent of the cases, both parties were without attorney representation.¹¹ This study contrasts strongly with a 1985 study of the same court which reported 47 percent of divorces involved one pro se and a 1980 report finding that 24 percent of all divorce cases involved at least one unrepresented litigant.¹²

The Maricopa study also identified groups more likely to handle their domestic litigation without attorney assistance. Specifically, the study found that:

- Lower-income people are more likely to represent themselves;
- Younger persons are more likely to represent themselves than older individuals;
- Although less well educated people are more likely generally to handle their litigation pro se, the majority of people who handled their domestic relations cases pro se were relatively well-educated, with the most common level of education for pro se domestic litigants being 1 to 3 years of college;

In addition, the Maricopa study found that although many pro se litigants expressed confidence in their ability to handle their cases, approximately 30 percent experienced problems with the legal process and/or legal forms. Of these individuals, only 50 percent obtained assistance in addressing their problems.¹⁴

The findings of the Maricopa study were echoed in the recent report of the State Bar of California on self-representation in domestic relations cases. Although no specific data on the income or education levels of the pro se litigants were available to the study sponsors, the report argued that in many California counties more than half of all family law parties proceed pro se, far exceeding the percentage of California citizens who are poor and poorly educated. The report concluded that many pro se domestic litigants in California are neither indigent nor poorly educated.¹⁵

B. UNREPRESENTED LITIGANTS IN OTHER CIVIL CASES

Although the information concerning pro se litigation in nondomestic cases is more limited, what is available clearly demonstrates that pro se litigation is increasing. For instance, according to a Report of the Circuit Court Pro Se Advisory Committee, in 1994, 30 percent of all of the new general civil ac-

tions filed in Chicago claiming less than \$10,000 in damages were brought pro se. This same study found that 28 percent of the landlord tenant cases and, in 1995, 25 percent of *all* new civil suits, were filed pro se.¹⁶ A Bureau of Justice Statistics Special Report dated April, 1995, which examined the records from 45 urban trial courts, found that an average of 3 percent of all tort cases involved at least one pro se litigant.¹⁷

Pro se litigation is also increasing in the federal courts. In a study of 10 United States district courts from 1991 to 1994, the Federal Judicial Center found that unrepresented litigants accounted for 21 percent of cases filed. Thirty-seven percent of those pro se filings were non-prisoner pro se cases. The Administrative Office of the U.S. Courts reports that between 1991 and 1993, self-represented litigants in the United States Courts of Appeal increased by 49 percent.¹⁸

In August 1996, the American Judicature Society ("AJS") and the Justice Management Institute ("JMI") administered a mail survey to a nationwide sampling of state court judges.¹⁹ Respondents included judges presiding over courts in both urban and nonurban locales, hearing cases ranging from general civil litigation to juvenile delinquency.²⁰ Although the results were not sufficiently random to allow nationwide generalization about the nature and scope of pro se litigation, the responses are helpful in framing the issues concerning the judge's perspective on pro se litigants.

Specifically, over 30 percent of the judges surveyed responded that, over the last five years, the numbers of unrepresented litigants in their courts had "increased greatly," while another 35 percent noted a moderate increase.²¹ Overwhelmingly (approximately 91 percent), the judges responded that there was no "courtwide" policy in their jurisdiction governing the manner in which judges should handle pro se litigation.

The judges identified the principal problems they faced where one party represents himself:

- Litigation delays;
- Maintaining judicial impartiality;
- Attorney impatience;
- The pro se's perception that he is being "railroaded" or that evidentiary rules and court procedures get in the way of the "truth;"
- Maintaining control over the pro se litigant;
- Getting the pro se to comply with court procedures and evidentiary rules;
- Counsel's reluctance to press an advantage over a pro se litigant; or
- On the contrary, 'overkill' by attorneys.²²

The AJS and the JMI also surveyed state court trial managers, 45 percent of whom responded that over the last five years the overall proportion of pro se litigants had increased greatly.²³ Sixty-six percent stated that court staff devotes 1-25 % of their time responding to requests concerning pro se matters, while another 20 percent estimated that 26-50% of the staff day is devoted to pro se related work.²⁴ In keeping with the trend reflected in other studies, court managers overwhelmingly ranked domestic relations as the area of the law about which they receive the greatest number of public inquiries.²⁵

In 1994, a pilot program was launched in certain Michigan courts to develop form and instruction packets for use by pro se litigants in obtaining restraining orders in domestic violence cases and wage garnishments for small claims court judgments. Before distribution of the packets, a "pre-pilot" survey was administered to judges and court staff to gauge their attitudes towards pro se litigation.²⁶ Survey respondents widely agreed that the legal process is too complicated for unrepresented litigants, and that the courts are not currently doing a sufficient job in han-

dling pro se litigation.²⁷ While responses were mixed on whether pro se litigants “waste the court resources,” there was very strong agreement that pro se litigants take more time, and that pro se cases must be handled differently from other matters.²⁸

C. THE PRO SE LITIGANT

Less well-researched are the perceptions, concerns and needs of the pro se litigants themselves.²⁹ Some existing studies, however, do provide guidance. A 1994 American Bar Association legal needs survey of more than 3,300 low and moderate income individuals found that:

- More than one-half of low and moderate income households in the United States are facing one or more situation that could be addressed by the civil justice system;
- Nearly 71 percent of these situations affecting low-income households and 61 percent affecting moderate income individuals do not find their way into the justice system;
- When faced with a legal or potential legal situation, most individuals surveyed would handle it on their own, without an attorney; and
- The legal situations most likely to end up in court involve domestic issues.³⁰

In establishing the Maryland Legal Assistance Network, the Maryland Legal Services Corporation reports that, based upon Maryland and national data, between 50% and 70% of the requests for civil legal assistance by low and moderate income individuals can be met through information and limited legal services.³¹

In connection with a Court Facilitator pilot program, the Washington Bar Association gathered data concerning the pro se litigants in Washington

state serviced by the Facilitators at each of the sites. They found that female clients outnumbered males at every site, with significant gender differences in several counties.³² Most pro se litigants were between 26-35 years old; few were under 18 or over 46. The distribution of monthly income varied considerably. Although the median monthly income of clients at most sites was \$600-\$999, approximately 10 percent had incomes of less than \$300 per month, while 14 percent had incomes of more than \$1,500 per month.³³

That the pro se phenomenon is felt across the spectrum of economic groups was confirmed by 1996 research of the New York State Bar Association. That study found that “better educated” individuals on the higher end of the middle income spectrum are increasingly choosing to represent themselves.³⁴

The efforts to gauge the feelings of pro se litigants themselves are ongoing. In January, 1998, the Minnesota State Bar Association sponsored a survey of pro se litigants throughout the state of Minnesota. The results of this survey should be available later this year.

Summarizing the findings of various studies throughout the country, the American Judicature Society stated in “Meeting the Challenge of Pro Se Litigation:”

The data collected in these studies show that there is no one particular type of pro se litigant; people from different income and educational levels represent themselves and each, due to the particular circumstances of the case, may have differing needs for assistance. Some self-represented litigants need a mere explanation regarding the process on which they are about to embark, others may only need assistance in filling out court forms or drafting pleadings, while still others may need more intensive services to assist them in the litigation process.³⁵

II. THE COURTS OF THE COMMONWEALTH

A. PROBATE AND FAMILY COURT

1. THE NATURE AND SCOPE OF PRO SE LITIGATION

The Massachusetts Probate and Family Court reflects the national trend of burgeoning pro se litigation in family law cases. In the Probate and Family Court today, litigants are more likely to appear without counsel than with counsel. A study in the Probate Courts in twelve counties conducted by the Office of the Chief Justice of the Probate and Family Court revealed that in over two-thirds of the cases examined, one or both of the litigants were pro se.

The Office of the Chief Justice of the Probate and Family Court collected data on cases heard in December, 1997, in every county except for Barnstable and Nantucket. *See*, Exhibit A attached. In 69% of the 10,746 cases heard during that month, one or more litigants were pro se. The county with the highest percentage of cases involving pro se parties was Hampden County, 76%. Data for other counties showed: Middlesex County, 75%; Franklin County, almost 71%; Norfolk County, 69%; Suffolk County, almost 67%; and Dukes County 24% of the cases heard during the month of the study involved one or more pro se parties.

The caseload of the Probate and Family Court has increased substantially over the last decade, due to federal mandates for child support, decriminalization of paternity actions and creation of civil remedies for establishment of paternity, support and other parental rights related to children of unmarried parents.³⁶ Since the 1996 enactment of the civil paternity statute, G.L. c. 209C, the Massachusetts Department of Revenue, the agency responsible for the child support program, has flooded the court with civil paternity related actions. Litigants in these actions are generally pro se. Once paternity or support is established by the Department of Revenue, addi-

tional pro se litigation often follows relating to custody or visitation issues. Jurisdiction of the Court also continues to expand. Within the past three years, G.L. c. 209D interstate child support enforcement cases as well as standby and emergency health proxy guardianship cases have been added to the court's caseload.

The Probate and Family Court encounters some of the most difficult problems facing today's families, including high divorce rates, substance abuse, domestic violence, poverty and other socially or economically based difficulties. Many cases involve issues relating to children. The fact that so many parties are unrepresented in these difficult cases creates serious concerns for judges and court staff as well as for the litigants.

In attempting to assess the nature of these concerns, the Task Force built on the efforts of the Chief Justice of the Probate and Family Court and others studying pro se litigation in that department. In 1996, a group of Probate and Family Court practitioners prepared a report on the general condition of the court.³⁷ As part of that effort, court personnel were interviewed to determine the scope of pro se litigation in the Court. After a Bench Bar Conference in 1997, then Chief Justice Mary C. Fitzpatrick established the Probate and Family Court Pro Se Committee, chaired by Judge Elaine M. Moriarty. As noted above, that Committee gathered statistics concerning unrepresented litigants, distributed surveys to court personnel and interviewed pro se litigants.³⁸ The Probate and Family Court Pro Se Committee and this Task Force have coordinated efforts and shared data, resulting in a substantial amount of information relating to pro se litigation in the Probate and Family Courts. Our investigations were designed to supplement and not duplicate the work of the Probate Court and others.

In exploring the challenges presented by pro se litigants, our study focused on probate courts in Suf-

folk, Middlesex and Norfolk counties. Specifically, judges and court staff were interviewed by the Task Force and/or submitted responses to Task Force questionnaires. Additional data were collected by law student interviews of judges and court staff. Judges and employees in those courts were asked to identify concerns in cases involving pro se litigants. In their responses, 8 of 11 judges said that pro se cases usually or always require extra time in the motion and trial sessions. Seven of 10 judges responded that it is more difficult to conduct proceedings when pro se litigants are involved, and 9 of 11 judges said that they have to ask more questions in trial sessions (10 of 11 in motion sessions) in cases involving pro se parties. Nine of 11 judges responded that pleadings, motions and other documents filed by pro se parties are rarely or sometimes in proper order.

Staff in those courts noted similar concerns. Twenty-four of 34 respondents stated that the court usually or always has to ask more questions in motion sessions; 20 of 31 court staff responded that the judge usually or always has to ask more questions in trials. While the judges found that “nightmare” cases were not more likely to involve unrepresented litigants, 20 of 35 court employees indicated that such cases were more likely to involve *pro se* parties. This response suggests that unrepresented litigants create different pressures on different parts of the court system. Court staff have earlier contacts with pro se litigants, and may need to “trouble shoot” a case before it reaches the judge.

Court staff are frequently confronted with requests for legal advice; all responded that they are asked to provide advice of this nature.

2. CURRENT INITIATIVES

The Probate and Family Court judges and personnel have a long history of efforts to assist pro se litigants. These efforts include the following programs, which in some cases exist in every Probate and Family court in the state.

Lawyer for the Day Program. This program was created in 1990 in the Suffolk Probate and Family

Court by then First Assistant Register (now Suffolk Probate and Family Court Judge) Nancy Gould. Under the program, lawyers sign up to spend a day at the courthouse to assist low income pro se litigants by filling out forms and providing advice. Currently, most Probate and Family Courts throughout the Commonwealth have volunteer Lawyer for the Day programs.

Probate and Family Court Pretrial Committee. This committee, chaired by Judge Gould, is considering ways of improving pretrial practices. The committee is developing educational materials, including a pretrial memorandum form for use by pro se litigants to assist them to comply with the currently required pretrial memorandum.

Probate and Family Court Pro Se Committee. As described above, this standing committee of the court is studying ways to address the challenges presented by pro se litigants.

Efforts in the courts of Suffolk, Norfolk and Middlesex counties, which were the focus of our study, include the following:

Middlesex Probate and Family Court. This court has compiled informational packets for pro se litigants in divorce and contempt actions. The court has also distributed pro se booklets and posters prepared by the Boston Bar Association Family Law Section Pro Se Task Force and by Greater Boston Legal Services. A special grant under the Violence Against Women Act allows Greater Boston Legal Services to provide a domestic violence advocate on-site daily for low income unrepresented victims of domestic violence.

Norfolk Probate and Family Court. In this court, an Assistant Register has been designated to assist *pro se* litigants. The court also distributes information to pro se litigants prepared by the Boston Bar Association Family Law Section (printing costs were provided by the Norfolk County Bar Association) and is working with Greater Boston Legal Services to develop additional educational materials for pro se litigants. The Norfolk District Attorney's Of-

fice provides an on-site domestic violence advocate to assist victims of domestic violence with safety planning and restraining orders.

Suffolk Probate and Family Court. This court has an information booth from which a staff person provides directions, answers questions and distributes brochures and other information. The Register in Suffolk County has advanced printing costs and has also obtained funding for a community education program in which materials for pro se litigants relating to wills, estates, service of process, community legal resources and other subjects are distributed. Forms for temporary orders and answers are also distributed. Cases in which both parties are pro se are assigned for a special pretrial dispute intervention session with a family service officer.

3. RECOMMENDATIONS FOR ADDITIONAL INITIATIVES

The Task Force surveys distributed to the judges and court staff in the Suffolk, Norfolk and Middlesex Probate Courts afforded the respondents an opportunity to comment on additional steps that could be taken to deal with the challenges of pro se litigants. The responses indicated support on the part of judges and court staff for a number of measures. The judges responding to the question on “unbundling” of legal services, i.e. having attorneys undertake discrete parts of a case, were generally in favor of the concept. Judges and court staff generally were in favor of screening pro se litigants to assess their ability to speak and understand English. The respondents favored a mandatory certification that settlement agreements have been translated into the language of the litigants. Most judges and court staff agree that providing educational materials in print and on video would be helpful to the litigants.

With regard to the Lawyer for the Day Program, judges and court staff indicated that more lawyers to assist litigants in filling out forms would be helpful. Many respondents said that an expanded program in which lawyers would appear in court for a day would be helpful. Most respondents indicated

that additional training for the lawyers would be useful.

A number of the proposals about which the respondents were asked to comment related to scheduling practices. The majority of the respondents favored the use of an individual court calendar which would assign a single judge to hear all matters relating to a case. Of the three surveyed counties, only the Suffolk Probate and Family Court currently uses an individual calendar system. Only a small number of respondents favored the establishment of separate pro se sessions which *pro se* litigants could voluntarily choose to attend. Separate pro se sessions which pro se litigants were required to attend were also not favored by most respondents, although some thought they would be helpful in cases where both parties are pro se.

Few respondents thought that special training for judges on hearing pro se cases would be helpful. More respondents favored the development of protocols for judges to use with pro se litigants in motion and trial sessions. Training for family service officers and lawyers was generally thought to be helpful. Other measures receiving support from respondents include use of less formal courtroom proceedings, requiring in person judicial approval of agreements involving pro se litigants, screening of documents by assistant registers prior to filing, and designation of an on-site pro se facilitator.

In addition to the specific proposals discussed above, the Task Force considered some other recommendations unique to the Probate and Family Court. First, the court should use its statutory authority to award attorneys’ fees pendente-lite in divorce and separate support proceedings. Likewise, awards of attorneys’ fees are presumed to be available for a plaintiff if the defendant is found in contempt. Such fee awards could assist pro se litigants in obtaining counsel.

Second, the Task Force considered the need for a reexamination of the general approach for resolving matters in the Probate and Family Court. The

members recognize that the adversarial system in which most court participants were trained may not be the best method for resolving many of the conflicts brought to the Probate and Family Court. Teaching judges, lawyers and law students to consider the alternatives to traditional litigation can be

an important step in attempting to ensure that all matters, including those involving pro se litigants, are resolved in a way that is more satisfactory to the parties. A system to identify and channel appropriate matters to alternative dispute resolution will enhance justice for all users of the courts.

B. DISTRICT, MUNICIPAL, AND HOUSING COURTS

The District, Municipal and Housing Courts are the community-based courts of the Commonwealth. Among the many types of cases in the District Courts and the Boston Municipal Court are domestic abuse proceedings; civil small claims actions; civil motor vehicle infractions; inquests; mental health, alcoholism and drug abuse commitment proceedings; proceedings to enforce judgments; civil actions in tort and contract; evictions and related matters, concurrently with the Housing Court. The jurisdiction of the Housing Court extends to all cases that affect the health, safety or welfare of an occupant of residential housing. One type of case litigated in the Housing Court that affects many pro se litigants is the summary process action brought by landlords seeking to evict tenants. Because of their location in the communities and the nature of the proceedings there, the district, municipal and housing courts see large numbers of unrepresented litigants.

1. DISTRICT COURTS

Although unrepresented litigants appear routinely in the District Courts, the Task Force could find no previous study of the scope and nature of pro se representation in these courts. The Task Force, therefore, gathered new information and statistics concerning the extent of pro se involvement in the court but had no baseline for comparison.

The Task Force began its inquiry with a survey questionnaire mailed by the District Court Administrative Office to all of the approximately 168 sitting District Court judges as well as all court clerks and other selected personnel. Accompanying the questionnaire was a request from Chief Justice Samuel E. Zoll that the recipients complete the survey form. Sixty-eight judges and 76 clerk's office personnel responded.

In addition to the survey questionnaire, a two week sample of pro se appearances was undertaken in seven District Courts. Clerks in these courts counted unrepresented litigants in five types of non-criminal cases — 209A restraining orders, supplementary process, summary process, Civil Motor Vehicle Infraction (CMVI) appeals, and small claims. The participating courts in this survey ("session clerks' survey") were Brighton, Cambridge, Dedham, Dorchester, East Boston, Quincy, and West Roxbury. Session clerks recorded each case in the five categories and noted when a party was represented by counsel. For restraining order cases, clerks recorded if the plaintiff was accompanied by a lay advocate. In small claims cases, clerks noted whether the case involved a corporate plaintiff, and whether the case was in court for enforcement of judgment proceedings.

In addition to the session clerks' survey, pro se parties in two district courts were interviewed. Volunteer lawyers from Nutter, McClennen & Fish and Hemenway & Barnes interviewed 17 unrepresented litigants appearing in the Quincy and Dorchester courts in summary process and 209A restraining order cases.

A. RESULTS OF SESSION CLERKS' SURVEY

The results of the session clerks' survey support the reports of judges in their questionnaires that large numbers of litigants appear without benefit of legal representation in 209A restraining order, supplementary process, summary process, Civil Motor Vehicle Infraction (CMVI) appeals, and small claims cases.³⁹ In 60% of the cases counted in the survey neither party was represented by an attorney. In 2% both parties had counsel; in 36% only the plaintiff was represented by a lawyer; and in 2% only the defendant had an attorney. However, each of the five case types surveyed are different and must be examined separately in order to understand the quantitative impact of unrepresented persons in the District Court.

an important step in attempting to ensure that all matters, including those involving pro se litigants, are resolved in a way that is more satisfactory to the parties. A system to identify and channel appropriate matters to alternative dispute resolution will enhance justice for all users of the courts.

Restraining order matters, CMVI, and small claims cases are by statutory design structured to permit parties to represent themselves. Indeed, in 93% of the restraining order cases in the session clerks' survey, neither party had a lawyer. Both parties had a lawyer in 1% of the sample; in 3% only the plaintiff had an attorney; and in 3% the defendant alone was represented. In 58% of the cases, however, a lay advocate was present to assist the plaintiff.

In CMVI appeals, which are de novo hearings by a judge of the decision of a clerk-magistrate, the police never have a lawyer. The respondent motorists may choose to hire an attorney, but in the survey only 1% were represented.

The survey result for small claims cases was surprising. In small claims sessions, "the people's court," 47% of the plaintiffs had an attorney in cases where the defendant was unrepresented. Defendants were represented in 2% of the cases where the plaintiff did not have a lawyer. In 47% of the cases neither party had a lawyer and in 3% both had attorneys.

The sample of cases and courts involved in the session clerk's survey is too small for the Task Force to reach a definitive explanation of these results but the survey data suggest a possible correlation between legal representation and the corporate status of the plaintiff, especially when the small claims matter before the court involved enforcement of a judgment. For example, a corporation such as a utility company which is seeking to collect overdue bills from customers usually appears in small claims court with an attorney since corporations are prohibited by statute from self-representation.

In supplementary process (the procedure for enforcement of civil judgments) the survey showed that 100% of the plaintiffs were represented but only

1% of the defendants were represented.

The summary process (eviction) cases which were part of the session clerks' survey showed the following pattern: in only 8% of the cases were both parties represented; in 48% of the cases the landlord was represented but not the tenant; in 3% the tenant had a lawyer but the landlord did not. In the remaining 40%, neither party had an attorney.

B. CONCERNS EXPRESSED BY DISTRICT COURT JUDGES IN RESPONSE TO THE SURVEY QUESTIONNAIRE

District Court judges were concerned about unrepresented litigants by a margin of two to one. Judges mentioned three sets of problems:

- Cases with a pro se party or parties take more of a judge's time than other cases. The unrepresented litigant is usually unfamiliar with the substantive law and the rules of procedure and evidence. Most judges believe it important to explain at least some law and procedure. Pro se parties often talk at great length because they do not know what is important to emphasize in a case.
- Judges worry about what their proper role should be in relation to unrepresented persons. They are concerned that there may be an appearance of impropriety if they intervene too much, especially if the other side is represented, or if they intervene too little. They are also concerned about substantive unfairness. In many cases there may be issues or evidence which may have a determinative impact on a case which the pro se litigant does not have the knowledge or skills to raise or introduce.
- Some unrepresented parties are difficult and strain a judge's patience.

C. CONCERNS EXPRESSED BY CLERKS AND CLERK'S OFFICE STAFF IN RESPONSES TO QUESTIONNAIRE

Half of the District Court clerks and clerks' office personnel surveyed were concerned about unrepresented litigants. Those who were concerned

mentioned two sets of problems:

- Cases with a pro se party or parties can disrupt the orderly function of the clerk's office. Especially important is the amount of time an unrepresented person can consume. The unrepresented litigant is usually unfamiliar with the substantive law and the rules of procedure and evidence. Most clerks believe it important to explain the procedure involved.
- As do judges, clerks worry about what their proper role should be in relation to unrepresented persons. They are mindful of their ethical responsibilities to avoid giving legal advice but desirous of assisting pro se litigants with procedural help. They are concerned with issues of substantive unfairness and the appearance of impropriety as they assist pro se persons.

D. CONCERNS EXPRESSED BY UNREPRESENTED LITIGANTS IN INTERVIEWS

The small sample of litigants whom the Task Force interviewed were parties to restraining order and summary process cases. A number of those litigants said they had chosen to represent themselves. In many instances that appeared to be an informed choice based on the type of case (e.g., a 209A without complicated issues) or the cost of legal counsel compared with the relative simplicity of the case. In other cases (e.g., an eviction matter) the litigants appeared unaware of the complicated nature of the law and procedure involved and how much legal advice and representation might help them. Those litigants who might qualify for free legal aid had little or no information on local legal services programs and their eligibility criteria.

E. RESPONSE OF THE DISTRICT COURT

The 68 District Court judges who responded to the Committee's survey confirmed that the District Court has few special programs or procedures (with the exception of small claims court) designed

to assist unrepresented litigants in civil cases. The judges were, however, supportive of the idea that such programs would be helpful. Specifically, of those possibilities identified on the questionnaire, the most popular among the judges were the brochures which explain court procedures and forms, an on-site volunteer lawyer for pro se litigants, and training of court personnel on how to work with pro se litigants. More than a third of the respondents also favored an "800" telephone number staffed by a pro se assistant, an increase in the number of pro bono attorneys and lawyer of the day programs, and an onsite pro se facilitator. A video room, with a repeating video showing district court procedures and practices, was endorsed by 22 of the judges. One judge reported that his court had a voice mail menu with simple instructions on how to file various matters.

The 76 District Court clerks who responded to the Committee's survey also noted that there are few special procedures or programs now available to assist unrepresented litigants in civil cases. As part of their duties, however, clerks do provide various types of informal assistance to pro se litigants with whom they come into contact. The clerks listed several brochures which were distributed primarily in the domestic violence, housing and small claims areas.

In response to the inquiry about the kinds of programs the clerks would find useful in dealing with unrepresented litigants, the clerks expressed greatest interest in brochures which describe court procedures and forms. A close second, with 56 clerks supporting the idea, was an 800 telephone number with a pro se assistant. More than half of the clerks surveyed would also like to have an on-site lawyer volunteer for pro se litigants. In addition, almost half of the clerks surveyed supported the training of court personnel on how to work with pro se litigants and an increase in the number of pro bono attorneys. Less than a fourth of the clerks supported such ideas as a pro se clinic, educational seminars or a video room showing a video that describes district court procedures and practices.

A table summarizing the survey responses

may be found in Exhibit B attached.

In summary, there is no systemic approach to unrepresented litigants in the District Court. Individual judges and clerks will take extra time to explain court procedures to pro se persons and make a policy of advising the unrepresented of the risks of proceeding without a lawyer. Many courts will continue cases to enable parties to retain counsel and will make referrals to local bar association lawyer referral agencies and legal services programs. Some courts have written materials to assist the public, including those who are unrepresented. These materials, however, are generally limited to certain types of cases, particularly abuse prevention restraining orders and small claims. Neither the Trial Court or the District Court Administrative Office monitor these handouts for accuracy, readability, or effectiveness.

2. BOSTON MUNICIPAL COURT

As with the District Courts, there was no history of attempts to investigate the extent or nature of the pro se challenge in the Boston Municipal Court before this Task Force. There were, therefore, no statistics to serve as a baseline.

The task force began its inquiry with its survey questionnaire, which was distributed by Chief Justice William Tierney to all 11 of the Boston Municipal Court (BMC) judges as well as to clerks and other selected personnel. Four judges and eight members of the civil clerk's office responded. In addition, a civil session clerk counted the number of unrepresented litigants in a 209A restraining order session. Task Force member Joseph Borsellino, Esq., also interviewed 12 unrepresented litigants appearing in the BMC in supplementary process and small claims cases.

The reports of judges in their questionnaires and Attorney Borsellino's interviews suggest that large numbers of litigants appear without benefit of legal representation in the BMC in supplementary process, small claims, and 209A restraining order cases. In the session clerks' survey of one restraining order session, in eight of the ten cases neither party was represented by an attorney. In one case both par-

ties had lawyers and in another the plaintiff was represented but the defendant was not.

A. CONCERNS EXPRESSED BY BOSTON MUNICIPAL COURT JUDGES

All four BMC judges were concerned about the challenges presented by unrepresented litigants. They mentioned the same types of problems articulated by their District Court colleagues:

- Cases with a pro se party or parties take more of a judge's time.
- The judges worry about what their proper role should be in relation to unrepresented persons. They are concerned that there may be an appearance of impropriety if they intervene too much, especially if the other side is represented, or if they intervene too little. They are also concerned about substantive unfairness, especially regarding issues which a lawyer would raise or evidence an attorney would introduce which would have a determinative impact on a case but which a pro se person lacks the knowledge to raise or introduce.
- Some unrepresented parties are difficult and strain a judge's patience.

B. CONCERNS EXPRESSED BY COURT CLERKS AND CLERK'S OFFICE STAFF

Of the clerks and clerks' office personnel surveyed, half were concerned about unrepresented litigants. Those who were concerned mentioned the same problems as their District Court counterparts.

C. CONCERNS EXPRESSED BY UNREPRESENTED LITIGANTS IN INTERVIEWS

The litigants in the BMC whom Attorney Borsellino interviewed were parties to supplementary process and small claims cases. Most of the persons were judgment debtors. Most of the litigants said that they were unrepresented because they could

not afford an attorney. They believed, however, that a lawyer could help them get a better result than they could get on their own. Two of the litigants were middle class professional persons who felt that an attorney would not be necessary in light of the issues presented in their cases.

Attorney Borsellino offered to serve as “attorney for the day” for those he interviewed, giving them advice and answering their questions. The unrepresented litigants welcomed his assistance and some felt it improved the result in their cases.

D. RESPONSE OF THE BOSTON MUNICIPAL COURT

There is no systemic approach to unrepresented litigants in the Boston Municipal Court. Individual judges and clerks will take extra time to explain court procedures to pro se persons. Individual judges make a policy of advising the unrepresented of the risks of proceeding without a lawyer. The BMC, in appropriate cases, will continue cases to enable parties to retain counsel and will make referrals to local bar association lawyer referral agencies and legal services programs.

3. HOUSING COURT

The Housing Court has divisions headquartered in Boston, Springfield, Worcester, Fall River and Lawrence. The Northeast Housing Court, located in Lawrence, keeps statistics on unrepresented litigants and has done so for several years. The Court publishes these statistics in its Annual Report. Judge David Kerman has devised a computer program which should be able to track the number of cases being litigated pro se in the other Housing Court divisions.

The results of a study of the Boston Housing Court by Neil Steiner, then a student at Harvard Law School, are contained in his unpublished monograph “An Analysis of the Effectiveness of a Limited Assistance Outreach Project to Low-Income Tenants Facing Eviction” (October 14, 1997) (“*Steiner Study*”). Mr. Steiner has graciously made his paper available

to the Task Force. The *Steiner Study* contains data concerning the number of litigants appearing pro se in the Boston Housing Court in certain types of cases and data on differences in outcome between represented and unrepresented parties. The *Steiner Study* also suggests that even limited legal assistance can improve outcomes in comparison with unrepresented people.

The Task Force studied the existing data, heard a presentation on the *Steiner Study* from David Grossman, Esq., an attorney specializing in housing law from the Hale and Dorr Legal Services Center and Neil Steiner’s supervisor while the study was conducted, and discussed the issues with Task Force member Harvey J. Chopp, Housing Court Administrator. Also available to the Task Force were the results of experimental representation conducted in the Northeast Housing Court contained in “Grant Report: Neighborhood Legal Services Eviction Defense Mediation Services” (“*Grant Report*”).

In addition, Task Force member Barbara Billig Morse, Esq. and two members of her staff at the United States District Court interviewed 18 unrepresented litigants in the Boston Housing Court on April 2, 1998. David Grossman collected data on the representational status of the parties before the Boston Housing Court for summary process hearings on February 19, 1998.

A. DATA CONCERNING PRO SE LITIGANTS IN HOUSING COURT

According to the Northeast Housing Court’s Annual Report for Fiscal Year 1997, 79% of the litigants appearing in cases entered during that fiscal year appeared without counsel. That percentage has remained relatively constant over a period of five years. Summary process actions constituted over sixty percent of the cases newly entered in the Northeast Housing Court during FY 1997. In those cases, 51.9% of the landlords and 92.3% of the tenants appeared without representation. Both of these percentages have risen steadily over a five year period. In FY 1993 only 38.9% of the landlords and 81% of the tenants lacked representation.

The jurisdiction of the Boston Housing Court ("BHC") extends to all cases that affect the health, safety or welfare of an occupant of residential housing in the City of Boston. Among the many types of cases litigated in the BHC are summary process actions brought by landlords seeking to evict tenants. In 1996, over 6800 eviction cases, or approximately 135 new cases per week, were filed in BHC. Summary process actions follow a strict timetable, and all eviction trials are scheduled on Thursdays. On a typical Thursday, between 250 and 300 cases appear on the BHC docket. Approximately 10% of tenants and 75% of landlords are represented in summary process eviction actions in the BHC. Eighty percent of the scheduled cases are handled through mediation with a housing specialist or resolved through informal negotiation in the corridors of the courthouse.

The *Steiner Study*, based on a study of pro se litigants in summary process cases, has similar results to the Northeast Housing Court statistics: among 624 no-fault or nonpayment summary process cases commenced between January and May 1996 and October 1996 and February 1997 and involving non-subsidized and non-owner-occupied rental units located in certain neighborhoods in Boston, 48.6% of landlords and 82.4% of tenants appeared without a lawyer. David Grossman's data from the BHC session of February 19, 1998, which includes all summary process actions, reveals that 23.7% of the landlords and 90.6% of the tenants were pro se.

B. PERSPECTIVE OF THE UNREPRESENTED LITIGANTS

The litigants interviewed by Attorney Billig Morse and her staff were often intimidated and frightened by the process of appearing in the Boston Housing Court. There are not sufficient signs to direct people to the correct floor and no information desk or other means for litigants to know where to go or what to do. The Court is understaffed and all summary process cases are scheduled only on Thursdays. Ms. Billig Morse and her fellow interviewers found the available staff helpful and incredibly pa-

tient given the volume of people present and the level of activity.

Most of the unrepresented litigants reported that they wanted an attorney but felt they could not afford one. Some had attempted to retain free legal aid but were discouraged from pursuing this route when told they did not fit into the priorities of one legal services program and were referred to another. At the next legal services program, they were told they came too late because there was not enough time left before the hearing to prepare a case. Many of the pro se litigants do not know what defenses are available or how to raise them.

The available data suggest that the indigent unrepresented are correct in believing that an attorney could assist them in achieving a better result than they could obtain for themselves. Among the cases considered in the *Steiner Study*, tenants who were represented retained possession 41.3% of the time while pro se tenants retained possession in only 12.5% of cases. Tenants who did not retain possession were given an average of 129.7 days before execution issued in cases where they were represented by counsel and an average of 53.7 days when they appeared pro se. On the other hand, the *Steiner Study* found that pro se landlords obtained somewhat better results than those who had retained counsel. This result may be explained by the significant difference in the incidence of tenant defaults: final default judgments entered in 44.2% of all of the cases where the landlords were pro se and in only 22.4% of the cases where the landlords were represented.

The *Grant Report* from Neighborhood Legal Services also supports the better results achieved by litigants who receive even limited representation over those who proceed pro se. Where tenants were given "pro se instruction" and then left to represent themselves in court, fewer than 15% retained possession of their apartments. Where attorneys assisted tenants in court sponsored mediation only under a limited retainer agreement, 58% of the tenants retained possession. In the *Steiner Study*, represented tenants retained possession 28.6% of the time while pro se tenants kept possession in 15.8% of cases. In medi-

ated cases in which the landlord achieved possession, the represented tenants had an average of 84.6 days until execution issued while pro se tenants had an average of 66 days. Interestingly, in the *Steiner Study*, tenants, whether represented or not, tended to achieve poorer results in court sponsored mediation cases than in those resolved either through negotiation or by a judge. Tenants retained possession of their apartments in 16.4% of cases resolved by mediation, 28.6% of cases resolved by negotiation, and 44.2% of cases resolved by judicial decision. Among tenants who lost possession the average amount of time until execution issued was 66.7 days in mediated cases, 99.6 days in negotiated cases, and 84.4 days in cases decided by a judge.

C. RESPONSE OF THE HOUSING COURT

Chief Justice E. George Daher and his staff are aware of the data discussed above and have indicated their interest in finding solutions to the problems posed by the data. The Court, however, reports that it is hampered by the lack of sufficient personnel, especially judges in the Boston Housing Court. The present volume of cases per judge often precludes giving cases with unrepresented litigants sufficient attention. The Housing Court filed proposed legislation in 1997, House Bill 3269, which sought to

add two additional judges to the Housing Court, one for the Boston Housing court and one circuit judge. The additional position for a circuit judge for the Housing Court was included in the budget signed by the Acting Governor in July 1998. While additional judicial resources are needed in every department of the Trial Court, the need for an additional judge in the Boston Housing Court, as well as for an additional circuit judge, is great and additional judicial resources would significantly assist in resolving the issues associated with unrepresented litigants in that court.

The Boston Housing Court is currently working to establish a program where a lawyer from Greater Boston Legal Services and the Hale and Dorr Legal Services Center would have space in the court every summary process session to assist pro se litigants with limited or full representation. The Housing Court Department has obtained Supreme Judicial Court approval for attorneys to enter "limited" appearances in summary process cases, thus allowing limited representation on needed matters without committing the attorney and client to full representation. A program to help pro se litigants is in the planning stage in Hampden County as well. In addition, new programs are being proposed in the Boston Housing Court to aid congestion, including retaining additional mediators.

C. COURTS OF GENERAL JURISDICTION

This Committee of the Task Force was established to: explore the nature and extent of pro se litigation in the Superior Court Department of the Massachusetts Trial Court, the United States District Court for the District of Massachusetts, and the United States Bankruptcy Court for the District of Massachusetts; assess the manner in which the challenges posed by unrepresented litigants have been addressed to date in those courts; and propose recommendations about further steps that can and should be taken to assist those courts and the people who work and appear in them (including the pro se litigants themselves) to respond to the unmet challenges. Although the three courts considered by this Committee have been grouped together as courts “of general jurisdiction” for administrative purposes, the differences among them substantially outweigh the similarities. Accordingly, the results of the Committee’s analysis are presented separately for each of them in the following pages.

1. SUPERIOR COURT DEPARTMENT OF THE MASSACHUSETTS TRIAL COURT

The nature and extent of pro se litigation in the Superior Court has not been explored in any systematic manner to date. Anecdotal information conveyed by judges and court employees has suggested that the Superior Courts in many counties have witnessed large numbers of unrepresented litigants in recent years and that this phenomenon has placed significant burdens on the judges and court personnel who are doing their best to assure that those litigants are treated fairly and with respect. Nevertheless, the perception among members of the bar and the public appears to be that pro se litigation is an “issue” only for other Departments of the Trial Court. Thus, it is not surprising that while some attention has been paid to developing ways to assist unrepresented litigants who appear in the Probate and Family Court, Housing Court, District Court and Boston Municipal Court Departments, Super-

ior Court judges and court personnel have been left to their own devices as they attempt to address the issues raised by pro se litigation in their courthouses. The Task Force hopes to focus some much-needed attention on the Superior Court and lay the groundwork for both a more formal and organized data collection effort and an institutional response to the phenomenon of unrepresented litigants in that court.

A. THE NATURE AND EXTENT OF PRO SE LITIGATION IN THE SUPERIOR COURT

Consultation with the Clerk Magistrate of Suffolk Superior Court, the First Assistant Clerks of Middlesex and Norfolk Superior Courts, and the Civil Coordinator of the Administrative Office of the Superior Court confirmed that the Superior Court does not maintain any formal records of the number and types of cases in which one or both parties appear without counsel. The only relevant data that appears to be kept on any sort of regular basis relates to civil cases brought pro se by individuals incarcerated in Massachusetts correctional facilities. In a conversation on April 15, 1998, Marie R. Zollo, Civil Coordinator in the Administrative Office of the Superior Court, estimated that as of April 1, 1998, a total of 800 pro se prisoner civil cases were pending in Suffolk Superior Court, 180 in Middlesex Superior Court, and 90 in Worcester Superior Court. Ms. Zollo subsequently informed the Committee that during the first twelve days of April, approximately 20 pro se complaints had been filed in Suffolk Superior Court along with affidavits of indigence.

The only other potential source of information that was mentioned to the Committee is the “entry book” in each court that indicates those plaintiffs who submit affidavits of indigence when they file their complaints or petitions for equitable relief. At the Committee’s request, Clerk Magistrate Michael Joseph Donovan of the Suffolk Superior Court reviewed the civil entries in that court for the month of November 1997. Of the 488 new cases commenced that month, 75 were entered by plaintiffs who also filed affidavits of indigence. That group represents more than 15% of the total new cases for the month.⁴⁰

The number of affidavits of indigence filed does not represent the number of pro se litigants. As Clerk Magistrate Donovan pointed out, this statistic is under-inclusive in that it does not include the number of pro se complaints that were accompanied by payment of an entry fee and cases in which the defendant subsequently appeared pro se. The 15% figure is over-inclusive as well, because some plaintiffs who file affidavits of indigence are in fact represented by pro bono counsel. For example, a former Regional Administrative Justice for Suffolk Superior Court reports that he cannot recall having been presented with a "Mary Moe" petition under G.L. c. 112, §12S (abortion consent for minors) in which the petitioner lacked representation.⁴¹ Nevertheless, the figures for pro se prisoner cases (27) and complaints seeking temporary restraining orders under the general equitable jurisdiction of the court (15) are consistent with the information provided by Marie Zollo and by the judges and court personnel who responded to the Committee's survey. Those cases alone accounted for 8.6% of the new cases filed in November 1997.

In February 1998, the Committee distributed survey forms to court personnel and judges sitting in Suffolk, Middlesex and Norfolk Superior Courts.⁴² These forms were circulated by the Clerk Magistrate or First Assistant Clerk in each of those courts and by two former Regional Administrative Judges. Responses were received from a significant number of each group that was canvassed, many with very thoughtful comments.⁴³ Although there were some significant differences among the responses,⁴⁴ the survey data with respect to the level and nature of pro se litigation in the three courts show a fairly consistent picture: unrepresented litigants account for a substantial portion of the Superior Court caseload; and the bulk of those cases involving unrepresented litigants falls into the categories of equitable remedy and abuse prevention cases, prisoner cases, and, in Suffolk County, Chapter 30A appeals and motor vehicle surcharge and traffic cases.

Of the nineteen judges who responded to the questionnaire, all but one (who sits primarily in Bristol and Barnstable counties) regularly see unrepresented litigants in their sessions. The percentage

of cases in which one or both parties appear pro se were estimated by the judges to range from 5% to 20%; the average of all responses is about 10%. As one judge noted, unrepresented litigants appear in less than 5% of the jury trials that he conducts but in approximately 20% of the hearings on motions and applications for restraining orders. Another judge estimated that although 10% of the hearings in his session involve unrepresented litigants, the percentage of all cases on his docket in which there is an unrepresented litigant is likely far smaller. Eleven judges reported an increase in the number of pro se litigants who have appeared before them over the past two years, four reported no increase, and four expressed no opinion (either because they are relatively new to the bench or, in one case, because she rarely sits in any court in which there is much pro se litigation).

All but one of the twenty-four responding clerks who work in Suffolk Superior Court regularly deal with unrepresented litigants and report an increase in the volume of pro se litigation over the past two years. These clerks devote a significant amount of time to these litigants, with estimates ranging from less than 5% to 70% in the case of the clerk responsible for handling remands to the District and Boston Municipal Courts. The proportion of the time that the twelve clerks who work in the Clerk's office devote to unrepresented litigants averages more than 30%. The proportion of time spent by the twelve session clerks who responded to the survey is about 18%. These responses, when read together with those of the judges, reflect a funnel-like pattern. The entry clerks and certain others who work in the Clerk's office see the highest number of unrepresented litigants and spend a large amount of time assisting them. The volume decreases as those litigants reach the session clerks, and is reduced further before they reach the stage of a hearing before a judge. Whether unrepresented litigants simply fail to pursue or defend their cases, or whether those cases are settled or otherwise diverted before they reach the judge cannot be ascertained from the available data.

The First Assistant Clerk in Middlesex Superior Court distributed the surveys to session clerks

only, including some clerks in criminal sessions. Thus, the responses from that court do not reflect the volume of unrepresented litigants who appear daily in the Clerk's office and may understate the level of pro se activity in Middlesex Superior Court. Twelve of the seventeen session clerks who returned their surveys reported direct contact with unrepresented litigants, and their estimates of the amount of time they devote to this group range from 1% to 20%, with an average of 8.6% among those who provided such estimates. The responding clerks split evenly on the question whether they have witnessed an increase in the number of pro se litigants over the past two years. These figures appear to be consistent with those provided by the judges and Suffolk Superior Court session clerks as the volume of pro se litigation in Middlesex County is almost certainly lower than in Suffolk County.⁴⁵

The eleven clerks from Norfolk Superior Court who returned their surveys all reported having direct contact with pro se litigants. Of those who estimated the amount of time they spend with unrepresented litigants, seven gave answers ranging from 5% to 55%, with an average of 18.6%. Ten of the clerks noted an increase in the number of pro se litigants who have appeared in that court over the past two years.

Both judges and clerks in all three of the courts report experience with unrepresented litigants in every category of case that is identified on the survey form. Nevertheless, there are clearly certain types of cases that are more likely to involve pro se litigants, and many of those cases involve disputes between two unrepresented parties. Of the nineteen judges who responded to the survey, eighteen reported that they regularly see pro se litigants in abuse prevention cases and sixteen of those judges say that both parties to those cases often are unrepresented. Seventeen judges regularly are presented with cases brought by pro se prisoners. And fifteen regularly handle equitable remedy cases in which at least one party is unrepresented; according to eleven of those fifteen judges, both parties to such cases often are unrepresented. Other categories of cases in which unrepresented litigants regularly appear, including

Chapter 30A appeals, Registry of Motor Vehicles and parking ticket cases, pale in significance to these three.

A virtually identical pattern is reflected in the responses from the clerks of Suffolk Superior Court. Twenty-two of the twenty-four respondents report regularly dealing with pro se litigants in abuse prevention cases; sixteen clerks say that both parties generally are unrepresented. Twenty clerks deal with unrepresented prisoners, another fifteen with civil rights cases involving pro se litigants (primarily plaintiffs), and thirteen with equitable remedy cases, in most instances between two unrepresented parties. Half of the Suffolk Superior Court clerks (by far the highest percentage of any of the groups surveyed) also note that they regularly deal with administrative agency appeals, Motor Vehicle Surcharge Board appeals, Boston Traffic Department appeals and Section 12S petitions filed by unrepresented litigants. As nine of these twelve clerks work in the Clerk's office, it is likely that many of these cases are disposed of or diverted before they reach the sessions, thus explaining the lower volume of such cases reported by the judges.

In Middlesex Superior Court, eleven of the twelve session clerks who responded to the survey report that they regularly deal with unrepresented litigants in equitable remedy cases and prisoner cases, and nine say that they regularly see pro se litigants in abuse prevention cases. Again, in both the first and third category of cases, both parties are often unrepresented. A similar pattern is reported by the eleven clerks from Norfolk Superior Court. They note regular contact with unrepresented litigants in equitable remedy (seven), abuse prevention (six) and prisoner (six) cases. In both courts, 50% or fewer of the responding clerks regularly deal with pro se litigants in the other categories of cases identified in the questionnaire.

Some tentative conclusions can be drawn from these responses alone. First, the Superior Court is being presented with a heavy volume of disputes between neighbors and others who seek equitable relief in situations that do not involve domestic vio-

lence or otherwise fall within the scope of Chapter 209A. Anecdotal information provided by clerks and judges suggests that this phenomenon results from the fact that the District and Boston Municipal Courts, which typically would be expected to handle these types of local matters, lack the power to grant equitable relief in the form of restraining orders and injunctions (except by statute in domestic violence disputes) and that police departments, housing authorities and other community agencies and groups are not providing dispute resolution services and in fact may be suggesting to citizens that they bring their complaints to the Superior Court.

Further, despite the high level of publicity accorded to the widespread incidence of domestic violence, it appears that major efforts to date on the part of the Legislature, legal services agencies, the private bar, women's groups and shelters to fund and provide lawyer and non-lawyer representation to victims of domestic violence have failed to reduce the high volume of victims and defendants who appear pro se in these cases.

B. THE RESPONSE OF JUDGES TO UNREPRESENTED LITIGANTS

The Superior Court judges who responded to the Committee's survey overwhelmingly report that the presence of an unrepresented litigant affects the way that they handle a case. Most say that they engage in careful explanations of court proceedings at every stage of the case, put all hearings and other matters of substance on the record, and pay greater attention to the pleadings and statements of the pro se litigant in order to make sure that no viable claim or defense has been missed. The judges report that the presence of an unrepresented litigant also results in a longer hearing and the need to take live testimony rather than rely on affidavits.⁴⁶ Most of the judges are more lenient towards pro se litigants with respect to procedural matters. One of the principal themes reflected throughout the judges' responses is the desire to make sure that pro se litigants are treated fairly and are made to feel that they have been heard.

Fifteen of the judges say that they do not treat non-indigent pro se litigants any differently from those who are indigent. Two report that they sometimes make a distinction, one saying candidly that he is less sympathetic to those litigants who can afford a lawyer but choose to represent themselves. Fourteen of the responding judges say that they regularly explain to unrepresented litigants the disadvantages of proceeding without counsel. Although only eight judges say that they advise pro se litigants to seek counsel, eleven refer unrepresented litigants to bar associations, legal services offices and mediation services. Fourteen judges would make such referrals if a list of resources was made available, although a few state that they will not refer a litigant to a specific attorney or make a referral in a way that might compromise the appearance of their neutrality. Others say that they will not make a referral if the litigant can afford to retain a lawyer.

Every single judge who responded expressed concern over the phenomenon of pro se litigants in his or her session. The majority of their concerns are focused on the litigant rather than on the judicial system itself. Thus, the judges refer to the unrealistic expectations held by many unrepresented litigants, their misperceptions about the availability and efficacy of judicial remedies and the lack of understanding which results in frustration and dissatisfaction with both the judicial process and the result in a particular case. In addition, the judges report feeling a tension between their desire to be fair and their need to maintain their neutrality (in appearance as well as in fact), and they worry over potential unfairness to both sides in a case where one of the litigants is unrepresented. The judges also note the excessive amount of time required to handle these cases and the burdens imposed by pro se litigation on court personnel, represented litigants and the judicial system as a whole. As a few judges pointed out, many cases with pro se litigants are "crisis-focused," and many involve a high level of emotionalism on the part of one or both parties. This factor not only exacerbates some of the other problems identified by the judges, but it also sometimes poses security problems for the court.

The judges who responded to the Committee's survey unanimously confirmed that the Superior Court has no special programs or procedures designed to assist unrepresented litigants in civil cases⁴⁷ and expressed the belief that such programs would be helpful. Of those possibilities identified on the questionnaire, the most popular with the judges are brochures which explain court procedures and forms, an on site pro se facilitator, and mediation programs.⁴⁸ Among the suggestions offered by these judges, some form of on site mediation was the most frequently mentioned. Particular reference was made to neighborhood and other interpersonal disputes and some prisoner claims. More than half of the respondents also favor an "800" telephone number with a pro se assistant, an increase in the number of pro bono attorneys and lawyer for the day programs, and special training for court personnel. The position of "pro se clerk" was endorsed by nine of the judges. Some judges recommend the expansion of the equitable jurisdiction of the District Court and Boston Municipal Court Department so that many neighborhood and family disputes can be handled locally. Others suggest that pro bono lawyers be made available to screen and perhaps mediate those categories of cases in which pro se litigants regularly appear.

The judges appear to be unconvinced about the desirability of a standard protocol, perhaps because they are uncertain what would be included in such a protocol. However, several judges expressed a desire for some guidance on the extent to which, if at all, a judge should assist unrepresented litigants. Others suggested that a set of uniform explanations and standards to which pro se litigants should be held with respect to behavior and compliance with court procedures would be welcome.

C. THE RESPONSE OF CLERKS TO UNREPRESENTED LITIGANTS

The clerks of the three courts involved in the Committee's survey confirm the judges' report that there are no special procedures or programs available to assist unrepresented litigants in civil cases. Of necessity, however, the clerks provide various types of informal assistance to the pro se litigants with whom

they come into contact. The greatest burden falls on the clerks who work at the entry desk or front office. In all three courts, the clerks furnish information about court rules, procedures, and deadlines. They sometimes provide forms. The only other written materials to which any of the clerks referred were booklets about domestic violence. While most of the clerks expressed a willingness to distribute brochures or other materials, a few made it clear that they would do so only if authorized by the Court.

In response to an inquiry about the most common questions posed by unrepresented litigants, the clerks in all three courts provided a laundry list of "how to" and "what does this mean" questions. In addition, some clerks report that they are often asked to provide advice (e.g., "Why won't you tell me what to do?" "Why can't clerks act as attorneys?" "Will this TRO really protect me?"). The clerks generally advise pro se litigants to seek counsel, and provide referral information, primarily to bar associations and legal services agencies. Several clerks say that they would make such referrals if they were supplied with a list of resources. Only a few clerks report that they sometimes go to extra lengths with indigent pro se litigants, as distinguished from those who can afford representation, showing more patience, understanding and concern that the parties get as much help as is available.

With few exceptions, the clerks in all three courts express concern about unrepresented litigants in their courts. The clerks report a greater concern than do the judges with the behavior of some of these litigants. Several refer to the mental instability, anger, emotionalism, lack of respect and high level of frustration of many pro se litigants. A few clerks report being subjected to verbal abuse, and several express concern about their own safety. At the same time, however, most of the clerks who responded report that they are troubled by the plight of unrepresented litigants, noting their lack of communication skills, lack of understanding and trust of the judicial system, frequent fright, confusion and high level of stress, and the difficulty of making sure that they are treated fairly. Language barriers were also mentioned, and several clerks in Suffolk County suggest the need

for more interpreters and for brochures in several languages.

In response to the inquiry about the kinds of programs the clerks would find useful in dealing with unrepresented litigants, the clerks in all three courts expressed greatest interest in brochures which describe court procedures and forms. The clerks from the Suffolk and Norfolk Superior Courts also support specialized training of court personnel and mediation programs. The lack of substantial interest from the Middlesex clerks likely is attributable to the fact that the respondents were limited to session clerks. The clerks in Suffolk Superior Court would also like to see more pro bono attorneys and lawyer of the day programs, and more than half of them approve of an on site pro se facilitator and special pro se clerks, ideas that received less support from the clerks of the other two courts. Several clerks from Suffolk Superior Court suggest that language courses be offered to court employees and that explanatory brochures include a list of legal resources and explain the pros and cons of self-representation. Most clerks believe that such programs should be made available to all unrepresented litigants, regardless of ability to pay. A few clerks, however, caution that these programs should not encourage pro se representation; they would like to see a reduction in the level of unrepresented litigants, especially prisoners.

Finally, the clerks offered a range of suggestions as to how best to handle unrepresented litigants. Most stress the need to be professional, patient, courteous, respectful, calm and firm, while still showing understanding and compassion. Interestingly, the comments of the clerks reflect the same appreciation of the tensions noted by the judges — between compassion and a concern with fairness on the one hand and the need to be objective and neutral on the other.

D. RECOMMENDATIONS FOR FURTHER ACTION

As mentioned at the outset, it would be useful to develop a more substantial and reliable factual basis upon which to analyze and assess the phenomenon

of pro se litigation in the Superior Court Department of the Trial Court. Until court record-keeping is sufficiently computerized with appropriate fields so that the relevant information can be easily retrieved, however, such an investigation would be unduly time-consuming and probably not worth the effort. Nevertheless, this Committee is of the opinion that the data contained in this report, limited as it is, provides an adequate basis upon which to make recommendations for cost-effective actions that likely can be implemented within a relatively short time frame in order to address what both judges and clerks perceive as a significant problem that needs to be addressed. Our recommendations include the following:

- Special training of both judges and clerks on the most effective ways to deal with unrepresented litigants. Training programs might be developed under the aegis of the Flaschner Institute and could be offered to judges and clerks from all Departments of the Trial Court. Alternatively, or in addition, special on-site training might be more effective and reach more participants in judicial process.
- Development of simple forms that can be used by unrepresented litigants in those categories of cases in which one or both parties often appear pro se. Forms currently exist for Chapter 209A petitions, "Mary Moe" petitions, appeals from the motor vehicle surcharge board and appeals from the sexual offender registration board. Others might be prepared for harassment claims, certain types of prisoner complaints, and simple contract and property disputes.
- Preparation of easy to understand brochures, in several languages, that explain the essential nature of the judicial process; describe the most commonly applicable court rules and procedures and the standards of conduct expected of all parties, regardless of whether they are represented by counsel; provide basic "how to," "where," and "when" information; and identify available resources for lawyers and social services.

- Development of written guidelines for dealing with unrepresented litigants to serve as a reference for both judges and clerks. Any such guidelines should of course be consistent with any written information provided to these litigants in brochures.
- Assessment of current responsibilities of clerk's office personnel and possible assignment of one or more clerks to serve as "pro se" clerks. Development of an appropriate job description for such a position.
- Development of a program whereby members of the private bar serve as on-site screeners/mediators for certain categories of cases in which one or both parties typically proceed without representation. The purpose of such intervention at the outset of these cases would be to resolve those disputes in which one or both parties simply need to air their grievances to an independent person or in which a settlement can be easily reached, to provide guidance to the parties in other cases to make sure that they understand the process and what is expected of them going forward, and to offer other appropriate assistance and referrals to legal and social services agencies.

2. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

The Boston Bar Association Task Force on Unrepresented Litigants surveyed the judges and clerk's office personnel of the United States District Court for the District of Massachusetts, obtaining responses from fifteen of the twenty-one active judges and magistrate judges, and from eighteen out of thirty-three clerk's office personnel. The responses suggest that the District Court carries a significant pro se caseload, receiving, on average, 500 civil cases annually filed by indigent, unrepresented litigants. The majority of judges and court personnel commented that they have not noticed an increase in the number of pro se filings in the past two years, but a quarter of the respondents said that they have noticed an increase.

Prisoner litigation accounts for 70% of this caseload, primarily civil rights claims, habeas corpus petitions and motions to vacate sentences. In April 1996, the United States Congress passed two statutes that may affect the volume of prisoner litigation in the federal courts. Title I of the Antiterrorism and Effective Death Penalty Act concerns habeas petitions, and the Prison Litigation Reform Act concerns prisoner civil rights complaints. Non-prisoner litigation includes civil rights and employment litigation, as well as tax and social security appeals.

A. JUDICIAL OFFICERS' RESPONSES

i. Treatment Of Pro Se Litigants

The federal judicial officers surveyed by the Task Force included judges and magistrate judges of Boston, Worcester and Springfield. The judges and magistrate judges noted that pro se litigants present special problems and concerns for the courts. Many judges have difficulty figuring out pro se plaintiffs' claims, and they and their law clerks must therefore do more work to understand the allegations and reach legally correct conclusions. Case management is often more difficult because pro se parties do not understand the discovery rules. One judge stated that in the past decade, "I have only had three pro se cases go to trial." Other typical concerns about unrepresented litigants are as follows:

- Unrepresented litigants may have some factual basis for a claim or claims that never come to the attention of the court because they are unable to investigate.
- Despite efforts to deal evenhandedly with pro se litigants, the desire to ensure that no plausible position is unexplored and to explain judicial procedures which represented parties have explained by their counsel may create an unconsciously administered advantage for pro se litigants not afforded others.
- Opposing parties, as well as the court, inevitably incur added costs when the pro se litigant's positions in the litigation are determined to be meritorious.

- Pro se litigants bring many frivolous cases and motions, which would be screened out if they were represented by responsible counsel.
- Sometimes there are security concerns. Pro se civil litigants sometimes are somewhat eccentric. One judge reports: "I will usually have a court officer in the courtroom if the litigant is someone I'm not familiar with." One litigant was so angry that the litigant picketed in front of the courthouse for months.

Twelve judges stated that the fact that a litigant is unrepresented affects their handling of the case. The judges were split, though, between those who hold pro se litigants to the same standards as attorneys and those who do not. Even those who do not hold pro se litigants to the same standards for matters of form, however, hold them to the same standards as represented litigants on substantive matters, and several judges inform unrepresented litigants that they will not receive special consideration as to substantive matters or as to overall conformity with procedural and evidentiary standards.

The judges generally indicated that they take special steps when proceeding with cases where one or both parties are pro se. The majority of the judges will grant a continuance to find an attorney, will explain the nature of the proceeding, will explain possible disadvantages of going pro se, will hold conferences to get a better understanding of the issues, and will write explanations of procedure and law to make judicial decisions easier to understand. One judge said: "I am more careful with respect to a pro se litigant's defense to a motion to dismiss in civil matters and find that I need to explain more to such litigants as well as criminal pro se defendants." Thirteen judges stated they will generally advise pro se litigants to seek counsel. Half the judges surveyed generally refer unrepresented litigants to bar associations and legal services offices.

With respect to procedural matters, the judges give more leeway to pro se litigants in a variety of ways. The judges are generally more lenient with deadlines, and in affording opportunities to amend

complaints, and many will not issue case management scheduling orders for unrepresented litigants. Some additional steps that various judges said they take with pro se litigants are: excusing consultation requirements before filing of motions, allowing a second chance to meet a requirement for admissible evidence to support a contention, securing Criminal Justice Act counsel where permissible in criminal cases, and letting unrepresented litigants talk, and then listening "with the ear of a diagnostician" to see if there are issues they want to present but have not successfully articulated.

ii. Efforts to Deal With Pro Se Litigation

The District Court already has a number of programs and resources for pro se litigants. First, it now dedicates two employees to pro se litigation. Since the 1970's the Boston Clerk's Office has employed a pro se intake clerk who receives case filings and correspondence from pro se litigants. In 1982, the Administrative Office of the United States Courts implemented the pro se law clerk program, which provides courts with law clerks who specialize in handling pro se litigation. Since 1990, the District of Massachusetts has employed a pro se law clerk to assist the judges of the court and to coordinate the court's civil pro bono program. The pro se law clerk is essentially a specialized law clerk. The pro se law clerk performs an initial screening of pro se complaints (but not habeas corpus petitions), reviews applications to waive filing fees and assesses partial payments where appropriate. She screens out cases which are improperly filed in the District Court (such as paternity and custody cases), and makes a recommendation to the judge about whether dismissal is appropriate under 28 U.S.C. § 1915, which allows judges to dismiss "frivolous" suits sua sponte if they have been filed on an in forma pauperis basis. The pro se law clerk also coordinates efforts to place pro se litigants with pro bono counsel, and generally is able to find lawyers for 20 to 30 cases each year. The court also administers criminal appointments under the Criminal Justice Act.

In addition to providing the services of a pro se intake clerk and pro se law clerk, the District Court

has published a step-by-step guide to filing a civil action in federal court. The guide is about thirty pages long, and explains such concepts as federal jurisdiction and the rules governing service of process.

Fifteen judges believe these programs and procedures are effective. However, many judges noted that the civil pro bono program would be more effective if resources were available to compensate appointed counsel.

Six judges believe that there should be a standard judicial protocol for treatment of unrepresented litigants, but ten judges disagreed. Generally, the respondents felt that the answer to this question required more detailed consideration. As one judge commented, "Many standard protocols are ignored due to inadequate resources and therefore only get in the way."

Other jurisdictions have developed programs to assist unrepresented litigants. The judges think the following programs would be helpful in federal district court:

- 12 judges: brochures describing the procedures and forms
- 11 judges: increase the number of pro bono attorneys
- 8 judges: training of court personnel to work with pro se litigants
- 6 judges: 800 telephone number with a pro se assistant
- 6 judges: on site pro se facilitator already in place
- 3 judges: video room with procedures and practices
- 3 judges: increase the number of lawyer of the day programs
- 1 judge: pro se clinic
- 1 judge: educational seminars
- 1 judge: Each law firm should commit to taking a fixed number of pro se cases on a rotating

basis. The number would be determined by law firm size.

The responding judges were evenly split about whether programs like these should be made available to all pro se litigants without regard to their financial resources. The judges that said "no" commented: "If a person is not indigent, a law firm should not have to provide free services;" "You will simply encourage nuisance filings;" "People who can afford an attorney should be encouraged to hire one because they are able to be much better represented." On the other hand, it was noted that "Administering financial qualifications is labor intensive and difficult to manage narrowly;" "The lack of counsel to take a case may indicate lack of merit;" "This can only encourage the filing of pro se law suits;" and "If a party has the financial resources to obtain counsel, pro bono counsel should not be appointed."

B. COURT PERSONNEL'S RESPONSES

The court personnel surveyed by the Task Force included clerk's office managers, courtroom deputies, docket clerks and intake clerks. Their responses generally displayed a high level of sensitivity to pro se litigants' general lack of experience and sophistication, and to the need to treat pro se litigants with dignity and respect. In the words of one respondent, "I believe the more efficiently we accommodate pro se litigants, the more effective the judicial system will be for all." Other representative comments included:

- Treat all people with respect.
- I believe we should encourage our court personnel to treat pro se litigants with respect.
- I believe we should encourage our court personnel to answer any questions posed by pro se litigants honestly and in plain English.
- Sometimes I fear their rights are being violated and litigant has no opportunity to hire counsel.
- Concerned that those who have viable claims get the proper attention and respect and those that

have frivolous unintelligible claims are also treated with respect, but don't take too much of my time.

At the same time, however, the responses of court personnel conveyed the frustration of dealing with unsophisticated and uninformed litigants. According to the respondents, the most common questions asked by unrepresented litigants regard federal practice and procedure, including such basic questions as: "When will a hearing be scheduled?," "May I speak to the judge?," "What should I do next?," "What should the motion say?," "How do I appeal?," "May I have a court-appointed lawyer?," "What does this ruling mean?," "When is my case going to be heard by the judge?," "How do I word my motion?," "Can I talk to the judge?," "What is my trial date?," "What will happen in the courtroom?," and "What is the status of my motion?"

The respondents also emphasized that pro se litigants can be "extremely difficult to deal with at times and often unpredictable." Although one clerk said that "Sometimes you need to let them vent," others were more concerned about the sometimes volatile emotional states of unrepresented litigants. With respect to this problem, representative comments include:

- I am concerned with their mental capacity.
- Pro se cases are either frivolous or not grounded on a valid federal cause of action. The processing of these cases (which often get dismissed) takes away time which could be spent on legitimate cases. Also, service of pleadings is rarely done, so the clerk's office winds up doing a lot of the leg work which would otherwise be the responsibility of a party. Additionally, pro se litigants usually want to discuss in detail the merits of their case, and it is difficult to convey to them that the clerk's office does not get involved to that extent.
- A misunderstanding of the jurisdiction or mission of this Court, or an unrealistic view of the relief one should expect from it, often leads to anger when the litigant's desired result is not obtained. Clerks experience many uncomfortable

moments when delivering negative news to pro se litigants on the telephone or, especially, in person. In the latter instance physical manifestations of anger are often observed. At times the customary terminology used in dismissing a suit or prayer for relief is insulting to the lay litigant (e.g. "frivolous" or "without merit.").

- The emotional state of pro se litigants who visit the court in person is sometimes alarming. The clerks have to deliver bad news from a judge who has become frustrated with redundant, sometimes incoherent, requests for relief.

The most common types of assistance provided by court personnel to unrepresented litigants include providing forms and information about court rules, case status, procedures and practices, and due dates and deadlines. Some court personnel provide referral information (names of bar associations, legal services agencies, and social service agencies) as well as copies of docket sheets. The court does not make "outside" self-help materials available to pro se litigants. The pro se intake clerk gives unrepresented litigants the court's "Step-by-Step Guide to Filing a Civil Action in Federal Court" as well as a list of legal information and referral organizations.

Sometimes the assistance is more substantive. Pro se litigants often receive sample motions and instructions for finding similar cases for purposes of comparison and sample motions, and clarification and explanation of rulings in order to reduce the unrepresented litigant's frustration. One clerk commented: "I try very hard to tell all pro se litigants (that are not in custody) to get counsel and help. I explain the pitfalls of representing oneself without aid of counsel. I explain that statistically the deck is stacked against them because of the need to know the law."

Many clerks advise pro se litigants to obtain counsel, and some help them do so. Eleven clerks said that they generally advise pro se litigants to seek counsel. One clerk stated: "I don't think pro se litigants necessarily present their cases as aggressively as if they had an attorney to represent them." Five

clerks said that they refer unrepresented litigants to bar associations and legal service offices.

When asked to comment on the procedures already in place to deal with pro se litigants, twelve clerks said that the programs and procedures are effective, though three emphasized the need for more volunteer lawyers for the civil pro bono program. With respect to the programs developed by other jurisdictions, the clerks thought the following programs would be helpful in federal district court:

- 11 clerks: brochures describing the procedures and forms
- 11 clerks: increase the number of pro bono attorneys
- 11 clerks: training of court personnel to work with pro se litigants
- 9 clerks: 800 telephone number with a pro se assistant
- 9 clerks: increase the number of lawyer of the day programs
- 9 clerks: on site pro se facilitator already in place
- 6 clerks: video room with procedures and practices
- 5 clerks: pro se clinic
- 5 clerks: educational seminars
- 1 clerk: sensitivity training for judicial officers, with goal of making rulings more comprehensible and less confrontational for pro se litigants.

Thirteen clerks believe that these programs should be made available to all pro se litigants without regard to their financial resources; two disagreed.

C. FEDERAL COURT RESPONSE TO PRO SE LITIGANTS

In 1981, the pro se law clerk program was initiated by the Administrative Office of the United States Courts to meet a need for expediting the handling of prisoner cases in the federal district courts. Faced with an increasing caseload and restraints on available judicial resources, the courts explored in-

novative procedures for streamlining the handling of prisoner cases.

While the procedures used by the pro se law clerks vary from district to district, the pro se law clerk is a centralized resource for the entire court. The pro se law clerk serves dual functions, acting both in an administrative capacity and as legal resource, doing research and writing. All pro se law clerks work with prisoner cases; some work with non-prisoner cases as well. Pro se law clerks are assigned to certain districts based upon the annual filings of prisoner cases, so the availability of this specialized resource varies from district to district.

One United States District Court which has significant pro se resources developed its own approach to pro se litigants. After an advisory group determined that civil actions by unrepresented litigants were clogging the court (accounting for 28% of civil filings in 1995), and that such cases were not addressed as readily as cases in which plaintiffs had counsel, the United States District Court for the Southern District of Florida developed two unusual programs to deal with pro se litigation. First, the Court created a Pro Se Division consisting of one magistrate judge, four pro se staff attorneys, and a pro se clerk who performs both clerical and secretarial functions. All pro se prisoner cases are stamped at initial filing with both a district judge's name and the Pro Se Division magistrate judge's name. Pursuant to a standing order, the Division handles all cases referred to it in their entirety, except that reports and proposed and final orders in nonconsent cases are submitted to district judges to enter final disposition upon interim dispositive motions. When the parties consent, both jury and nonjury civil rights cases are tried by the Pro Se Division magistrate judge.

The Division handles all paperwork, often without the necessity for any action by a district judge. At the start of each case, it enters a general order of instructions to pro se litigants. It prepares the paperwork necessary to obtain service of process on all defendants and assists plaintiffs in moving cases along through orders explaining their rights and responsi-

business and restructuring of indebtedness through a reorganization plan. Both the Code and the Rules provide complex provisions governing the ongoing operation of the business during the bankruptcy and the requirements to successfully emerge from Chapter 11.

- Chapter 13 is available only to individuals with regular income, subject to certain debt limitations. Under Chapter 13, a debtor can use his income over 3 to 5 years to fund a Chapter 13 plan, which provides for repayment of indebtedness at a reduced level or on restructured terms. There is also an independent Chapter 13 Trustee, who monitors the plan. Since the debtor retains his assets, Chapter 13 is often used where there is substantial equity in an asset such as a house. As with Chapter 7, the debtor will receive a discharge, but not until completion of the plan. The Chapter 13 discharge is broader in scope than a Chapter 7 discharge, permitting the debtor to discharge certain debts which could not be discharged in a Chapter 7 proceeding.

Bankruptcies often involve multiple parties since all creditors are entitled to participate. During a bankruptcy case, matters are handled through motions and procedures outlined by the Bankruptcy Code and the Rules. Certain matters such as objections to discharge are required to be handled through separate proceedings, similar to traditional civil litigation, known as adversary proceedings. Adversary proceedings are more often a two party dispute, commenced by complaint, with rules similar to civil litigation.

A. THE NATURE AND EXTENT OF UNREPRESENTED LITIGANTS IN THE BANKRUPTCY COURTS

The issue of pro se debtors in Massachusetts was previously studied by the National Consumer Law Center ("NCLC") in Self Representation in the Bankruptcy Court: The Massachusetts Experience ("NCLC Report"). In its study, NCLC undertook to analyze not only the nature and reasons for self representation but also whether debtors were obtaining relief in bankruptcy. The NCLC Report reviewed

a sample of pro se cases filed in 1990 and 1991, analyzed the pleadings and files in those cases, and compared the results with a control group. In addition, NCLC spoke formally and informally with court personnel and sought interviews with pro se debtors (although the interviews were with a more limited pool.)

Among the conclusions the NCLC Report reached were the following: (a) Chapter 7 can be successfully negotiated by unrepresented debtors, but Chapter 13 cannot;⁵⁰ and (b) pro se cases place substantial strains on both the procedural and substantive aspects of the system. The NCLC Report also contained recommendations for future action.

The Committee sought additional information on the current status of unrepresented litigants in the Massachusetts Bankruptcy Court by surveying the Bankruptcy Judges and Bankruptcy Court personnel. All five of the Massachusetts Bankruptcy Judges participated in the survey. In addition, twenty-one (21) members of the Clerk's office participated in the survey, including intake clerks, case administrators and courtroom clerks. The Clerk of the Bankruptcy Court, James M. Lynch, also provided the Committee with certain statistical information for 1996 and 1997 on pro se debtors.⁵¹

An analysis of the current information confirms that pro se debtors have a significant presence in the Bankruptcy Court. NCLC reported 580 pro se cases in 1990, representing 5.7% of the 10,154 total cases filed that year, and 813 pro se cases filed in 1991, representing 5.6% of the 14,476 total cases. The Bankruptcy Court has seen an explosion of consumer cases in recent years, despite the robust economy. In 1997, there were more than 23,894 cases filed, of which 96% were non-business or consumer filings. In 1996, there were 1465 pro se cases, representing 8.1% of the total caseload. In 1997, there were 1403 pro se cases, representing 5.9% of the 23,894 cases filed.

As more fully set forth on Exhibit D, the majority of pro se debtor cases involve Chapter 7 liquidations and Chapter 13 cases. As would be expected,

bilities at every stage of the proceedings. To facilitate this process, the Division has developed more than 100 forms dealing with routine procedures.

Every district judge receives a separate monthly computer printout of his or her cases assigned to the Pro Se Division, showing the filing date and current status of each. Software developed by the Division tracks cases on a daily basis. All litigants who have filed more than three pro se suits are identified, and a list of all his or her cases, their subject matter, and status is provided in reports on dispositive motions. As a result, prisoners can no longer present the same claims in multiple cases before different judges. The list also makes it easy to pinpoint plaintiffs who have filed numerous cases that were dismissed as frivolous. In addition, every report prepared by the Division is indexed and cross-referenced so that research need not be repeated, and a databank of current law on issues frequently raised in pro se litigation is maintained.

The Division originally received all pro se prisoner cases filed in the district, but it discontinued processing motions to vacate that attacked federal convictions when the numbers became prohibitive. More than 5,500 cases have been referred to the Pro Se Division since its inception. Of these, fewer than 10% were pending in the spring of 1996.

In addition to establishing the Pro Se Division, the court also instituted the Volunteer Lawyers' Project to provide for the payment of counsel and expenses in noncriminal pro se indigent litigation. Cases are drawn not only from the Pro Se Division, but also from a variety of other pro se civil filings. Faced with the serious problem of cases ripe for trial in which plaintiffs had no funds for discovery or to subpoena witnesses, let alone to pay counsel, the court's Civil Justice Advisory Group created the project, which is supported by a revolving loan fund administered by the Florida Justice Institute. Seed money for the project was obtained through a stipulation by lawyers that part of a civil contempt penalty be allocated for the fund. A \$25 voluntary annual assessment on all members of the bar supplements the fund. When a case results in monetary

judgment, costs that were paid by the fund are repaid and successful counsel donate 25% of their fees. Local law firms not only provide attorneys who undertake representation of pro se litigants but also contribute additional financial support to the project. A pro bono coordinator supervises the project's day-to-day operations.

3. UNITED STATES BANKRUPTCY COURT

The Task Force also examined the nature and extent of unrepresented litigants in the United States Bankruptcy Court for the District of Massachusetts ("Bankruptcy Court"). The Bankruptcy Court has jurisdiction of cases arising under the United States Bankruptcy Code ("Bankruptcy Code") which involve businesses and individuals. Bankruptcy is a highly specialized area, with substance and procedure governed by the Bankruptcy Code, the Bankruptcy Rules, prescribed forms, the Local Bankruptcy Rules, case law, and local practice.

To place the discussion of pro se litigation in context, it is helpful to have a brief overview of bankruptcy cases. There are three principal types of bankruptcy cases: Chapter 7 (Liquidation), Chapter 11 (Reorganization), and Chapter 13 (Adjustment of Debts of an Individual with Regular Income).⁴⁹

- Chapter 7, which is available to both business and consumer debtors, involves the turnover of non-exempt assets to an independent trustee, who liquidates the assets and distributes them to creditors of the debtor. Individual debtors are entitled to retain certain assets, designated as exempt, and their wages or future earnings. In a Chapter 7, an individual debtor seeks a discharge of his or her indebtedness, which precludes creditors from continuing to collect the debt from the debtor personally or from the exempt assets. Certain debts, such as taxes, alimony, and student loans, are nondischargeable. In addition, a discharge can be denied for all debts if a debtor engaged in certain types of pre-filing conduct.
- Chapter 11 is principally used by businesses to provide for the continued operation of the

there are only a handful of pro se Chapter 11 filings, which is consistent with the use of this chapter by businesses, not individuals.

A statistic which is more difficult to capture is the number of unrepresented creditors in a bankruptcy. Although creditors may be affected by a bankruptcy, they may not formally appear and thus not be listed on record. In addition, the computerized docket does not reflect some of the other arenas in which a creditor may appear, such as in dealing with trustees, or the United States Trustee's office, which is responsible for the administrative aspects of bankruptcy.

The information provided by the judges and court personnel confirms the picture reflected by the statistics. All of the judges regularly see unrepresented litigants, with estimates of the cases involving at least one unrepresented party ranging from 4% to 9%. The type of cases also is consistent with the statistics. All of the judges responded that unrepresented debtors regularly appear before them in Chapter 7 and Chapter 13 proceedings. In contrast, several of the judges reported seeing no or few unrepresented Chapter 11 debtors. The judges' responses also provided a picture of unrepresented creditors. Four of the judges reported seeing unrepresented creditors in Chapter 11 regularly, with three judges also seeing unrepresented creditors in Chapter 7 and Chapter 13.

The actual impact on the Court may be greater than the percentage of cases would suggest. This fact is reflected in the Court personnel's response to the amount of time spent with pro se litigants. Of the twenty-one responses from Court personnel, nineteen, or more than 90%, have direct contact with pro se litigants. Of those who estimated the amount of time they spend with unrepresented litigants, fifteen gave estimates ranging from 5% to 50%, with ten respondents stating that more than ten percent of their time is spent with unrepresented litigants. Most of the court personnel see significant numbers of pro se Chapter 7 and Chapter 13 debtors, as well as creditors in those types of cases. While none of the clerks reported dealing with Chapter 11 debtors, eight clerks see unrepresented Chapter 11 creditors regu-

larly.

Both the statistics and the responses provide a mixed perception of whether pro se filings have increased. Although the statistics reflect some variation, the statistics for 1997 show that at least 5.6% of cases are pro se. The judges provided a mixed response, with two reporting an increase and others finding it difficult to determine. More than fifteen of the clerks, however, reported an increase in the number of pro se litigants, suggesting that regardless of the constant percentage, the actual impact on the Bankruptcy Court may be increasing.

B. THE RESPONSE OF JUDGES TO UNREPRESENTED LITIGANTS

All five Bankruptcy Judges reported that the presence of unrepresented litigants affect their handling of a matter. The judges commented that cases with pro se parties are more time consuming, require more explanation of the law or the Court's rulings, or create delays while litigants seek counsel. Several of the judges regularly explain the nature of the proceedings or the possible disadvantages of going pro se. Two of the judges adopt special procedures. For example, one judge commented that where both parties are pro se, he will swear in both parties and then allow them to speak from counsel tables, similar to the People's Court. Another judge advised that she will not hold telephone conference hearings with pro se debtors because of problems experienced in the past.

Four of the judges generally advise unrepresented litigants to seek counsel, and most will grant a continuance for the pro se parties to find an attorney. Referrals from judges occur less often. Although two of the judges report referring litigants to the Massachusetts Bar Association ("MBA") and Boston Bar Association ("BBA"), one judge stated that she no longer suggests referrals, since litigants have advised that legal services agencies will not handle bankruptcy cases.

Four of the judges expressed concerns about unrepresented litigants in the Bankruptcy Court. The

concerns expressed included (i) the loss of valuable rights by the litigants who do not understand the process, (ii) the minority who misuse and bog the system down with frivolous motions, (iii) the inability of unrepresented litigants to maneuver within the system, affecting the adversary process and handicapping the even-handed administration of justice, and (iv) the delay of cases and the additional work imposed on the Court and on the represented parties.

Three of the judges do not hold litigants to the same standard as attorneys. Of the other judges, one does attempt to hold them to the standards, although he is more relaxed on the pleadings. Most of the judges do not believe that there should be a standard judicial protocol for treatment of pro se litigants. One judge found it difficult to generalize, noting that while some pro se litigants file frivolous motions, one pro se litigant's letter raised meritorious claims that ultimately resulted in a class action settlement benefiting thousand of debtors.

C. RESPONSE OF COURT PERSONNEL TO UNREPRESENTED LITIGANTS

As may be expected, court personnel respond to a variety of procedural and informational requests from pro se litigants. Court personnel report that they frequently provide pro se litigants information on hearings, due dates, deadlines, and local rules. Other types of assistance include providing forms or telling them where to purchase forms, providing the trustee's name and address, providing information on what to file, and providing informational materials.

Court personnel report a variety of questions raised by pro se litigants ranging from basic information (where to obtain forms, when meetings are held, filing deadlines) and explanations of terminology or procedure (what is a Certificate of Service, who do I serve, when do I file),⁵² to substantive questions of law (how do I fill out the forms, what does the order mean). In addition, many of the questions reflect a basic lack of understanding of the bankruptcy process and its impact (will I lose my house, what do

I do next, what happens next, what are the ramifications of filing).

Fifteen of the clerks responded that they generally advise pro se litigants to seek counsel. As would be expected, the clerks more often provide referral information. Ten of the clerks responded that they provide referrals to litigants, including the Boston Bar Association, the Massachusetts Bar Association, Lawyers Referral Service, Tel Law, or legal services.

Twelve of the Court personnel also expressed concerns about pro se litigation in the Bankruptcy Court. Similar to the judges, a number of clerks express concern that pro se debtors are unable to successfully complete the process. As one respondent summed it up, "[m]any do not realize everything that can happen or what bankruptcy truly means."

In addition, there were a number of responses reflecting concern with the interaction between court personnel and unrepresented litigants. Several clerks commented that pro se litigants look to the clerks to provide advice, and become upset when they are unable to do so. Another expressed a concern for litigants "going off the deep end." The frustration of both the clerks and the unrepresented litigant is summed up in the question faced frequently by one clerk "Why can't you just answer the question?"

D. POSSIBLE SOLUTIONS

There are no special programs or procedures directed exclusively to pro se litigants in the Bankruptcy Court, although some of the court personnel noted the general availability of forms and local rules for all litigants.

The survey suggested a number of options available in other jurisdictions to assist pro se litigants. A majority of judges agreed that an increase of pro bono attorneys would be helpful. No clear consensus emerged from the judges on the other suggestions although at least one or more judges supported each of the following ideas: an 800 telephone number, lawyer of the day program, an on-site facilitator, brochures, and training of court personnel. Interest-

ingly, one judge strongly opposed brochures and another judge felt strongly against training of court personnel. The lack of a consensus is best explained by the conclusion of one of the judges who felt these matters needed to be addressed by the full Court, reflecting that "[e]ach of these suggestions, while facially attractive, carries a variety of procedural and substantive problems."

Another reason for higher scrutiny in the bankruptcy area may be the concern regarding non-lawyer document preparers, who will complete bankruptcy forms for a fee. In bankruptcy, however, completion of the forms often requires substantive decision making: for example, what type of bankruptcy to file or, what set of exemptions to claim. In 1994, Congress added language to the Bankruptcy Code providing governance over non-attorney petition preparers.

Court personnel were also asked about a variety of programs developed in other jurisdictions. A majority thought the following suggestions would

be helpful: an 800 number with a pro se assistant, brochures describing the procedure and forms, increasing the number of pro bono attorneys. In addition, a significant number thought a pro se clinic or special pro se clerk or facilitator would be helpful.

The distinction between indigent and non-indigent litigants is seen more often in the discussion of future programs. Four of the judges and the vast majority of clerks stated that whether or not the litigant is indigent does not affect their handling of a matter, although one clerk admitted to being more inclined to assist an indigent. In terms of future programs, however, more judges and clerks were willing to draw a distinction. While some judges felt that programs should be open to all, other judges felt that would lead to a basic unfairness and that those with resources should pay. As noted by one Bankruptcy Judge: "Bankruptcy proceedings are usually about money and who is entitled to it." Similarly, the majority of court personnel believe pro se litigants should be provided with programs without regard to resources, although a minority expressed the concern that those who have resources should pay.

D. APPELLATE COURTS

This section addresses the nature of pro se litigation in the appellate courts of Massachusetts, the Supreme Judicial Court (SJC) and the Appeals Court. Each of these courts has both full court jurisdiction exercised by a panel of justices and single justice sessions, with a separate docket for each of the two types of business. In the SJC, there are two separate clerk's offices, an Office of the SJC Clerk for the Commonwealth and an Office of the SJC Clerk for Suffolk County. There is one Clerk of Court for the Appeals Court.

Two survey instruments were used to elicit data from personnel in the appellate courts - a Court Personnel Pro Se Survey and a Judge Survey. (Copies of the surveys are included in the separately bound Appendix to this Report). Both surveys included questions designed to obtain information pertinent to the appellate system.

In the Appeals Court, the judges' surveys were distributed to each of the 15 Justices. The court personnel surveys were distributed by the Clerk of Court to those employees in her office having contact with pro se litigants, including assistant clerks and clerical personnel. Several staff attorneys in the Appeals Court also completed the surveys.

In the SJC, the judges surveys were sent to each of the 7 Justices. In the Office of the SJC Clerk for the Commonwealth, each of the five employees completed the survey. The SJC Clerk for Suffolk County distributed the surveys in her office to the employees, including assistant clerks and clerical personnel, who have dealings with pro se litigants.

Thirty-seven surveys were completed by appellate court personnel. In the SJC, 12 surveys were received from court staff and 7 from the Justices. In the Appeals Court, there were 11 surveys from court staff and 7 from the Justices.

1. DATA

In addition to the survey responses, data maintained in the Clerks' offices provide an overall sense of the scope of pro se litigation in the appellate courts. In the Appeals Court, in calendar year 1997, 2,326 appeals to a panel of justices were entered. In 340 of those cases, the appellant proceeded pro se. This represents 14.6% of the total appeals to a panel. Of the 340 pro se appellants, 69 were pro se prisoners.

In calendar year 1996, of the 2,088 appeals entered, 269 had pro se appellants, representing 12.9% of the total entries. Forty-six of the 269 appellants were prisoners.

In 1997, the Office of the Supreme Judicial Court Clerk for the Commonwealth received 656 petitions for appellate review, requesting either direct or further appellate review. Of those petitions, 63 of the petitioners were pro se, representing approximately 10%. In the same year, 33 appeals involved pro se litigants (generally appellants) out of a total of 278 appeals filed. This represents approximately 11% of total appeals. For calendar year 1996, comparable figures are: 87 pro se petitions for direct or further appellate review out of a total of 693 petitions filed and 29 appeals involving pro se litigants out of 257 total appeals. Thus, in 1996, approximately 12% of the petitions for appellate review were filed by pro se petitioners and in about 11% of the appeals one of the parties was pro se.

In the Office of the SJC Clerk for Suffolk County, a separate administrative pro se docket is kept to track every written document sent to the Clerk by an individual acting without a lawyer. A response to the pro se correspondent is mailed by the Clerk's office within 30 days. In 1996, there were 139 files in this administrative docket; in 1997, there were 173 files. These files do not mean that a case will necessarily be filed by the correspondent. In fact, both of the SJC Clerks noted that the number of

cases involving pro se litigants does not give a true indication of the time spent by personnel in the clerks' offices dealing with pro se matters. Many inquiries require time on the part of staff, whether or not a case is eventually filed.

Many pro se matters before the Supreme Judicial Court originate as letters sent to a judge, clerk, a named SJC employee, or to the SJC as an institution. The numbers of new letter files opened during the past three fiscal years are as follows:

FY '95 - approximately	200
FY '96 - "	170
FY '97 - "	115

It is important to note that many of these files contain numerous letters from the same correspondent. Some prison inmates send many voluminous letters each month and since the above statistics only reflect files opened, subsequent correspondence from the same parties would not be reflected in the calculation.

Some of the letters received are from persons offering opinions but not requesting legal relief. Many are from pro se inmates of jails or prisons. If legal relief is requested which is obtainable in the Supreme Judicial Court (e.g. extraordinary relief pursuant to G. L. c. 211, Sec. 3), the letter is referred to the appropriate clerk's office for handling as a separate case. Many of the letters are answered by providing information, including referrals to lower courts and to legal services agencies such as Committee for Public Counsel Services, Massachusetts, Correctional Legal Services, Greater Boston Legal Services, etc. The types of requests include, but are not limited to, questions about statutes, the common law, further appellate review, direct appellate review, single justice appeals, substance abuse resources, complaints against judges and other court personnel, complaints against the Board of Bar Overseers and Commission on Judicial Conduct, cases pending in lower courts, divorce, child custody, complaints about prison conditions, credit for jail time, appointment of counsel, habeas corpus petitions, bail, summary process, mental health, abuse prevention, small

claims, supplementary process, waiver of filing fees, constitutional law and numerous other subjects. Many of the letter writers follow up a response with telephone calls to the person who replies. Some of the letters are incomprehensible, undecipherable or both. No statistics are available as to the number of letters which become cases.

2. SURVEY RESPONSES

A. JUDGES

i. Supreme Judicial Court

All of the Justices responded to the survey. The responses estimated that approximately 4-5% of the single justice matters and 2% of other matters coming before the Court involve pro se litigants. Five of the Justices indicated that they saw pro se litigants in Chapter 211, Sec. 3 matters, although two noted that this only occurs rarely. One Justice responded that pro se litigants appear in single justice sessions in appeals of evictions. On the full bench side, two of the Justices responded that they see pro se litigants in civil, delinquency, Children In Need of Services ("CHINS") and care and protection proceedings. One Justice stated that pro se litigants also appear in abuse prevention and criminal matters.

Only one Justice responded that he has seen an increase in the number of people filing pro se in the past two years; two responded that they have not seen an increase. Two Justices said that the fact that a litigant is not represented does not affect their handling of a case. One Justice responded "yes and no" to this question, indicating that in some respects, pro se status does influence his handling of the case. One Justice responded yes to the question, noting that he may take special steps to grant a continuance to allow the unrepresented party to find an attorney, spend time explaining the nature of the proceeding and explain the disadvantages of a litigant proceeding on a pro se basis. Two Justices said that there are significant differences between record appendices filed by pro se litigants and those filed by lawyers. One noted that he finds it necessary to spend extra time reviewing the briefs filed by pro se litigants to ascertain if there is an appealable issue. Another Justice

stated that he tends to give pro se litigants the benefit of the doubt when reviewing their briefs.

With respect to oral argument by pro se litigants, one of the responses indicated that it is usually unhelpful; one said that it is sometimes helpful; and one Justice commented that it makes the litigants feel better. Two Justices said that they generally advise pro se litigants to seek counsel, and one Justice does not generally offer this advice. Two of the Justices stated that they do not refer pro se litigants to bar associations, legal service offices and social service agencies. One sometimes makes these referrals. None of the Justices reported treating pro se litigants differently if they are not indigent.

Six of the Justices responded that they do not have concerns about pro se litigants in the Court. One Justice noted his concern about unclear and incompetent presentations from these litigants. All of the responses indicated that the Court does not have special procedures to deal with pro se litigants, one response noting that the Clerk's office is helpful both to lawyers and pro se parties. Six Justices responded that they hold pro se litigants to the same standard as attorneys. The seventh Justice stated that he tries to hold these litigants to the same standard. Five Justices believe there should be a standard judicial protocol for treatment of pro se litigants and one was not in favor of a standard protocol. One or more of the responses indicated that the following programs would be helpful in the Court: 800 telephone number, brochures, increase the number of pro bono attorneys, increase the number of lawyers of the day programs, on-site pro se facilitator, pro se clinic, video room, and training of court personnel. Three Justices believe these programs should be made available to all pro se litigants and three say they should only be provided to indigent pro se parties, one noting that those who can afford representation should pay their "fair share."

ii. Appeals Court

Six of the seven Justices indicated that pro se litigants appear regularly in their courts, and the other Justice indicated that pro se litigants appear infre-

quently. The estimates of pro se litigants ranged from less than 5% to 20% of single justice cases and from 1% to 10% of other cases.

The Justices indicated that they regularly see pro se litigants in civil cases, including domestic relations cases, criminal cases, review of indigency claims, summary process, injunctive relief and prison condition cases. Only three of the Justices indicated they had seen an increase in the number of the people filing pro se. Five of the Judges indicated that their handling of the case is affected at least some of the time by the fact that the litigant was pro se. All indicated that in their review of the brief they spend more effort to try to identifying the claim and that they are more tolerant, sometimes overlooking non-compliance with the rules for pro se litigants. One Justice indicated there are no differences in the way he handled pro se litigants. Four of the Justices indicated they take special steps when proceeding in cases in which there were pro se litigants including granting a continuance to allow the pro se litigant to find an attorney, explaining the nature of the proceedings, and trying to evaluate arguments to discern whether there were issues which are not being brought out by the litigant. All of the Justices indicated that oral argument from pro se litigants is not usually helpful but there are instances where a pro se party is able to defend the case well and in one instance, better than opposing counsel. Three Justices indicated they might refer unrepresented litigants if early enough in the process, specifying prisoners' rights groups, bar association groups and legal services, but the majority felt it was "too late in the process" to suggest counsel. One Justice indicated that if the litigant was not indigent, he might not be as tolerant of looking "behind the brief." The other Justices indicated their treatment of the pro se litigants does not differ if they are not indigent.

Six of the Justices indicated they have "concerns" about pro se litigants in the Court. Among the concerns expressed were that although the clerks are helpful, there generally is not available any "booklet" to assist pro se litigants procedurally, that it is very difficult for judges to determine whether there are meritorious issues given the condition of the briefs,

that people are being prejudiced by less than adequate representation, especially in criminal cases, and that it is a burden on the Justices to attempt to be fair to both sides. None of the Justices indicated that the Court has any special programs to direct pro se litigants and referred the question to the clerks. Three of the Justices said they do not hold pro se litigants to the same standards as attorneys; one indicated he does "mostly," one indicated that some lawyers are not much better than pro se litigants, and one Justice said he occasionally overlooks procedural defects in order to prevent an "injustice." Four of the Justices indicated that there should not be a "standard judicial protocol" for treatment of litigants. One indicated there already was a protocol, i.e., that pro se litigants are to be treated the same as represented litigants. Five of the Justices felt that the following programs would be helpful in the Court: an 800 number, brochures describing procedures, an increase in the number of pro bono attorneys, a pro se clinic, educational seminars, a video room, and training of court personnel in working with pro se litigants. Three of the Justices thought that the programs should be made available without regard to financial resources. Only two of the Justices had suggestions for dealing with pro se litigants. One of the Justices suggested: "courtesy, respect and patience," and the other suggested that the appellate level is too late to "bail out" the litigant and that the problem must be dealt with at the trial court level, also indicating that lawyers' pro bono obligations should be more closely tracked in devising practical solutions.

B. COURT PERSONNEL

i. Supreme Judicial Court

The survey responses completed by the staff of the SJC Clerks' offices indicate that virtually all respondents feel that pro se litigants appear regularly in their courts. Staff contact with these litigants is over the counter, by phone and by letter. SJC employee respondents reported spending from 5 to 75 percent of their time with pro se litigants, with most responses indicating staff spends between 20-25% of their time with pro se parties.

The responses from SJC personnel indicate that pro se litigants appear in all types of cases before the Court. Personnel from the Office of the Clerk for the Commonwealth report seeing significant numbers of pro se litigants in petitions for appellate review, single justice appeals, motions for appointment of counsel, and complaints about judges, clerks and movement of cases through the trial court. The majority of responses from the Office of the Clerk of Suffolk County report that significant numbers of pro se litigants appear in matters involving credit for jail time, complaints about jail conditions, habeas corpus petitions, summary process cases, motions for appointment of counsel, single justice appeals and complaints about judges, clerks and caseflow. Each category of case listed on the survey was checked by at least one respondent.

Nine of the SJC employee respondents report seeing an increase in pro se litigation during the past 2 years. The common questions asked by pro se litigants mentioned in the responses relate to the appellate process. Questions such as "Can I appeal?," "How do I appeal?," "Where do I appeal?," "Can I have an attorney?," "Who will pay?," and "How long until I receive a decision?" are frequently asked. No respondent reported treating a pro se litigant differently if the litigant is not indigent.

Personnel in the Office of the Clerk for the Commonwealth all report that they advise pro se litigants to seek counsel. Two respondents from the Office of the Clerk for Suffolk County report that they sometimes advise litigants to seek counsel.

A number of the SJC employees commented on the difficulty in dealing with the significant frustrations felt by pro se litigants in the SJC. The litigants see this Court as their last hope. Its rules and procedures are complex and court staff feel that the level of difficulty of the legal tasks often outweighs the training and skills of the litigants. Two responses indicate a concern for the safety and security of staff because of the emotional state of the litigants. Another concern noted was that pro se litigants often fail to supply the court with the background and other information required to properly state their case.

The assistance provided to pro se litigants by SJC employees generally takes the form of supplying the litigants with copies of rules of court and samples of petitions and briefs. Most respondents favored the development of programs to assist pro se litigants. Providing an 800 telephone number and brochures which describe procedures and forms were the programs most frequently checked by SJC staff as ones which would be helpful in their court.

ii. Appeals Court

The survey responses completed by the staff of the Appeals Court include responses from the Clerk of the Appeals Court and four assistants in the Clerk's office. There were also responses from six staff attorneys. The personnel in the Clerk's office deal directly with pro se litigants; the staff attorneys handle pro se litigants' work product as reflected in briefs and record appendices.

In the Clerk's office, all respondents agree that pro se litigants appear regularly in the Appeals Court. Contact with these litigants is over the counter, by telephone and by letter. Personnel in the Clerk's office spend from 3 to 30 percent of their time with pro se litigants.

The responses from Appeals Court personnel indicate that pro se litigants appear in many different types of cases before the court, including direct appellate review, single justice appeals, small claims, abuse prevention, summary process, motions for appointment of counsel, divorce and child custody, complaints about prison conditions and complaints against judges and other court personnel.

All except one assistant clerk perceive an increase in the number of pro se litigants in the past two years. The most common questions asked by pro se litigants concern waiver of filing fees, waiver of the requirement to conform to the Rules of Appellate Procedure concerning briefs, and how to prepare briefs and appendices.

Personnel in the Clerk's office often refer unrepresented litigants to bar associations and legal ser-

vices organizations. One assistant reported making no such referrals. Four out of five respondents indicated that treatment of pro se litigants does not differ if the litigant is not indigent. The one response indicating different treatment referred to areas where indigency is relevant such as waiver of filing fees.

Concern was expressed about the increasing amount of staff time spent with pro se litigants. Other than the availability of procedural checklists for compliance with the Rules of Appellate Procedure, there appear to be no special procedures or programs in the Appeals Court for pro se litigants. Members of the Clerk's office favored use of new programs including expanded brochures and use of video, increasing the number of lawyers available to help pro se litigants and training for court personnel.

The concerns of the six staff attorneys who responded focused on the quality of briefs and appendices filed by pro se litigants. References were made to concerns about the poor quality of legal argument in pro se litigants' briefs and a lack of understanding as to what belongs in the record appendix. It was stated that pro se litigants typically fill the appendix with irrelevant material and omit critical documents from the trial court record. It was also stated that frivolous appeals, poor framing of issues, and weak arguments require court personnel to spend substantial amounts of time in disposing of pro se cases.

3. CONCLUSION

Data kept by the Clerks in each of the appellate courts confirm the general impressions of court staff recorded on the surveys that an increasing number of pro se litigants are appearing in all types of cases brought in the appellate courts. The impact of this litigation is felt most keenly by the personnel in the Clerks' offices, who expressed more concern than did the judges about the challenges presented by pro se litigants. The Clerks' office personnel have significantly more in-person and telephone contact with these litigants and frequently spend considerable amounts of time communicating with pro se parties before matters are even docketed. They emphasize that the number of cases involving pro se parties does

not adequately reflect the substantial amount of staff time devoted to these litigants.

The challenges presented by pro se litigants in the appellate courts are primarily related to the difficulties these litigants face in understanding the appellate process and in properly stating their claims. One court administrator noted that many pro se litigants believe that they will receive another chance to try their case in the appellate courts. Judges and court personnel report that they spend extra time reviewing materials filed by pro se litigants. Clerks' office personnel spend significant time communi-

cating with these litigants and express some concern for security because of the high emotional state of some of the litigants as they deal with the court which they view as their last hope.

There are no formal programs for pro se litigants in place in either of the appellate courts. Personnel in the Clerks' offices provide informal assistance in the nature of advice and sample filings. These employees indicate that they would be eager to implement any initiative which would help the pro se litigants to better understand and use the appellate process.

III. UNREPRESENTED LITIGANTS WITH SPECIAL CONCERNS

The difficulties faced by unrepresented litigants have been well-documented by the work of this Task Force as well as by other studies. Yet, when these problems are compounded by linguistic barriers, cultural differences or physical limitations, the pro se litigant's disadvantages are prodigious. In order to understand how unrepresented litigants with such special concerns manage in the court system, the Task Force, with the co-sponsorship of the Pro Se Committee of the Probate and Family Court, organized a focus group on this subject. Twenty-one speakers addressed the focus group, which was co-chaired by Judge Elaine M. Moriarty and Edward Notis-McConarty, chair of the Task Force. In addition, a Task Force member conducted interviews with citizens of color, legislators, judges, a City Councilor, employees of the Massachusetts Commission Against Discrimination (MCAD), the Equal Employment Opportunity Commission (EEOC) and social service agencies, a member of the National Association for the Advancement of Colored People (NAACP), housing advocates, parents of children in public schools, in Metco programs, and in special need programs as well as parents of incarcerated youth, attorneys of color, pro se litigants, business leaders and others representing areas of concern to people of color.

At the focus group, participants discussed the particular difficulties faced by non-English speaking litigants when they represent themselves in court. Even where brochures and other self-help materials are available, they are rarely obtainable in languages other than English. Interpreters are not consistently available. Family members (even children who may be the most fluent English speakers in the family) may act as interpreters of notices received from the courts. Sometimes (particularly in emergencies) such family members are also used as interpreters in court proceedings, although they may have an interest in the outcome. Lawyers would interpret and explain the proceedings to their clients in the course of representing them, but without a lawyer, a family with

Written settlement agreements also present difficulties for non-English speakers. Some judges require that a interpreter certify that a settlement agreement has been translated (not just "explained") to non-English speaking pro se parties.

Unrepresented litigants sometimes have cultural, as well as linguistic, barriers to asserting their rights. A number of speakers at the focus group noted that women of certain cultures (including Chinese, Muslim, Haitian and Guatemalan) are ashamed of divorce, which is interpreted as a failure by the woman. One Probate and Family Court judge noted that on several occasions she has seen Chinese couples divorcing where the wife gets little or no property and few rights with the children. Suspecting that such agreements are not understood, One Probate and Family Court Judge refers these women to a volunteer lawyer of Chinese descent. With the more onerous immigration laws, and the Legal Services Corporation ban on handling some immigration matters, many non-citizens are afraid to speak up and have less access to legal assistance.

Some pro se litigants are at a particular disadvantage in mediation. In some cultures, a high value is placed on adherence to authority. For these parties, without lawyers, a mediator's position of power can lead to an agreement which is not really understood or accepted. Unrepresented parties sometimes enter into agreements in these situations which are disadvantageous or which they do not fully understand.

Disabled litigants also find it difficult without a lawyer. Litigants who are blind, hearing impaired, or have suffered a severe injury must overcome huge hurdles to represent themselves. While the Disability Law Center provides important assistance, the Center cannot handle the volume of cases referred, and people with disabilities may not have received the training or education needed to represent themselves. Physical barriers are still a problem. For ex-

ample, it was reported that although the Suffolk County courthouse has an exterior entrance accessible to persons with disabilities, there is no signage to indicate its location.

The unavailability of legal services is a severe problem for persons of color who seek to assert claims of race or national origin, discrimination in housing, employment, or education or claims of police misconduct or racial violence. There are scarce legal services available to civil rights litigants; most of the traditional legal service agencies offer no or very limited civil rights services. Greater Boston Legal Services provides some employment discrimination services; however, it has few resources available for these cases. The law school legal services clinics also have no active civil rights litigation practice. Although the Lawyers Committee For Civil Rights attempts to leverage the pro bono resources of law firms, it cannot fully meet the demand for representation. While the Center For Law & Education provides good informational resources to litigants with concerns in educational civil rights issues, it has no advocacy and litigation branch. The Office for Civil Rights of the U.S. Department of Education ("OCR") offers investigation and equitable remedies to complainants, but cannot pursue compensatory or monetary damages. The inability to afford private legal counsel is cited by interviewees as the major reason victims of civil rights violations are not represented; lack of knowledge of the limited legal resources available is another barrier.

The MCAD and EEOC are the two primary administrative agencies charged with the enforcement of civil rights laws. The MCAD reports its dismissal rate of discrimination complaints for lack of probable cause at 65%.⁵³ Being successful in discovery and hearing without counsel is extremely difficult; representation at de novo re-trials of MCAD cases in the Superior Court jury sessions is critical to a civil rights claimant's likelihood of success. In the EEOC context, where the federal court has jurisdiction if a "right to sue" letter is issued, unrepre-

sented litigants are also severely disadvantaged. Interviewees noted that despite the law's provision for private counsel, lawyers are almost never appointed by the federal court in these cases.

Many people of color or economically disadvantaged parties find themselves without lawyers at administrative agencies other than the MCAD and EEOC. In the housing area, HUD hearings for housing discrimination involve many unrepresented litigants (this is also true of the Boston Housing Court complaint procedures).

An area of particular concern to people of color is discrimination in education. Legal representation in educational discrimination is greatly lacking. When provided, the cost is staggering. Parents reported legal expenses of \$5,000 - \$10,000 just for full scale administrative challenges without any court proceedings. Litigation is even more expensive. While the MCAD has no jurisdiction over educational discrimination except for admissions, the OCR can do investigations and provide injunctive remedies but cannot award compensatory damages. The OCR handles hundreds of complaints, many from parents who are unrepresented.

Legal services are also greatly needed in cases of employment discrimination. The MCAD reports that the overwhelming majority of its cases involve workplace discrimination. Race discrimination cases are reported to be among the most difficult to prove as discrimination is increasingly subtle. Interviewees universally felt that legal representation was imperative and that success in the judicial system is illusory for unrepresented claimants.

Thus, the difficulties experienced by unrepresented litigants are exacerbated when they are people of color, non-English speakers or disabled. The areas of concern are not limited to the courtroom, however; these litigants experience problems throughout the legal process and often before administrative agencies and mediators.

The response of specific Massachusetts courts has been noted above. However, the response of our courts must be seen in the context of responses elsewhere in the country. Also, the response in Massachusetts is broader than just the individual courts, as

legal services and other organizations are also responding. To work toward an organized overall response, a broader view must be taken. legal services and other organizations are also responding. To work toward an organized overall response, a broader view must be taken.

IV. THE RESPONSE TO PRO SE LITIGANTS

A. NATIONWIDE RESPONSE

Until the last decade or so, attorneys represented most litigants in court, even in cases other than criminal or juvenile matters. Attorneys prepared paperwork, advised clients about the consequences and implications of court proceedings, settled cases as appropriate, and represented clients in court. The success of the legal system in dealing with conflict was based on effective interaction between attorneys and judges who were trained in and familiar with the law.

The numbers of litigants appearing in court without representation have dramatically increased in recent years. The increasing number of pro se litigants poses a serious problem to our legal system and to our society at large. In response, over the last few years, bar associations, the courts and public interest law organizations throughout the country have expanded the number of legal options and strategies available to low income and moderate income citizens who are seeking just outcomes in our courts.

Despite this response, however, the number of low and moderate income Americans in need of legal assistance is outpacing the current level of available legal services. This seems particularly true for the civil legal assistance needs of low income individuals. Despite great efforts by public interest law groups and the bar, both to retain funding and to carry out their legal programs on behalf of low income clients, staff in these programs are being cut and resources are constantly being pulled in too many directions.

An increasing number of courts across the nation have developed new methods to cope with the problems that consistently arise when pro se litigants come to court. In many states, courts have published instructional printed materials. For example, pamphlets have been written to guide pro se litigants through the process of filing a claim and to inform them of relevant court procedures. Similarly, some

courts offer training classes and others have gone an additional step and provide free legal advice.

It is not just the courts that have responded. To address the challenge of increasing numbers of pro se litigants, sometimes the resources of the courts, the legislature, the bar and practitioners themselves all must be effectively coordinated and directed. A variety of mechanisms have emerged. Some states have enacted simplified divorce statutes. Some courts have worked with bar associations to adopt comprehensive sets of model pleadings and standardized forms that reduce the complexity for the parties.

Programs offering procedural assistance to pro se litigants also are emerging in a variety of forms. Some jurisdictions have employed courthouse ombudsmen, some distribute self-help form packets, and others have established workshops and clinics that give hands-on instructions to groups of pro se litigants and representation to those who need it. Programs offering substantive assistance also have been developed. Different types of bar sponsored or non-profit clinics are being employed to supplement traditional legal representation.

Some jurisdictions have developed particularly promising policies, programs and resources for pro se litigants. These programs are joint efforts of state and local bar associations, of the courts themselves and of non-profit organizations. Because of these programs, through which resources have been committed to helping people represent themselves, particularly in family, probate and housing matters, the process for managing pro se litigation has speeded up and become less disruptive.

The programs encompass a wide range of approaches, from those that offer simplified forms, explanatory brochures and limited staff assistance to programs that offer hands-on advice or even more extensive services. The description of these programs is divided into two categories: (1) services provided

directly to pro se litigants, and (2) programs involving internal systemic changes in the courts themselves.

1. SERVICES FOR PRO SE LITIGANTS

A. COURT FORMS AND INSTRUCTIONS

The simplest service for a court to provide is to have basic forms available for uncontested divorce, small claims and name changes. Many courts do this. They often accompany the forms with instructions about how to complete the forms, how to serve them and when and how to file them. Some courts, such as the Brown County Courthouse in Green Bay, Wisconsin, also provide forms which are generated via a computer in the courthouse.

The QuickCourt project, which began in Arizona and is now in use in Michigan, Colorado and Utah, makes court forms and procedures more accessible to the public through the use of touch screen technology. There are 25 free-standing kiosks (computers with touch screen technology similar to ATM machines) in Arizona and five in Utah. The information is available in English or Spanish. A pro se litigant follows on-screen instructions and enters the information called for in the forms; a printer in the kiosk then generates the completed forms.

In Maryland, standardized forms and pleadings with accompanying instructions have been developed by the judiciary and are available in courthouses and community facilities throughout the state, as well as on-line through the People's Law Library of Maryland (www.peoples-law.com).

B. EXPLANATORY MATERIALS

Another easy approach taken by courts is to write and distribute brochures and flyers that explain how various types of cases normally proceed. In some states, such as Florida and New Jersey, the text of explanatory brochures can also be found on the web pages of the courts. The New Jersey State Courts web page has a special section for Pro Se Litigants

that contains appellate division forms, information about county law libraries, and forms for wills and probate, small claims, landlord/tenant claims and collecting a judgment. This very thorough and well written web page also offers descriptions of the courts and of what happens in particular types of legal proceedings.

Video technology has been used in several courts around the country. Michigan, the District of Columbia, New Jersey, Pennsylvania, Colorado and New York all have produced videos which are shown to pro se litigants to guide them through the court process or through the necessary steps to prepare and file a court document. Videos are shown in rooms at the courthouses, at bar associations and in law libraries.

C. STAFF ASSISTANCE

In addition to providing services and materials to pro se litigants, some courts have trained specially-assigned court staff to provide information regarding options. Of course, these programs help the litigants achieve more just outcomes. In addition, one of the benefits sought by some of the courts which have instituted these programs is alleviation of the workload of the clerk's office by providing an outside resource for self-represented litigants who have questions or concerns on domestic relations issues.

In New York City's Family Court, for example, a petition clerk will interview litigants and actually prepare a petition or other document required for a proceeding in Family Court. The county courts in the State of Washington also have permanent staff working in the courthouses whose job is to assist pro se litigants by providing information and helping them fill out forms. Other courts use volunteer staff.

The Circuit Court of Maryland joined together with two law schools in Baltimore to create a clinical project called the Family Law Assisted Pro Se Project. The Project supervises law students while they provide legal information and advice to more than 4,000 unrepresented litigants in domestic cases.

In Chicago, the court-use-assistance program is limited to guardianships for minors and obtaining civil orders of protection. In Manhattan, the Supreme Court opened up the first pro se office in the state, called the Office for the Self Represented, which is staffed by court employees, volunteers lawyers and law students. They offer assistance in filling out and filing forms, and guiding litigants through the process. They also show a video on court procedure.

D. LEGAL CLINICS

Legal clinic programs (sometimes called People's Law Schools) are a combination of workshop-seminars that teach prospective pro se litigants about a substantive topic, about how the court handles the particular type of matter that interests the litigants, what forms need to be prepared, what to do in court and how the case moves through the court system. Although a few courts have implemented such programs to educate pro se litigants about the court process, most of the current legal clinic programs have been initiated by bar associations, law schools, legal services programs and community organizations. Like many other bar associations, the Houston Bar Association offers a free course for litigants in divorce or family proceedings. In Virginia, legal services offices offer one day clinics in family law and bankruptcy proceedings. The Colorado State Bar has set up five "community schools" that run clinics on child support, bankruptcy, divorce and small claims. Legal clinics are also held in California, Minnesota, Maryland, Hawaii and Pennsylvania.

E. SELF-SERVICE CENTERS

Arizona's self-service center offers the public many services, including court forms, instructions to pro se litigants and other educational materials. The court keeps a listing of attorneys who are willing to work with pro se litigants on a task-by-task basis and of mediators who may help a litigant with dispute resolution services. The self-represented litigant is offered information in the following areas of the law: divorce, paternity, child custody, child support, child visitation, enforcement, modification, domestic vio-

lence, guardianship, conservatorship, and transfer of property when a person dies.

The center is visited by about 400 people per day. The Center's web site (www.maricopa.gov/supct/ssc/sschome.html) is visited by another 200 per week. All court forms are available online as well. The automated telephone system provides access to court information and services handling 4,000 calls per week.

2. INNOVATIVE PROGRAMS INVOLVING INTERNAL SYSTEMIC CHANGES IN THE COURTS

A. STANDARDIZATION OF FORMS AND PROCEDURES

One of the major barriers encountered by pro se litigants is the complexity of the law and its procedures. The Florida Supreme Court, with the help of the Florida Bar Association, has developed simplified divorce procedures and adopted standardized forms and pleadings. In a number of states, committees or task forces reviewed and revised existing forms and, as necessary, developed new forms for use by unrepresented litigants. In Minnesota, for example, the State Bar Task Force on Pro Se discovered a startling lack of uniformity in the information being provided to pro se litigants. The Task Force recommended that a committee including judges, court administrators, staff attorneys and pro se users be established to determine what basic useful and understandable information should be made available to pro se litigants. This information should be uniform and used throughout the state.

B. CREATION OF BENCH BOOKS WITH PROTOCOLS/ GUIDELINES FOR USE BY JUDGES AND ALJ's DURING HEARINGS.

Judges are in need of guidance on the most effective and ethically permissible strategies for assisting self representing litigants. In response to that need, Minnesota has created a list of protocols for use by judges when appropriate in dealing with pro se litigants. These guidelines are very broad in nature. For example, they suggest that the judge explain the process, explain the terms and the elements

needed for a particular order or motion to succeed, and explain that the party bringing the action has the burden to present evidence in support of the relief sought.

**C. TRAINING AND EDUCATION OF COURT
ADMINISTRATIVE AND JUDICIAL OFFICERS
REGARDING PRO SE ISSUES AND SERVICES.**

Pro se litigants often seek assistance from court staff, but that staff is often appropriately reluctant to give information that could be construed as legal advice. John M. Greacen, Clerk of the U.S. Bankruptcy Court, District of New Mexico, Albuquerque, NM wrote an article entitled, "No Legal Advice from Court Personnel: What Does That Mean?" The article discusses how staff can be trained to answer questions concerning court rules, procedures, and practices. The staff can answer questions containing such words as, "Can I?" or "How do I?" but not questions that start "Should I?" In addition, Greacen concludes that court staff can provide examples of forms and documents used in their court, explain their meaning and answer questions about deadlines and due dates.

The Michigan Court Support Training Consortium developed guidelines for court staff dealing with pro se litigants and incorporated the guidelines as part of a computerized, interactive training pro-

gram for the staff. The program uses a series of examples to show court staff what information they may provide to self represented litigants.

Some states are also training their court staff to be familiar with and prepared to make referrals to local legal services programs and bar association's Tel-Law programs.

**D. DEVELOPING PLANS AND METHODS FOR
DISSEMINATING INFORMATION TO THE PUBLIC
ABOUT THE AVAILABILITY OF PRO SE SERVICES,
FORMS AND BROCHURES, EITHER THROUGH THE
COURT OR THROUGH INDEPENDENT PROGRAMS
SUCH AS THOSE DESCRIBED ABOVE.**

Recognizing the need for improved communication among the state court system, legal services, lawyers, libraries and community organizations, the State Bar in Pennsylvania has a pro bono coordinator who oversees the compilation of county-by-county information packets on pro se litigation. Other states have recommended that law libraries dedicate a section to pro se users, with information and materials to be developed. In addition, they have recommended that law librarians be included in any training provided for court personnel. Finally, by using the new technologies developed in states like Florida and New Jersey, community agencies can assist in the implementation of pro se workshops and distribution of pro se materials.

B. MASSACHUSETTS RESPONSE

The increasing presence of pro se litigants in the Massachusetts courts and the resultant pressures on the courts, other parties and the unrepresented litigants themselves have not gone unnoticed in Massachusetts. In its investigation of the pro se issue, the Task Force has found many people and institutions here concerned about unrepresented litigants' lack of effective access to the Massachusetts courts; we have also found a number of programs that have been crafted to address that concern. Some of these programs in Massachusetts provide information and assistance beforehand to those who are going into court without legal counsel others help the unrepresented litigants in the court process. The following is a summary of some of the present programs in Massachusetts that address the needs of pro se litigants.⁵⁴

1. PRE-COURT PRO SE CLINICS

The Task Force has found that many legal services agencies and law school programs have experimented with clinics to prepare those litigants who are going to court hearings or trials without representation. Twelve of these clinics involve family law (most cover divorce but other family law topics are also addressed), eight of the clinics focus on housing matters and two involve bankruptcy cases. Several other such clinics are being developed. In addition, several county bar associations have presented occasional clinics, primarily on family law. The Massachusetts Academy of Trial Attorneys operates a "peoples' law school." Despite the number and range of these clinics, there are few detailed evaluations of their effectiveness. While the sponsors of the clinics by and large believe that the programs help pro se litigants to some extent, the actual impact of these clinics is not clear.

2. INFORMATION DESKS AND OTHER COURT-BASED ASSISTANCE

Although a centralized information desk in a court is the key feature of the Maricopa County, Arizona system, there are few such efforts in place in the Massachusetts courts. Exceptions include Suf-

folk Probate and Family Court, the Norfolk Probate and Family Court pro se Clerk (from whom the Task Force heard in person) and the information desk in the Greenfield courthouse, which resulted from the Franklin County Reinventing Justice Project. The clerk's office of the United States District Court has a pro se intake clerk who handles case filed by unrepresented litigants.

3. INFORMATION PREPARED FOR UNREPRESENTED LITIGANTS

Many courts, legal services programs and bar associations have prepared information for unrepresented litigants. For example:

- Middlesex Probate and Family Court has brochures on contempt and "no fault" divorce cases.
- The United States District Court in Boston has a thirty page guide for pro se litigants on how to file a federal court lawsuit.
- The Trial Court's Judicial Institute has just produced a videotape called "For your Protection: 209A - Videotape for Victims of Domestic Violence" available in 4 languages.
- The Boston Bar Association Family Law Section Subcommittee on Pro Se Litigants has prepared a series of booklets on family law topics. These booklets, which address representing yourself, paternity, child support, financial statements, and guardianship of a minor, have been distributed in the Suffolk and Middlesex Probate and Family Courts and have also recently been made available in the Norfolk Probate and Family Court.
- Community Legal Services and Counseling Center has prepared a booklet, which has been distributed in some Probate and Family Courts, on the duties of Family Service Officers.
- Suffolk Probate and Family Court has prepared written materials and forms on a "Proposed Temporary Order" and answer forms for unrepre-

resented litigants.

- The Concord branch of Middlesex Probate and Family Court has developed a video tape on domestic violence issues.
- The Attorney General's office has domestic violence brochures available in many languages.
- Neighborhood Legal Services in Lynn has established a web page (www.neighborhood-law.org) for persons who may be eligible clients, which contains much information on legal topics and on court matters. The web page was demonstrated at one of the Task Force meetings.
- Many legal services programs now have telephone hot lines, through which staff give out information and send written materials on various legal issues, including to those going to court. Such hot lines are operated by Legal Advocacy and Resource Center in Boston, the Massachusetts Justice Project in Worcester and Holyoke, and the New Center for Legal Advocacy in New Bedford. In addition, for many years the Massachusetts Bar Association has had a Tel-Law capacity to explain to callers, through recorded messages, certain legal topics.

4. SCREENING AND DISPUTE RESOLUTION PROGRAMS IN COURT

- The Middlesex Superior Court and the Cambridge District Court use the Cambridge Dispute Settlement Center for referrals of cases that appear appropriate for dispute resolution outside of court.
- Proposals have been made to the Suffolk Probate and Family Court and to the Boston Housing Court for screening by lawyers and law students at the beginning of cases to evaluate cases, assist persons who go to court hearings without lawyers and to refer certain cases for legal representation or dispute resolution programs. Some dispute intervention already exists in the Probate and Family Court through its Family Service

Officers. The Boston Housing Court has long had a "mediation" program through which 80% of eviction cases are resolved.

- As a pilot project, the Boston Municipal Court has instituted a mandatory, pre-trial case management conference which allows parties in a case to discuss settlement while also facilitating preparation for trial. This event is the first step proposed in a Boston Bar Association task force report which further contemplates the offer to the parties of a voluntary mediation conference. The court is considering implementation of the full recommendation.

5. LAWYER FOR THE DAY PROGRAMS

Most Probate and Family Courts now have Lawyer For The Day programs, in which volunteer lawyers participate, at the courthouse, in discussing legal matters with unrepresented litigants, helping them to prepare forms and otherwise giving them advice on court hearings. These lawyers do not provide any representation in court.

6. NONLAWYER ASSISTANCE TO UNREPRESENTED LITIGANTS IN COURT

In certain categories of cases, nonlawyers assist unrepresented litigants in presenting their cases in court. The Trial Court's Small Claims Rules authorize nonlawyers to appear with litigants who do not have lawyers in small claims cases and to assist them in presenting their cases. The Small Claims Advisory Service of Phillips Brooks House at Harvard provides college student volunteers to accompany unrepresented litigants to Small Claims sessions.

In Chapter 209A matters, the statute encourages the use of representatives to assist unrepresented litigants in court. Although the practice varies, some judges permit those advocates to make presentations on behalf of a 209A petitioner. In other courts, those advocates consult with the litigant but do not address the court. The state has begun to fund advocate programs called SafePlan in several areas of Massachusetts. These programs provide both non-

lawyer and lawyer advocates to 209A petitioners. In addition, Greater Boston Legal Services has a federal VAWA (Violence Against Women Act) grant to provide assistance, through experienced paralegals, to pro se domestic violence victims in Middlesex Probate and Family Court.

7. NON-COURT DISPUTE RESOLUTION PROCEDURES

The Task Force considered dispute resolution processes at administrative agencies to see whether they might hold lessons for how courts can handle large numbers of litigants. The Task Force found that many such processes exist and are successful at resolving large numbers of disputes, thus greatly lessening the numbers of those disputes that have to go to court. Examples of these procedures include the public housing grievance procedure, neighborhood dispute resolution programs and state administrative agency determinations and fair hearing processes.

8. RECENT DEVELOPMENTS CONCERNING ETHICAL ISSUES IN DEALING WITH PRO SE LITIGANTS.

The MBA Ethics Committee has recently published an opinion which states that certain activities by lawyers who "ghostwrite" pleadings or other legal documents for unrepresented litigants may violate ethical rules. *See*, MBA Ethics Opinion No. 98-1. Broadly speaking, the opinion raises questions only where a lawyer is, in essence, representing a client and perpetrating a fraud on the court by failing to disclose the lawyer's role to the court and opposing counsel. Some have questioned whether the opinion suggests that other activities that a lawyer might per-

form in connection with limited, rather than full, representation might also raise ethical concerns. As discussed elsewhere in this report, the ability to engage in limited representation - sometimes colloquially referred to as "unbundling" legal services - is a potentially important avenue of assisting pro se litigants. *See*, Powers, "Pro Bono and Pro Se: Letting Clients Order Off The Menu Without Giving Yourself Indigestion," Boston Bar Journal, Vol. 42, No. 3, (May/June 1998). The Task Force has been informed that the SJC Standing Committee on the Rules of Civil Procedure has taken up the question of the potential ethical issues raised by the MBA opinion.

Lawyers dealing with pro se litigant adversaries are also concerned about their ethical obligations. Many lawyers state that they will not communicate with pro se litigants except in writing. There is presently no effective ethical rule governing the duties of a lawyer, representing a client, who deals with a litigant who is unrepresented. This issue has been the subject of the thoughtful article by Russell Engler, New England School of Law entitled "Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons," 85 Calif. L. Review. 79 (January 1997).

Finally, we note that the ethical rules governing the unauthorized practice of law are not intended to prevent the activities of a non-lawyer advocate whose role is explicitly authorized by statute, regulation, or by the court. In addition, the potential application of these rules to court staff in dealing with pro se litigants is discussed in the opinion of the SJC Advisory Committee on Ethical Opinions for Clerks of Courts attached as Exhibit E.

V. FINDINGS

Based on the investigation detailed above, the Task Force makes the following findings:

I. LITIGANTS WITHOUT LAWYERS APPEAR IN STRIKING NUMBERS IN ALL MASSACHUSETTS COURTS.

In every court studied by the Task Force, litigants without lawyers are present in surprising numbers. In some counties, over 75% of the cases in Probate and Family Courts have at least one party unrepresented. In the Northeast Housing Court, over 50% of the landlords and 92% of the tenants appear without lawyers in summary process cases. In abuse prevention cases in District Court, both parties were represented in only 1% of the cases in the survey; a lawyer appears in only 7% of the cases.

While these are the most dramatic numbers, other courts are not far behind. Although little information is available in the Superior Court, reports are that in equitable remedy cases, abuse prevention cases, and prisoner cases, unrepresented parties are common. Virtually all observers report that the number of pro se litigants is growing and significant in every court.

II. UNREPRESENTED PARTIES PRESENT NEW CHALLENGES WHICH THE CURRENT JUDICIAL SYSTEM CANNOT HANDLE ADEQUATELY.

Unrepresented litigants do not fit neatly into the traditional judicial process. Pro se parties press court staff and judges for advice they cannot give. Parties without the help of lawyers misunderstand terminology, and they take longer to focus on points which judges or lawyers think are important. Cases with unrepresented parties often take longer to handle and resolve. Our judicial system is straining under the weight of the ever-increasing numbers of cases in which one or more parties do not have lawyers.

Pro se litigants are unable to use the present system effectively. There is a common perception that they have difficulty voicing the facts and arguments needed to present their side of the case. As one Massachusetts judge stated, "I find very often that if a low-income litigant does not have legal counsel, it is impossible to properly conduct court business." Massachusetts Commission on Equal Justice, *Equal Access to Justice: Renewing the Commitment* (1996) at 47.

In sum, if pro se litigants are to have meaningful access to justice, and if the judicial system is to hold up under the weight of the increasing numbers of unrepresented litigants, changes must be made.

III. IN SOME TYPES OF MATTERS UNREPRESENTED LITIGANTS DO NOT OBTAIN RESULTS AS FAVORABLE AS THOSE WITH COUNSEL.

Studies in the Housing Court measured results obtained by unrepresented tenants and concluded that represented parties obtain better results. The results obtained by unrepresented litigants in other matters are more difficult to measure, and some processes such as small claims were designed for pro se parties. However, interviews with judges, lawyers, and with pro se litigants themselves reflect a common belief that parties with competent counsel have a clear advantage. One observer commented, "If you go to court without an attorney, the result is you lose. With an attorney you have a better chance and may get more respect." *Equal Access to Justice*, the Massachusetts Commission on Equal Justice (1996) at 5.

IV. UNREPRESENTED LITIGANTS ARE A CONCERN TO JUDGES, WHO SEEK GUIDANCE IN HANDLING PRO SE MATTERS.

Judges feel caught between their obligation of impartiality and the inability of pro se litigants to recognize and press substantive claims. Pro se litigants are mostly inexperienced and sometimes not highly educated; yet they are trying to navigate a system designed for experts. Judges note that pleadings drafted without lawyers often are not prepared properly. Judges are asked in court for advice and explanations which, if answered, would be inconsistent with the neutral role they are expected to play. Judges do not want to assist a pro se party at the expense of an opposing represented party. Most judges do take more time explaining the process to pro se litigants, but they worry about going too far. Most judges also report that they grant continuances to unrepresented parties so that they can retain counsel. Judges note the delays which result from all these factors.

V. COURT PERSONNEL FIND UNREPRESENTED LITIGANTS A PARTICULAR CHALLENGE.

Court personnel are unequivocal - unrepresented litigants are not "business as usual." Pro se litigants sometimes expect immediate assistance from court personnel, and urgently seek attention. Often the questions asked by pro se litigants place court personnel in the difficult position of drawing the line between legal "information" and "legal advice." Court personnel seek more guidance on drawing this line. Pro se litigants can take considerable time; some can be very emotional, others even angry. Court personnel are concerned when unrepresented litigants appear unstable. Court personnel would like to help, but feel constrained by time, the prohibition against giving legal advice, and the fear of taking sides by giving assistance to one side in a case.

VI. FINANCIAL CONSTRAINTS CAUSE MANY PARTIES TO PROCEED PRO SE.

There are other reasons given for proceeding without a lawyer, but lack of funds is the most common. With the recent cutbacks in federal funding for legal services, many poor or near poor litigants have no choice but to proceed without a lawyer.

VII. RESPONSES TO UNREPRESENTED LITIGANTS HAVE NOT BEEN CONSISTENT OR ORGANIZED.

The Task Force found instances of extraordinary effort and patience in dealing with unrepresented litigants. Individual judges, court personnel, and legal services programs have made remarkable efforts, but there are few systematic, uniform approaches to dealing with pro se litigants. Brochures and other printed materials have been produced with great effort, but are not generally available. Each judge and court employee is left to develop his or her own approach with little or no training or guidance. The result is uneven, and the treatment of unrepresented litigants is erratic.

Judges and court staff favor a more organized, consistent approach to unrepresented litigants. An approved policy statement as to how far they can go in assisting pro se litigants, or court sanctioned brochures, would allow some uniformity. A conscious effort should be made to search for and articulate generally accepted methods of handling unrepresented parties, so there is more predictability in the process for everyone.

VIII. UNREPRESENTED LITIGANTS BENEFIT MOST FROM A COMBINATION OF APPROACHES.

The *Steiner Study* and the *Neighborhood Legal Services Grant Report* concluded that unrepresented litigants achieve best results when they are supported by a combination of resources. Providing a pro se tenant with a seminar or a brochure seems to help, but the impact is more substantial if combined with advice from a lawyer for the day or another volunteer lawyer. A brochure, a video, or even a seminar is helpful in providing general understanding. However, ongoing support from a volunteer lawyer or advocate appears to be critical if the unrepresented party is to have the confidence to speak up in court or at mediation.

IX. FURTHER INFORMATION IS NEEDED TO ASSESS THE PRO SE ISSUE.

This Report is the first attempt to gather data concerning unrepresented litigants in many Massachusetts courts. Many courts, for example, have not kept records which would allow anyone to measure fully the numbers of pro se litigants or the kinds of cases in which they tend to appear. Moreover, the numbers and the nature of pro se litigants are changing. In order to better understand pro se litigation, and to measure the effectiveness of responses to pro se litigants, data should be collected on an ongoing basis by the courts themselves.

X. THE CHANGES REQUIRED TO ACCOMMODATE UNREPRESENTED LITIGANTS WILL ONLY OCCUR IF THERE IS AN ONGOING INSTITUTIONAL COMMITMENT WITH CLEAR RESPONSIBILITY.

The current adversary system in our courts fundamentally assumes that lawyers will guide parties through the process. Adjusting to the reality of numerous unrepresented parties requires a basic change in the culture of lawyers, judges, and court personnel. Specifically, the barriers to accommodating pro se litigants outlined above must be addressed. Further information must be gathered and implementation of some difficult changes must be assured. Responsibility for recommending and implementing the changes must be clearly assigned and results must be measured at the highest levels of the judicial system.

VI. RECOMMENDATIONS

In light of the above Findings, the Task Force makes the following Recommendations:

I. THE AVAILABILITY OF LAWYERS MUST BE INCREASED.

This investigation suggests that pro se litigants are at a disadvantage, except in those proceedings where the process is designed for unrepresented parties. The advantage of representation by a trained, experienced, independent lawyer cannot be offset except in rare circumstances. Accordingly, the first and most important Recommendations of the Task Force are to:

1. Increase funding for legal services programs for those who cannot afford to hire a lawyer;
2. Increase the pro bono services available from members of the bar and channel the resources into:
 - Full representation of indigent clients;
 - Lawyer for a Day Programs;
 - Private attorney service as case screeners and mediators; and
 - Support for the training and educational activities set out below;
3. Recruit, train, and make available panels of lawyers willing to undertake representation on a reduced fee, sliding scale basis depending on the ability of the client to pay, as well as at no fee;
4. Make accurate, up-to-date information about available lawyer referral resources readily available to courts and administrative agencies, including specialized panels in areas such as family law or bankruptcy, which must be identified or developed;
5. Support and encourage the unbundling of legal services such that litigants can pay for and receive advice or discrete services for the separate phases of litigation.

II. COURTHOUSES MUST BE MORE ACCESSIBLE AND USER-FRIENDLY.

At present virtually all courthouses in Massachusetts are unfamiliar, even hostile environments to the general public. Our courthouses must be designed and operated to welcome, educate, and provide justice to the public:

1. Information Booth. There should be an information booth inside the entrance to each courthouse to answer questions and give directions to the public. These information booths should be staffed by trained, welcoming, patient individuals who see the public as their constituency. Ideally, these individuals should have some familiarity with family law, interviewing, counseling, and civil procedure (including local procedures), among other topics. Trained volunteers could staff these information centers.

2. Signs and Schedules. Signs and schedules should be clearly posted so that an unsophisticated, first-time visitor can know where to go, at what time, and find his or her way. Signs should be posted in languages in addition to English in courts where any significant part of the population using the court is non-English speaking.

3. Courthouse Schedules. Courthouse schedules must be designed to accommodate not just lawyers (accompanied on occasion by a client), but also the general public for whom a court appearance is not a usual part of daily life, but is an interruption which imposes an often heavy burden:

- For many types of cases, hearings should be scheduled at specific times staggered throughout the day so that all parties and their lawyers (if they are represented) are reached with a minimum of waiting time.
- Categories of cases, such as summary process, where the volume can be very heavy and in which unrepresented parties predominate, should not all be scheduled for hearing at the same time such that a fair, orderly and efficient disposition of the cases becomes extremely difficult.
- Consideration should be given to separate and less formal sessions - in which the judge can explain the process and take an active role in making it more user-friendly - where pro se litigants can be more easily accommodated. Such sessions would be available for any matter if both parties agree. Pro se litigants appear to be willing to try such sessions. Although it is expected that these sessions will be hospitable to pro se litigants, represented parties might also choose a less formal session.

III. EDUCATIONAL AND EXPLANATORY MATERIALS SHOULD BE PRODUCED AND EFFECTIVELY MADE AVAILABLE.

Availability of educational materials for unrepresented parties is haphazard in most cases. Even in subject areas where good materials have been prepared, the materials are not printed or made available in any systematic way. Some types of cases are so technical that education and training may not allow an unrepresented party to advocate effectively for him or herself. However, the following channels of communication must be used to their fullest effect:

1. Web Site. Use of the World Wide Web to distribute directions and descriptions of courts and substantive or procedural information is a unique opportunity. The web allows broad, instantaneous, inexpensive access to needed information, not limited by location or by hours, with minimal personnel cost after start-up. The only limitation is access to the web, which can be provided by monitors at courthouses, libraries, community centers, and schools as well as homes. Another advantage of the web is that updating is easy, reducing the danger of outdated materials which may be distributed years after they were written and printed. Taking advantage of this opportunity must be a high priority. The website designed and maintained by Neighborhood Legal Services of Lynn is an excellent example (www.neighborhoodlaw.org). Materials such as the Boston Bar Association family law brochures and the substance of the excellent Tel-Law recordings at the Massachusetts Bar Association should be added to such sites. The website should be reviewed and approved by the courts to ensure accuracy, updating and acceptance. The present website maintained by the Trial Court (www.magnet.state.ma.us/courts) should be expanded and monitors for access should be made available at courthouses, including the new courthouse on New Chardon Street in Boston. The technology fund budgeted for the new courthouse on New Chardon Street in Boston is a potential source of funding for these initiatives.

2. Brochures. A full inventory of all existing materials should be undertaken. We are informed that the Massachusetts Legal Assistance Corporation has taken steps in this direction. More brochures, such as the family law brochures written by the Boston Bar Association, must be drafted in an easy to understand form and in several languages. These brochures should explain the nature of the judicial process, the applicable rules and procedures and the standards of conduct expected of all parties, whether or not represented by counsel. Providing basic "how to," "where" and "when" information and regularly updated, the brochures

should be prominently displayed not only at each courthouse, but also at libraries, schools, churches, community centers, and other locations in communities.

The bar should take a leading role in writing the brochures, but there must be input from the courts. Many judges and court personnel indicated a willingness to distribute court-approved materials. In many cases, quality control and approval of materials will be best undertaken by the individual Trial Court departments, but in cases of overlapping jurisdiction (e.g., summary process cases), coordination between departments is needed. One potential way to accomplish this is through the office of the Chief Justice for Administration and Management.

3. Videos. One video can inexpensively and efficiently educate large numbers of viewers about basic procedure and substance. People are accustomed to learning information through this medium. Such videos should be prepared, and approved by each department of the Trial Court, to be shown at courthouses and made available for purchase, rental, or borrowing from libraries, courthouses, schools, and lawyers' offices. Existing videos, such as the new 209A video in four languages developed by the Trial Court's Judicial Institute and those used in the Concord Probate and Family Court and by the Middlesex Jury Commission for jurors, should be gathered and catalogued. This would be an appropriate project for the bar to undertake. As with brochures, court approval of the videos is desirable.

4. Telephone Hotline. At present, the telephone is the most accessible, user friendly medium for the communication of information about logistics, procedures, or substantive rights critical for unrepresented litigants. A staffed telephone hotline, easily accessed by virtually the entire population from home or nearby, must be used to its fullest potential. The model exists at the Legal Advocacy and Resource Center ("LARC") and elsewhere. This model should be expanded or replicated to increase significantly the availability of these effective services.

5. Recorded Telephone Information. The Massachusetts Bar Association maintains a telephone service called Tel-Law through which the general public can access recordings concerning nine categories of subjects including family law, immigration, and labor and employment matters for unrepresented litigants. The system is updated annually and should be publicized by the courts and the community. This is another way to take advantage of broad telephone accessibility. Tel-Law can be reached at (617) 542-9069.

6. Seminars/Self-Help Workshops and Clinics. Past efforts have demonstrated that clinics or seminars, if combined with videos and lawyer for a day programs, can increase dramatically the ability of unrepresented parties to raise and press their rights. The clinics described in the *Steiner Report*, and in the *Grant Report* for Neighborhood Legal Services provide effective models, as does the "People's Law School" run by the Massachusetts Academy of Trial Attorneys.

7. Community Outreach. All of the above attempts to provide information to unrepresented citizens are effective only to the extent that word gets out. An active program of communication with community groups is essential if these resources are to be used to their full potential. Any brochures, videos, or other materials designed to assist unrepresented litigants should be broadly distributed through community centers. This is an initiative in which the bar should take the lead, working closely with legal services and other community organizations.

8. Directions and telephone numbers for local courts should be posted and available at libraries, community centers, schools and other community (and electronic) locations.

IV. COURT STAFF MUST BE TRAINED AND ASSIGNED TO DEAL EFFECTIVELY AND DIRECTLY WITH THE PUBLIC.

The Task Force found that court staff at all levels in all courts believe that unrepresented litigants present particular challenges and call for special attention. With a few notable exceptions, the response from court staff has developed court by court, person by person, with little training or planning. The time has come to plan and implement a careful strategy to make the court staff a more effective resource for the general public. Keeping in mind the enormous demands already made on the staff to keep the courts moving, we recommend:

1. Assignment of Responsibility for Unrepresented Litigants. Each clerk's office should designate at least one staff member to be the primary resource for unrepresented parties. In busier courts, this may be a full time responsibility. This designation will allow in-depth training of one staff member, and should relieve pressure on other court staff who can concentrate on the other functions of the office. This designated staff member should be assigned primarily to the counter rather than to courtroom functions. One possibility is to assign a pro se clerk to the information desk referred to above. The person assigned in District Court might also be primarily responsible for small claims.

2. Training and Guidance. All court staff (clerk's office personnel, court officers, housing specialists, family service officers, etc.) should be trained to respond with a special sensitivity to unrepresented members of the public. Unrepresented persons may require more explanation, sensitivity to emotional or other problems, and patience than is required in assisting most lawyers and their clients. On-site training might be an effective approach for reaching more participants in the judicial process.

Court staff must be assured that they can assist unrepresented parties, and instructed where to draw the line. For example, initial screening of pro se filings for completeness and compliance with court rules and procedure has been identified as one important function court staff could perform. Attached as Exhibit E is a copy of Opinion 95-6 rendered by the Supreme Judicial Court Advisory Committee on Ethical Opinions for Clerks of the Courts. Also attached as Exhibit F is a proposed protocol for court personnel (Exhibit F). These materials should be circulated to assist court staff in providing assistance to unrepresented parties, and the protocol, or something similar, should be adopted. Training should be provided on these subjects.

V. ALTERNATIVE DISPUTE RESOLUTION SHOULD BE EXPANDED FOR UNREPRESENTED PARTIES.

Alternative dispute resolution techniques can be very effective and efficient for unrepresented parties in many circumstances. The rules of evidence and procedure tend to predominate in a formal court setting, presenting serious hurdles to unrepresented parties. By contrast, alternative dispute resolution can be adapted as necessary to encourage unrepresented parties to voice their concerns. The speed with which an arbitration, mediation, or conciliation hearing can be held is a big advantage to an unrepresented party. There are notable exceptions where there is a severe imbalance in power or a history of violence between the parties. Some types of cases, specifically domestic violence cases, are not appropriate for mediation. *See*, Guidelines for Judicial Practices in Abuse Prevention Proceedings at Guideline 405. We propose the following:

1. Community Dispute Resolution. Alternative forms of dispute resolution should be made available in the community before either party gets to court. Mediations or conciliations can be held at community centers during evening or weekend hours without interfering for extended periods with the everyday lives of unrepresented parties. To the extent that an unrepresented party primarily seeks an opportunity to be heard,

an early, informal setting is best. Law enforcement officials and community leaders should be encouraged to send disputes to a local dispute resolution service, rather than directly to court as is done in a number of excellent programs currently in operation.

2. Preliminary Diversion. For matters that do reach the courts, mediation or conciliation should be the first step for most types of disputes where such efforts have not already been made.

3. Training. Mediators or others who preside at alternative dispute resolution hearings must be trained to decline to handle those cases which are not appropriate for mediation (e.g. domestic violence), and to elicit a full story from each side.

4. Private Bar Participation. A program should be developed whereby members of the private bar serve as on-site screeners/mediators for cases in which both parties are unrepresented. The purpose of this intervention would be to resolve the dispute early, if possible or provide guidance to the parties on the future conduct of the litigation. Referrals to legal and social service agencies could also be made.

The new rules of the Supreme Judicial Court dealing with alternative dispute resolution provide essential guidance on the use of ADR techniques with pro se litigants. All litigants must be reminded that mediation is voluntary. Rule 6(d). Specific mention is made of issues of particular concern to unrepresented litigants including inappropriate pressure to settle (Rule 6(i)), the necessity of independent legal advice in order to have informed participation (Rule 9(c)(iii)), and the neutral's responsibility to raise questions for the parties as to whether they have sufficient information (Rule 9(c)(vii)). The comment on Rule 9(c)(iii) specifically urges courts to "develop and foster innovative approaches to serving unrepresented parties, such as "lawyers of the day," pro bono panels, lay advocates, information rooms inside the court, assignment of counsel, mediation assistance, substantive written information, the use of volunteer mediators to supplement court employees in busy sessions such as the Boston Housing Court, the use of a different ADR process, substantive checklist, and judicial participation in the review of agreements." The SJC's commentary on Rule 6(i) specifically notes that:

Court and programs should consider the use of checklists or other forms of the gathering of information by the neutral in dispute intervention in order to aid the neutral in discussing with unrepresented parties relevant factual circumstances and issues which might go unaddressed without such tools. In addition, courts should make their facilities available to "Lawyer of the Day" programs to which neutrals of the Court can refer unrepresented parties for legal advice.

VI. JUDGES SHOULD NOT ALLOW LACK OF REPRESENTATION TO RESULT IN A MISCARRIAGE OF JUSTICE.

Where one or more parties to a matter is unrepresented, a judge has a heightened responsibility to ensure that the proceedings are fair. A judge cannot, and should not, act as an "advocate" or attempt to offset completely the disadvantage of proceeding without counsel. A judge should, however, explain the consequences of proceeding without an attorney, and should attempt to avoid a miscarriage of justice resulting from the inability of an unrepresented party to comply with strict application of rules of evidence or procedure. Each judge should have discretion in deciding where to draw the line in a particular case. We propose:

1. Guidelines. Judges should be provided with and encouraged to use a model statement to pro se litigants. One example of such a statement is attached as Exhibit G. The purpose is to inform unrepresented parties of the risks of proceeding without counsel, and to inform them of the ground rules.

2. Explain Rules and Provide Opportunity to Comply. Where appropriate in their discretion, judges should explain procedural or evidentiary problems in simple terms, and consider the granting of a recess or

continuance to allow the unrepresented party to obtain counsel or find a way to overcome the problem.

3. Review of Settlement Agreements. Where unrepresented parties are involved in a case, a judge should review with care any settlement, such as settlement of a contempt or abuse complaint, which could result in imprisonment. The same should hold for a settlement which could lead to eviction or other severe consequences. The judges should put the settlement on the record and attempt to determine whether the unrepresented party understands it and has agreed to it. If a party (particularly an unrepresented party) appears to have a language barrier, the judge should have the agreement translated or explained in the party's primary language. The court should require the interpreter to certify that the agreement has been translated.

4. Support. Judges should be offered support and training in dealing with unrepresented litigants, including materials addressing the particular needs of unrepresented parties, opportunities to discuss and consider in a formal way the particular challenges of unrepresented parties, and assistance in recognizing parties who may be in need of medical, psychological, or other social services and are therefore at a particular disadvantage in representing themselves.

5. Case Management Conferences. Case management conferences should be mandatory at the outset of certain types of cases. At such conferences, judges (or magistrates) can set out clear deadlines and expectations for unrepresented parties, and explore the advisability of settlement or further conciliation. *See*, new Probate Court Rule 409.

VII. THE DISTRICT COURT AND BOSTON MUNICIPAL COURT SHOULD HAVE EXPANDED EQUITY JURISDICTION.

Our "community courts," which deal often with cases involving domestic abuse, landlord/tenant, and neighbor disputes, see large numbers of unrepresented parties. Existing equity jurisdiction for abuse prevention, housing matters, or small claims should be expanded. For many people, the District Courts are physically located close to their homes. At present, these courts lack the equity jurisdiction which is needed in many cases to deal effectively with those types of matters in which parties without lawyers are common. These courts should be given equitable jurisdiction so they can resolve these matters in practical, efficient ways.

VIII. SOME CHANGES REQUIRED TO ADJUST TO UNREPRESENTED PARTIES ARE FUNDAMENTAL AND WIDESPREAD, REQUIRING COMPREHENSIVE SYSTEMIC CHANGE:

1. Standardized and Simplified Forms. Each court should review the standard forms available for common categories of cases with a goal of making standard forms available to the general public for as many matters as possible. Existing, as well as many new forms, should be written in simple, straightforward language. Directions or explanations should be made available with the forms.

2. Unrepresented Litigants with Linguistic, Cultural, or Physical Barriers. Each court must recognize and accommodate the growing population of non-English speaking people (and specifically, litigants). Disabled persons are also increasingly asserting their right to use the courts on an equal basis with others. Signs, forms, and directions should be made available in a variety of common languages. Interpreters and bilingual personnel must be recruited. Printed materials must be made available in an alternative format for those with visual disabilities who want to advocate for their rights (or even to understand what rights they have). If unrepresented litigants face severe hurdles obtaining justice in our courts, unrepresented non-English speaking or disabled parties face even more significant problems. Providing adequate funding for

interpreter services is a basic responsibility of our court system. Current programs must be expanded and the effort to obtain adequate funding must continue.

3. *Make Procedures Simple, Self-Executing.* Court procedures should be as simple, straightforward, and self-executing as possible. If there are technical requirements, not easily understood by non-lawyers, they should be streamlined and explained as much as possible. For example, the Probate and Family Court, in new Supplemental Rule 410, has instituted mandatory discovery. The effect of this rule should be studied. There is concern that unrepresented parties, particularly if not advised of the obligations, may be unduly sanctioned for failure to comply. While affirmative discovery can help unrepresented litigants, the critical question may be how, or whether, the rules are enforced. With this caution, affirmative discovery obligations should be considered, so that an unrepresented party receives basic information even if he or she does not know enough to request it.

IX. IMPLEMENTATION.

The Task Force recommends that the Supreme Judicial Court establish a standing committee to address issues relating to unrepresented litigants. The Task Force would include representatives from each of the departments of the Trial Court, a representative from the office of the Chief Justice for Administration and Management, and representatives of the bar.

FOOTNOTES

¹ Additional supporting materials have been separately bound in an Appendix to this Report. Copies of the Appendix are available from the Boston Bar Association.

² Conference of Chief Judges, Report of the Minnesota Conference of Chief Judges Committee on the Treatment of Litigants and Pro Se Litigation, at 4 (April 1996), quoted in American Judicature Society, State Justice Institute, Meeting the Challenge of Pro Se Litigation - A Report and Guidebook for Judges and Court Managers, (American Judicature Society, State Justice Institute, 1998) at 4 (hereafter "Meeting the Challenge of Pro Se Litigation").

³ In some jurisdictions, "pro per" is the term used rather than "pro se." Also, "self-represented" is favored by some commentators, presumably to avoid any negative connotation associated with a lack of representation

⁴ Meeting the Challenge of Pro Se Litigation, at 15, 16 citing to Long and Lee, the Pro Per Crisis in Family Law, Memorandum submitted to the State Bar of California Board Committee on Courts and Legislation (August 15, 1995) (hereinafter "The Pro Per Crisis In Family Law") at 3-4.

⁵ Woo, "The Lawyerless: More People Represent Themselves in Court But is Justice Served?" Wall Street Journal, August 12, 1993, at 1.

⁶ Meeting The Challenge of Pro Se Litigation, at 8 citing to Law Review Staff, "The Unauthorized Practice Of Law And Pro Se Divorce," 86 Yale Law Journal 104, 160 (1976).

⁷ Court Facilitator Pilot Project Evaluation Final Report, Urban Policy Research (February, 1994), at 3 (hereafter "Court Facilitator Pilot Project").

⁸ Id. at 5.

⁹ Chicago Lawyer, "Anger, Ignorance And Arrogance Fuel Some Pro Se Divorces." September, 1997.

¹⁰ Meeting the Challenge of Pro Se Litigation, at 1.

¹¹ Meeting the Challenge Of Pro Se Litigation, at 11 citing to Sales, Beck, and Haan, "Self Representation In Divorce Cases" (Chicago: American Bar Association, 1993) (hereafter "Self Representation In Divorce Cases").

¹² Meeting The Challenge Of Pro Se Litigation, at 9 citing to Cox and Dwyer; "Meeting The Challenge Of Pro Se Litigation," at 11 citing to "Self Help Law: Its Many Perspectives," Unpublished Memorandum prepared for the American Bar Association (1987), at 21.

¹³ "Self Representation In Divorce Cases," at 8-11.

¹⁴ Id. at iii.

¹⁵ Meeting the Challenge Of Pro Se Litigation, at 13, citing to The Pro Per Crisis In Family Law, at 3- 4.

¹⁶ Id. at 9, citing to Circuit Court of Cook County Advisory Committee, "Report On Pro Se Litigation," (Chicago: Circuit Court of Cook County, December, 1995) at 2.

¹⁷ Id., citing to Smith, DeFrances, Langan, and Goerdt, Tort Cases In Large Counties, Bureau of Justice Statistics, Special Report (April, 1995) at 2.

¹⁸ Id., citing to Rauma and Sutelan, "Analysis Of Pro Se Case Filings In Ten U. S. District Courts Yields New Information," FJC Directions 6 (June, 1996).

¹⁹ Id. at 6.

²⁰ Id. at 117.

²¹ Id.

²² Id. at 118.

²³ Id. at 122.

²⁴ Id.

²⁵ Id. at 123.

²⁶ Pro Se Forms And Instruction Packets: Providing Improved Access To Michigan Courts, Final Report (November 4, 1994) at 9.

²⁷ Id. at Appendix A.

²⁸ Id.

²⁹ The Massachusetts Bar Association is presently undertaking just such a survey. It also maintains a website with information for pro se litigants.

³⁰ Meeting The Challenge Of Pro Se Litigation, at 11, citing to American Bar Association Consortium on Legal Services, Legal Needs and Civil Justice: A Survey of Major Findings From the Comprehensive Legal Needs Study (1994).

³¹ Rhudy, Concept Paper For Maryland Access To Justice Project (May 14, 1997) (unpublished), at 2.

³² Court Facilitator Pilot Project, at 11-12.

³³ Id.

³⁴ Meeting The Challenge Of Pro Se Litigation, at 12 citing to Spencer, Middle-Income Consumers

Seen Handling Legal Matters Pro Se, New York Law Journal, May 29, 1996, at 1.

³⁵ Meeting The Challenge Of Pro Se Litigation, at 13.

³⁶ To provide specifics for just one of these categories of cases, in 1997, the total number of divorce complaint filings (23,006) in the Commonwealth exceeded the paternity case filings (16,434) by only about 29%, but in some counties, the paternity complaint filings almost equalled or exceeded the number of divorce filings. Annual Report on the State of the Massachusetts Court System, Fiscal Year 1997, 88-93 (1998). On March 31, 1998, legislation was enacted which permits the Department of Revenue to order parentage testing, to administratively review support orders for modification and to obtain modification judgements based on signed documents. The period of time permitted for a challenge to paternity acknowledgements was also shortened. *See*, An Act to Improve Massachusetts Child Support Enforcement Program, Acts of 1998, Ch. 64. It is too soon to determine whether this will alleviate any of the court's burden relating to paternity and child support actions.

³⁷ Report to the [MBA] Family Law Section Committee on the Crisis in the Probate and Family Court (also known as the Kindregan Report) (1996).

³⁸ A more detailed presentation of the results of these surveys is presented in the separately bound *Appendix B* to this Report.

³⁹ The statistical results of the District Court survey questionnaire of judges and court staff is Appendix C.

⁴⁰ The April 13, 1998 letter from Dr. Donovan is included in Appendix C to this report.

⁴¹ According to Mr. Donovan's letter, these petitions accounted for eleven of the 75 cases in which affidavits of indigence were filed in November 1997.

⁴² Copies of the survey forms for judges and for court personnel are included in the separately bound Appendix to this Report.

⁴³ Responses were received from a total of nineteen judges (primarily sitting in Suffolk and Middlesex Superior Courts); twelve session clerks and twelve office clerks from Suffolk Superior Court; seventeen session clerks from Middlesex Superior Court; three session clerks and eight office clerks from Norfolk Superior Court.

⁴⁴ In addition to variations among the three courts, the responses of the clerks appear to reflect differences in the experiences of session clerks on the one hand and clerks who work in the clerk's office on the other.

⁴⁵ This assumption is confirmed by the statistics provided by Marie Zollo on pro se prisoner cases (800 pending in Suffolk and 180 in Middlesex as of April 1, 1998) and by the fact that a sizeable number of pro se cases in Suffolk Superior Court involve appeals from the Boston Traffic Department and Motor Vehicle Surcharge Board, for which there may be no counterparts in Middlesex and Norfolk Superior Courts.

⁴⁶ One judge said that for this reason, he hears cases involving unrepresented litigants at the end of a

session; another judge hears them first.

⁴⁷ Several mentioned the Committee for Public Counsel Services and bar advocates, who provide standby counsel in criminal matters.

⁴⁸ It appears that a pilot project between the Middlesex Superior Court and the Cambridge Dispute Settlement Center has recently been initiated. According to Gail Packer, the director of the Center (in a telephone conversation on April 6, 1998), after an initial examination by a Superior Court judge, written referrals of certain categories of cases (e.g., extended family and neighborhood disputes) that often involve pro se litigants will be made to a case coordinator at the Center for screening and possible mediation. The Center has been doing similar work in the Cambridge District Court. The Middlesex Multi-Door Court-house receives a large number of pro se referrals, most for neighborhood disputes. According to Barbara Stedman, director of this program, because of the highly charged nature of these cases and the amount of time that they demand, her office has been referring most of them to the Center.

⁴⁹ There are also specialized provisions in the Bankruptcy Code for farmers, stockbrokers, municipalities and railroads.

⁵⁰ NCLC noted, however, that its measure of success in Chapter 7 (a discharge) may not have achieved a particular debtor's goals. For example, a debtor may have filed Chapter 7 with the expectation she could keep her house.

⁵¹ Although official records on pro se cases are not maintained, the Clerk provided statistics on cases where there is no attorney for the debtor as reflected by the computerized dockets. The statistics reflect the status of the cases in 1998 and include changes since the filing, such as conversions from one type of bankruptcy to another and subsequent withdrawal of counsel. As a result, there may be some variance with actual pro se filings. A summary of the statistical information provided is attached as Exhibit D.

⁵² Several clerks commented that they received similar procedural questions from attorneys. This may arise from attorneys who do not regularly practice in the Bankruptcy Court.

⁵³ Another 15-18% of cases are dismissed for lack of jurisdiction, withdrawn, filed in Superior Court, or end in a predetermination settlement. Of those cases remaining, 95% settle; only 5% go to a public hearing.

⁵⁴ This is intended to be a representative, not a complete, list of Massachusetts programs. This summary relates primarily to programs concerning Massachusetts state court interactions with unrepresented litigants.



EXHIBIT A

PRO SE STATISTICS DATA COLLECTION SUMMARY SHEET ALL CASES HEARD IN DECEMBER 1997 IN PROBATE AND FAMILY COURT

	One pro se	Two pro se	Two Attorneys
BERKSHIRE	189	169	184
BRISTOL	288	309	284
DUKES	8	2	31
ESSEX	723	759	681
FRANKLIN	67	98	69
HAMPTON	824	715	481
HAMPHIRE	99	50	76
MIDDLESEX	455	442	292
NORFOLK	339	315	290
PLYMOUTH	188	100	184
SUFFOLK	332	165	249
WORCESTER	410	323	486
TOTALS	3992	3447	3307

Missing: Barnstable and Nantucket



EXHIBIT B

COMMITTEE SURVEY RESPONSES OF DISTRICT COURT JUDGES AND CLERKS

Proposals Set Forth in the Committee Survey	Percentage of Responses Favoring Each Proposal	
	<i>Judges</i>	<i>Clerks</i>
Brochures which explain court procedures and forms	65%	75%
On-site volunteer lawyer for pro se litigants	49%	54%
Training of court personnel on how to work with pro ses	47%	45%
800 telephone line staffed by a pro se assistant	41%	74%
Increase in number of pro bono attorneys	41%	37%
On-site pro se facilitator	35%	32%
Video room showing repeating video of procedures and practices	32%	21%
Pro se clinic	19%	25%
Educational Seminars	12%	24%



EXHIBIT C



Commonwealth of Massachusetts
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT
FOR CIVIL BUSINESS

Clerk's Office
SUFFOLK COUNTY

MICHAEL JOSEPH DONOVAN
Clerk/Magistrate

BOSTON. April 13, 1998

Toni G. Wolfman, Esq.
c/o Foley, Hoag & Eliot, L.L.P.
One Post Office Square
Boston, MA 02109

RE: Pro Se Survey

Dear Attorney Wolfman:

A review of our records shows that, for the month of November (1997), there were a total of 488 Civil entries commenced in this Office. Of the total number of entries, 75 cases were entered by pro se litigants. This represents 6.5% of the total entries.

The categories of cases entered are as follows:

- 11 - Mary Moe cases (i.e. Consent to Abortion) pursuant to G.L.c. 112fs;
- 4 - Administrative Agency Appeals pursuant to G.L.c. 30A;
- 2 - Abuse Prevention Petitions pursuant to G.L.c. 209A;
- 2 - Appeals from the District Court (re: Summary Process Actions) pursuant to G.L.c. 239;
- 3 - Application for Discharge (Sexually Dangerous Person) pursuant to G.L.c. 123A§9;
- 15 - Complaints seeking Temporary Restraining Orders (i.e. neighborhood disputes which do not come under G.L.c. 209A) under the Equity Jurisdiction of the Superior Court;
- 10 - Miscellaneous Complaints;
- 27 - Prisoner cases against the Commonwealth of Massachusetts, the Department of Corrections, the Superintendent and Commissioner, etc.; and,
- 1 - Appeal from the determination (i.e. classification) of the Sex Offender Registry Board pursuant to G.L.c. 6.

75

These statistics do not take into account the number of pro se Complaints that are filed, in which an entry fee is paid; nor, do the statistics reflect the amount of pro se defendant activity in which the plaintiff(s) are moving with or without representation by an Attorney.

I trust that this information, however limited, is of some assistance to you.

Please do not hesitate to contact me further, if I may be of further assistance.

Very truly yours,

Michael Joseph Donovan
Michael Joseph Donovan
Clerk/Magistrate

cc: Honorable Patrick King, Assoc. Justice
Superior Court Department of the Trial Court
Christopher Reavey, Clerk/Magistrate
Chair, Massachusetts Bar Association
Pro Se Committee



EXHIBIT D

STATISTICS ON PRO SE FILINGS IN THE UNITED STATES BANKRUPTCY COURTS FOR THE DISTRICT OF MASSACHUSETTS

Comparison of Pro Se Debtor Cases to Total Bankruptcy Cases

Year	Total Bankruptcy Filings	Pro Se Debtor Cases	Pro Se Cases as % of Total Filings
1990	10,154	580	5.71%
1991	14,476	813	5.62%
1996	17,744	1,465	8.26%
1997	23,892	1,403	5.87%

Breakdown of Pro Se Debtors by Bankruptcy Chapter

	1996		1997	
	Pro Se Debtors	% of Pro Se Debtors	Pro Se Debtors	% of Pro Se Debtors
Chapter 7	1,080	73.7%	1,160	82.7%
Chapter 13	363	24.8%	233	16.6%
Chapter 11	22	1.5%	10	.7%

Notes

1. Total bankruptcy filings are based on the official statistics reported by the Office of General Administration of the Courts. The statistics can be found on the website of the American Bankruptcy Institute at www.abiworld.org/stats.
2. The statistics on pro se debtors for 1990 and 1991 are as reported by the National Consumer Law Center in its study, *Self Representation in the Bankruptcy Court: The Massachusetts Experience*.
3. The statistics on pro se debtors for 1996 and 1997, including the breakdown by Chapter, were provided by James M. Lynch, Clerk of the United States Bankruptcy Court for the District of Massachusetts. Although official records on pro se cases are not maintained, the Clerk provided the number of cases where there is no attorney for the debtor as reflected by the computerized docketing system used by the court. The statistics reflect the status of the cases in 1998, and consequently, reflected any changes since the filing, such as conversion from one type of bankruptcy case to another the withdrawal of counsel after filing. As a result, there may be some variance from the actual number of initial bankruptcy filings.



EXHIBIT E

SUPREME JUDICIAL COURT
ADVISORY COMMITTEE ON ETHICAL OPINIONS
FOR CLERKS OF THE COURTS
1350 COURTHOUSE
BOSTON, MASSACHUSETTS 02108

95-6

November 8, 1995

Dear Register:

This is in response to your letter of September 8, 1995, in which you request advice from the Committee on a number of questions concerning the practice of law. You are the Register of Probate in the Division of the Probate and Family Court Department. You refer the Committee to S.J.C. Rule 3:02(2) which prohibits all Clerks of Court, Registers of Probate and the Land Court Recorder, and their assistants and employees from "engaging in the practice of law during the time they hold such office or employment."

Your employees, clerks and assistant registers have asked you to define what constitutes the practice of law pursuant to the rule. You ask this Committee: "1) Should this rule be interpreted to preclude any Clerk, Register, Recorder and their assistants and employees who are attorneys from engaging in the private practice of law;

or

2) should we read it in a broader context to apply to all the identified employees, regardless of whether they are attorneys, in their daily interactions with the members of the Bar and the general public in their roles as providers of access to the judicial system."

You further ask that, if the prohibition is interpreted in the broader context, the Committee provide guidance on the parameters of what constitutes legal practice. You describe five scenarios concerning which you request specific guidance. The scenarios, which we set forth below, are examples of situations which occur daily at the divisions in your department. With respect to each of the examples, you ask whether the Committee's interpretation of the "practice of law" would differ if the registry employee were responding to an attorney rather than a pro se litigant.

The five scenarios follow.

I. In response to a litigant's inquiry, a registry employee will suggest "the best" or "preferred" manner in which the litigant can proceed in the action.

Scenario 1: A grandmother comes to the counter to ask for help; she wants her grandson to come and live with her because the child's mother is addicted to drugs and unable to care for the son. The child's father is dead and has left money for the child but mother is spending it quickly on drugs. The registry employee tells the grandmother what the possibilities are with regard to filing a petition for guardianship of a minor of the person and the estate, or just the person and explains the need for filing a bond and the various types of sureties on the bond. After asking a few more questions of the grandmother, the registry employee suggests she file a guardianship of minor of the person and the estate, and a bond with sureties.

II. In response to a litigant's inquiry, the registry employee will advise the litigant of the options available to them and procedures which the litigant should follow.

Scenario 2: A husband calls the court to ask for no-fault divorce forms and when the registry employee asks which type of no-fault divorce, the husband responds he didn't know there was more than one. The registry employee distinguishes the Joint Petition for Divorce, Irretrievable Breakdown pursuant to c. 208, § 1A, and the Complaint for Divorce used for Irretrievable Breakdown pursuant to c. 208, § 1B, as well as the fault divorces. The registry employee further enumerates the forms required for each type and outlines the process and timelines for the two Irretrievable Breakdown actions.

III. In a typical incident of "counter assistance," the registry employee may do any or all of the following: explain terminology used in forms and the descriptions of the legal process; advise how to complete the form; actually complete the form; or explain a registry practice, i.e., marking up motions, or making service.

Scenario 3: A pro se litigant arrives at the counter saying her former husband is not paying the medical bills for her children as he was ordered in the divorce judgment. She has no money, speaks with an accent, and says the collection agency is threatening to bring her to court. She asks what she can do to make her former husband pay these bills. The registry employee gives her a complaint for contempt form and tells her to fill it out. The litigant begins to ask questions about the form, and the registry employee recognizes the litigant is illiterate. The registry employee reads the information requests on the form and fills it out quoting the plaintiff. The registry employee files the complaint and gives a copy of it along with a summons to the litigant and tells her how it should be served.

Scenario 4: A Vietnamese mother comes to the counter with bandages on her arms and face, two children bearing bruises on their arms and legs, and another woman. The mother wants to file a Complaint for Protection from Abuse, and to keep her address secret from her boyfriend. She speaks no English, and the woman with her speaks English but can not write it. The registry employee, through the English-speaking friend, asks the questions on the form and completes the form. Again, through the interpreter, the registry employee asks for a description of the incident of violence, and completes the affidavit based upon what the interpreter states.

Scenario 5: Pro se parties have come to the court for a wife's motion for temporary support in a Complaint for Civil Support action. The judge had referred them to the Family Service Office asking that financial statements be completed for each party. The Probation Officer learns that the wife has

previously paid all the bills and kept the accounts because the husband cannot add and subtract. The Probation Officer asks the husband the questions on the financial statement, writes the answers, and gives the completed financial statement to the husband for signature.

We note at the beginning of our discussion, that although you refer the Committee to the prohibition on the practice of law contained in S.J.C. Rule 3:02, this Committee is only empowered and charged with interpreting the Code of Professional Responsibility for Clerks of Court. Canon 3 of that Code, however, provides similarly that “[A] Clerk-Magistrate shall not engage in the practice of law”.

The Committee reads Canon 3’s primary purpose as assuring that court employees do not practice law for private clients, whether or not for a fee, either during or after their normal hours of employment by the Court. Such a prohibition both assures that court employees devote their full time to their duties, see Canon 3, and that they avoid private business dealings which could suggest a lack of impartiality in their role as court employees. See Canons 4(C) and 5(C) (1). It is, in the Committee’s view, an integral part of a court employee’s mandate to be sufficiently skilled and qualified to provide service to litigants and their attorneys in their dealings with the Courts, and we do not read this Canon to suggest or require otherwise.

We do recognize that the Canons, in particular Canons 4 and 5, require clerks to remain impartial, and we can conceive of situations where the degree of advocacy-oriented assistance provided to a litigant would not only call these Canons into operation but possibly raise the risk that the litigant would unjustifiably rely upon a clerk’s advice as he or she might that of an attorney, potentially implicating Canon 3 under a far narrower construction directed at preventing this type of consequence. As with questions regarding the “unauthorized practice of law” in other contexts, such determinations are necessarily made on the facts of each case. See In the Matter of the Shoe Manufacturers Protective Assn., Inc., 295 Mass. 369, 372 (1936).

With these interpretations in mind, we have reviewed the five scenarios. Each involves court employees being asked for assistance in the context of their jobs. In general, the assistance needed is advice concerning court procedures. In several scenarios, the assistance involves the completion of forms for a pro se litigant. In our opinion, the employees providing the assistance described in scenarios 2, 4, and 5 would not constitute the practice of law in violation of Canon 3 (or S.J.C. Rule 3:02). Our response on this issue would not differ if the requests for assistance were made by an attorney rather than a pro se litigant.

Under a literal reading of scenario 1, we perceive potential problems. In your description of this scenario, the clerk not only identifies and describes options and provides appropriate forms and assistance in completing them, but recommends or chooses the specific manner in which the litigant should proceed. We recommend that court employees provide such guidance and information as allows the litigant to make an informed choice among procedures, leaving however, the decision to the litigant.

Portions of scenario 3 are also troublesome for similar reasons. In that scenario, in response to an inquiry from a pro se litigant, the “registry employee gives her a complaint for contempt form and tells her to fill it out.” Again, in our view, it is not the role of a court employee to advise a litigant to bring a problem before the court or to suggest the specific manner of proceeding. The litigants must decide for themselves whether and how to proceed. Prior to making these decisions, however, they are entitled to receive a wide range of assistance and guidance from court employees.

You should be aware that other provisions of the Code may also be implicated in these scenarios and in other circumstances when assistance is requested from court employees. One of the principal themes underlying the canons of the Code of Professional Responsibility for Clerks of the Courts is the principle of impartiality. Your employees should be reminded that in providing help they must be evenhanded. Under Canon 4, they must be and appear to be impartial at all times. They must provide guidance and assistance in an equitable way to all parties to a proceeding.

In the opinion of the Committee, providing assistance with filling out forms and offering procedural advice clearly do not run afoul of the prohibition on the practice of law. Drafting documents, taking over a case and becoming an advocate on behalf of a litigant would clearly violate the prohibition. Other situations may need to be addressed on a case by case basis.

Reprinted August 4, 1998

EXHIBIT

EXHIBIT F

SAMPLE STAFF GUIDELINES

Do's

Court staff are expected to perform these tasks:

1. Provide public information contained in docket reports, case file, indexes, and other reports.
2. Answer questions concerning court rules, procedures, and ordinary practices. Such questions often contain the words "Can I?" or "How do I?"
3. To the extent available, provide examples of forms or pleadings for the guidance of litigants.
4. Answer questions about the completion of forms.
5. Explain the meaning of terms and documents used in the court process.
6. Answer general questions concerning deadlines or due dates.

Don'ts

In providing information, the staff will not:

1. Give information when they are unsure of the correct answer. Staff should transfer such questions to supervisors.
2. Advise litigants whether to take a particular course of action.
3. Take sides in a case or proceeding pending before the court.
4. Provide information to one party that they would be unwilling or unable to provide to all other parties.
5. Disclose the outcome of a matter submitted to a judge for decision, until the outcome is part of the public record, or until the judge directs disclosure of the matter.

* * *

Adapted from J. Graecan, 'No Legal Advice from Court Personnel' What Does That Mean?, The Judges' Journal (Winter 1995), at 10. Cited in BJI Report at 41.



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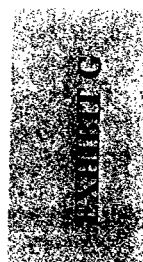


EXHIBIT G

BOSTON BAR ASSOCIATION TASK FORCE ON UNREPRESENTED LITIGANTS

PROPOSED PROTOCOL TO BE USED BY JUDICIAL OFFICERS DURING HEARINGS INVOLVING PRO SE LITIGANTS

A judicial officer should use the following protocol during evidentiary hearings involving pro se litigants:

1. Verify that the party is not an attorney, understands that he or she is entitled to be represented by an attorney, and chooses to proceed pro se without an attorney.

2. Explain the process. “I will hear both sides in this matter. First I will listen to what the Plaintiff wants me to know about this case and then I will listen to what the Defendant wants me to know about this case. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. Please also understand that I must also hear other matters, I have limited time, so please focus on those factors you consider most important. Please do not interrupt while the other party is presenting their evidence. Everything that is said in court is recorded on tape or written down by the court reporter and in order to insure that the court record is accurate, only one person can talk at the same time. Wait until the person asking a question finishes before answering and the person asking the question should wait until the person answering the question finishes before asking the next question.”

3. Explain the elements. For example, in abuse prevention cases: “The Plaintiff is requesting that the ex parte order of this court be extended for one year. I will extend the restraining order if the Plaintiff can prove abuse. Abuse means one of three things: (1) causing the Plaintiff physical harm or attempting to cause physical harm; or (2) placing the Plaintiff in fear of immediate serious physical harm; or (3) causing the Plaintiff to have involuntary sexual relations by force, threat of force, or duress.”

4. Explain that the party bringing the action has the burden to present evidence in support of the relief sought. For example, in abuse prevention cases: “Because the Plaintiff has requested this order, she has to present evidence to show that a court order is needed. I will consider the affidavit that has been filed in this matter after the Defendant has a chance to read it. I will also consider evidence that is presented here in court today.”

5. Explain the kind of evidence that may be presented. “Evidence can be in the form of testimony from the parties, testimony from witnesses, or exhibits. Everyone who testifies will be placed under oath and will be subject to questioning by the other party. All exhibits must first be given an exhibit number by the court reporter and then it must be briefly described by the witness who is testifying and who can identify the exhibit. The exhibit is then given to the other party who can look at the exhibit and let me know any reason why I should not consider that exhibit when I decide the case. I will then let you know whether the exhibit can be used as evidence.”

6. Explain the limits on the kind of evidence that can be considered. For example, in abuse cases, the rules of evidence need not be followed, provided there is fairness in what evidence is admitted.

7. Ask both parties whether they understand the process and the procedure.

8. Questioning by the judge should be directed at obtaining general information to avoid appearance of advocacy. For example, in abuse prevention cases: “Tell me why you believe you need an order for protection. If you have specific incidents you want to tell me about, start with the most recent incident first and tell me when it happened, where it happened, who was present, and what happened.”

9. Whenever possible the matter should be decided and the order prepared immediately upon the conclusion of the hearing so it may be served on the parties.

Adapted from Report of the Minnesota Conference of Chief Judges (cited in fn 2).