

The Supreme Court of New Mexico

THE SELF REPRESENTED LITIGANT WORKING GROUP

FINAL REPORT

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## **WHY ADDRESS THE SELF-REPRESENTED?**

In the early 1990s courts in New Mexico and nationally, at all jurisdictional levels, started to realize that many litigants were representing themselves in the legal process. Some litigants were choosing to represent themselves, but many believed they were required to represent themselves because of a lack of access to attorneys. By and large the entire legal industry whether public or private was caught off guard and unprepared for this increase in self-representation. For several years the courts faced the criticism that they were not accessible for most people having common legal problems. Acting in what they believed were the best interests of the litigants, courts frequently dismissed requests for help and direction in the belief that the issues involved were too complex and the ramifications of incorrect decisions too far reaching. Further complicating the pro se environment has been the legitimate concern by court staff to avoid action which could be construed as biased or advantageous to one of the parties. The chant of "no legal advice" became an absolute bar to assisting self-represented litigants with even the most common of legal problems. Despite court and bar reactions the increase in self-representation accelerated and in the mid 1990s the courts and bar initiated a number of positive responses.

Many New Mexico courts responded to the concerns of the self-represented with a variety of programs. The State Bar of New Mexico has also made efforts at increasing pro bono services. Many of these efforts have been subject to the normal fits and fizzes of any new effort at accommodating rapid societal change. However, many of the difficult issues involving the self-represented are only now coming into clear focus.

In November 1999 New Mexico was asked to send a team of court officials to the National Conference on Pro Se <sup>1</sup>Litigation in Scottsdale, Arizona. The conference was sponsored by several national legal organizations. Several new pro se programs were spotlighted in which fledgling pro se efforts had been initiated. To summarize the learnings of the

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<sup>1</sup>The terms Pro se and Self-represented are often used interchangeably. The legal community understands the term pro se, but most litigants only understand Self-represented.

conference John Greacen, New Mexico State Court Administrator presented some of the intellectual underpinnings of understanding pro se litigants and their needs. Many of his comments provided direction for current pro se efforts in New Mexico and are excerpted here:

Although the pro se phenomenon has recently been noted in trial and appellate courts it has been traditional that citizens have gone to the lower jurisdiction courts unrepresented by counsel. Matters of low dollar amounts or minimal penalty have not been seen as worthy, either in terms of economics or seriousness, to warrant an attorney. It is a natural extension to have the tradition of the lower courts lend itself to the higher jurisdictions. This is rational behavior by litigants, not contemptuous, and it is closely tied to other trends in society. When one considers no-broker-on-line-securities-trading, do-it-yourself-real-estate-transactions, and physicians being told what drug to prescribe it is clear that the pro se litigant is an outgrowth of a much larger societal trend. Sociologists have termed the trend *Disintermediation* which essentially means cutting out the middle man.

The courts did nothing to start the pro se trend, have done nothing to encourage it, have in fact tried to discourage it, and it seems unlikely that there is anything the courts can do to stop it. The effects are currently felt in Domestic Relations cases and we are not sure what the future holds. Since our traditional legal system has evolved and been designed by attorneys over centuries, self-represented litigants create stresses in the trial and appellate courts for judges, other lawyers and court staff.<sup>2</sup>

### **The Self Represented Litigant Working Group.**

At the national conference the team prepared an *Action Plan* for New Mexico<sup>3</sup>. The action plan led to the formation of the Self Represented Litigant Working Group in June of 2000 with Co-chairs Chief Justice Pamela B. Minzner and Eleventh District Court Administrator Gregory T. Ireland. The working group represented a broad cross-section of the New Mexico legal system. Courts from state, local, and federal jurisdictions participated as well as members of the bar from many geographic locations. Members of the bar were also asked to participate

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<sup>2</sup>John Greacen, National Conference - Pro Se Litigation, Scottsdale, AZ, November 1999.

<sup>3</sup>The Action Plan and team are attached as Exhibit A.

based on membership in key bar committees. Several litigants from the community were asked to contribute their perspectives. During the process representatives from Legal Services organizations were brought into the working group. Organized as a quick strike force the working group resolved to complete its work in six months.

One of the initial overarching goals was to educate members of the bar and the courts as to what the other was currently doing to advance the interests of pro se litigants. There was concern on the part of some members of the bar that court efforts were inappropriate because even the limited help that was provided was more problematic than no help. From the courts perspective there was a sense of the bar vs. the courts; that the bar had stymied efforts at pro se assistance, but had not had to live with the results. There was a tension between those who were convinced that action was necessary and those who were resistant to change. Said differently, the working group sought to repair a disconnect between the pro se strategies of courts and the bar.

### **Mission and Goals**

At the first meeting each participant was asked to speak as to his or her individual pro se interests and sense of need. These comments were later sorted, categorized, and are attached as **In Their Own Words**.<sup>4</sup> From their earliest comments the working group included the concepts of a separate track for the self-represented within the courts, more effective use of court staff and more integration of attorneys into the delivery system. The working group organizers then sorted individuals into sub-working groups based on **Judicial Responses** or **Bar Responses**. Eventually, the working group decided that the best clarification of a sense of mission had already been developed earlier by the Joint Supreme Court /State Bar Committee on Public Trust and Confidence. That committee issued a final report entitled, **Restoring Public Confidence in the Court System**.<sup>5</sup> Two guiding concepts emerge from the committees recommendations and the working groups efforts. First, there should be a comprehensive effort to increase lawyers into the delivery of legal services in order to decrease the number of pro se litigants. Second, all the involved participants need clarification of the very important ethical issues created by the self-represented. Therefore the mission statement and preliminary goal statements of the working group are stated as:

The courts and the bar resolve to respond to the special needs of self-represented persons. The right to represent oneself is firmly established, even in the most difficult criminal cases. For the courts to ensure that just results are reached when people take advantage of their right of self-representation, the courts and the bar need to make a series of significant changes, both in actions and attitudes.

**Recognize the right of self-representation.** Judges, lawyers and court staff need to treat

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<sup>4</sup> See Exhibit B.

<sup>5</sup> **Restoring Public Confidence in the Court System**, Recommendations of the Joint Supreme Court/State Bar Committee, 1998 .

persons who choose to represent themselves with respect and dignity. Self-represented persons must reciprocate by treating judges and staff with respect and dignity.

**Develop and provide standard, easy-to-use forms.** The courts must develop and provide, at no charge, standard forms for the use of persons who wish to represent themselves. The most important need exists in the area of domestic relations matters. The forms should be written in plain English and should be accompanied by instruction sheets for the guidance of users. The forms should not be copyrighted. They should be available in multiple forms - as paper documents, as templates for use with standard word processing software on courthouse computers or on diskettes, and on the Internet.

**Provide procedural manuals, self-help guides, seminars and clinics for persons who wish to represent themselves in a legal matter.** The courts, with the assistance of the bar, should prepare and make available to the public, at minimal cost, procedure manuals that explain how cases are handled in the courts and guides to behavior expected in the courtroom. Examples of such materials are guides for the handling of civil matters in magistrate and metropolitan courts and to the handling of appeals from metropolitan court to the district court, developed by the Pro Se Subcommittee of the New Mexico State Bar Legal Services Committee. Video presentations explaining procedures and illustrating typical types of hearings would also be helpful to self-represented persons. Legal organizations should be encouraged to publish simplified explanations of the substantive law that applies to typical legal problem areas. Bar associations and individual lawyers should provide seminars and clinics for persons contemplating representing themselves in court. Law guides and seminars should be provided at reasonable commercial rates. Materials should also be provided on alternative dispute resolution.

**Provide court staff with information to assist self-represented persons.** A recently issued Supreme Court policy makes clear to court staff that they have a duty to provide court users with detailed information on how to use the courts. Providing information does not constitute the giving of legal advice.<sup>6</sup> Court staff need materials and training in order to provide such information. They need access to the same procedures manuals as self-represented persons, and training in court procedures so that they can provide accurate information to the public. Each clerk's office should appoint someone to be responsible for the self-represented program.

**Provide free legal services to supplement the information available from court staff.** Law schools and bar associations are encouraged to replicate the services of the

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<sup>6</sup> For a complete discussion of the concept and specifics of legal information vs. legal advice please see "No Legal Advice From Court Personnel," What Does That Mean? The Judges Journal. Vol. 34, No. 1 at page 10.

Albuquerque Bar Association Volunteer Lawyer Booth, through which lawyers make themselves available at pre-arranged times at the Second Judicial District Courthouse to answer the domestic relations questions of self-represented persons.

**Provide legal services tailored to the needs of self-represented persons.** Members of the bar are encouraged to market legal services especially tailored to the needs of self-represented persons, such as the preparation of documents, pleadings and motions, the provision of legal advice on difficult legal issues in a matter, or preparation of a self-represented person to appear at a particular hearing. They should charge reasonable rates for these professional legal services unless the recipients are indigent. Lawyers can limit the scope of their representation for these unbundled services under Rule 16-102C<sup>7</sup> of the Rules of Professional Conduct by making this limitation clear in the engagement letter. Lawyers should be permitted to enter an appearance in a contested case for a specific purpose without entering a general appearance for all matters. A list of attorneys willing to provide unbundled services should be available in the courthouse for use by self-represented persons. This is known as providing `Aunbundled@services`.

**Provide training to judges and court staff in dealing with self-represented persons.** Court staff needs training in dealing with court users, particularly in dealing with difficult customers. Judges need guidance on how to tailor court rules and procedures to accommodate the needs of self-represented persons, how to explain those rules and court rulings to such litigants, and how to balance the rights of represented and self-represented persons in the same case.

**Space for services.** Space should be set aside in all courthouses for forms and work areas so that self-represented persons can complete forms and study the materials discussed in these recommendations.

**Adequate Funding.** A lawyer and support staff person should be hired to assist self-represented litigants complete paperwork in large judicial districts. More than one-half of domestic relations litigants are self-represented. The trend in this area is towards greater self-representation and assistance is necessary.

## FOUNDATIONS, ASSUMPTIONS, AND LEARNINGS

The working group approached its work with some major assumptions; some spoken and clear with others unspoken and unfocused. Although the Scottsdale team had been exposed to much of the current literature there was still a developmental period whereby many in the

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<sup>7</sup> **RPC 16-102 C Limitation of representation.** A lawyer may limit the objectives of the representation if the client consents after consultation.®



working group came to a more specific understanding of the issues. As the working group approached its business in the Fall of 2000 learnings emerged to refute, confirm, or clarify the assumptions.

### **Essential Services.**

As a presentation by former State Bar president Sarah Singleton made clear, pro se assistance is essential because it is a fallacy that there are enough attorneys for hire in New Mexico to address all legal matters, at any price. In 1995 a task force of the New Mexico State Bar used research from the American Bar Association to estimate that there were 144,000 annual legal needs in this state.<sup>8</sup>

These figures are consistent with previous research by the American Bar Association. In their 1996 publication Agenda for Access: the American People and Civil Justice<sup>9</sup> the American Bar Association estimated that the greatest unmet need for legal services was for those individuals *just above* the poverty line. Their estimate cited a greater number of litigants above the poverty line than below and that those below the poverty line often have access to governmental legal programs such as the Legal Services programs. Nevertheless, Ms. Singleton reported that 75% of pro se litigants in New Mexico are *involuntarily* pro se.

### **Current Responses of the Courts and Bar are Diverse.**

The working group was presented with current court and bar solutions to the self represented.

! The First Judicial District has an active pro se project involving information sessions and individual consultations with volunteer attorneys. There is no income qualification for the information sessions and individual sessions. In addition the First employs a legal assistant to be available at the court counter to assist litigants in Domestic Violence and Child Support. There are mandatory informational sessions for couples who are divorcing with children. Mediation and further court intervention services are provided on a sliding fee basis to assist parties in developing parenting plans.

! Since 1996 the Albuquerque Bar Association's volunteer Lawyer Program has provided a Courthouse Booth service limited to low income self represented litigants in domestic relations matters. Qualifying litigants can visit with a volunteer attorney (when available) and obtain free forms at an office in the court on a walk-in basis and can also attend a more intensive forms clinic with supervised paralegals at a separate location by appointment only. The growing

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<sup>8</sup> See Provider Survey on Legal Assistance for the Poor, New Mexico Center on Law and Poverty, 1997.

<sup>9</sup> Agenda for Access: the American People and Civil Justice, American Bar Association, Consortium on Legal Services and the Public, Chicago, IL, 1996, page vii.

demand for such services has outstripped the availability of voluntary attorneys. The court has added a supervising attorney and a legal assistant who now provide forms and limited information regardless of a litigant's income level.

! The Third Judicial District is also employing volunteer attorneys organized into a Pro Se Assistance Center.

! In the Fifth District the bar in Chaves County has developed a Pro Se Divorce and Paternity Clinic which offers a class type lecture.

! The Eleventh District is employing the Self Represented Resource Centers which groups many needs of pro se litigants together in one location. The services provided are mediation, County Clerk, Motor Vehicle Department, volunteer attorneys, child support officers, forms, and private process servers. There is no income qualification.

! The New Mexico Court of Appeals is perfecting appellate forms in combination with extensive explanations.

! The United States District Court for the District of New Mexico has employs a full time pro se law clerk to screen cases alleging civil rights violations, habeas corpus petitions, and other pro se filings.

! The Legal Aid Society of Albuquerque, Community and Indian Legal Services, Southern New Mexico Legal Services, and Peoples Legal Services all provide divorce clinics with a combination of classes and form completion assistance. For all of the legal services providers income screening is mandatory.

! In 1995, as a result of legal service programs' funding and service cutbacks the State Bar undertook several initiatives to respond to gaps in legal services. Many of the efforts produced a focus on low-income civil matters, but the new Legal Services and Programs Committee recognized that pro se assistance was vital to any answer to a legal services deficit. A new referral system, Lawyers Care, was developed and has proven to be especially vital at providing pro bono referrals to attorneys throughout the state. It is reported that approximately 30% of attorneys participate.

! Perhaps the most comprehensive pro se response is the entire business model of the Workman's Compensation Administration (WCA). The WCA is an example of a legislative solution whereby the legislature removed worker's compensation cases from district court jurisdiction and traditional adversarialism and substituted administrative review. The WCA promotes mediation at its earliest interactions with pro se litigants and employs attorneys to advise both workers *and* employers in resolving disputes.

Throughout many of the above responses there is obvious partnering between the courts and the bar.

### **Incomplete Responses.**

As a result of societal attitudes, constitutional considerations, and statutory mandates self-representation is more accepted in some areas of law than in others. Because of the constitutional right to representation in any criminal matter that might result in imprisonment very few litigants represent themselves on such matters. Courts also routinely appoint counsel to all litigants in abuse and neglect cases. For each of these case types funding for full representation is provided by the legislature. Other areas of law are where it is now routine to see the greatest concentration of the self-represented; domestic relations, landlord-tenant, and lower jurisdiction civil matters, receive no funding for complete representation. Consequently, the courts and some bar associations have independently begun to devise programs, alliances, and other initiatives, to meet this gap in services.

At the present time court and bar responses in areas where self-representation is common are incomplete. Perhaps the most prominent example of incomplete responses has been the tendency of some courts to rely exclusively on forms to assist the self-represented. Forms for a multitude of legal matters have grown up virtually overnight and come from many private and public sources. Forms by themselves, despite intentions to simplify issues, are still too difficult for many pro se litigants. The litigants have trouble with common legal definitions, do not understand what to put in blank spaces, and often fail to understand the proper sequence for multiple forms. Many are used in the wrong context or jurisdictions. Forms often do not provide procedural direction on proper usage to make the form effective. In spite of all these weaknesses many courts have often relied upon forms as the only technique to provide assistance to pro se litigants.

For its part the bar associations have largely relied on telephone referral systems and clinics staffed by volunteer attorneys.

Overall, the responses of the courts and bar are incomplete because they have been highly specialized and focused on a single issue or type of case. Many of the techniques used to assist the self-represented have been used in isolation from other techniques. Additionally, with some rare exceptions, these services are primarily provided to income-screened poor litigants.

### **Unbundled Legal Services.**

The working group believes that rule amendments to allow unbundling of litigation and other legal services are vital to encourage the private bar to provide more legal services to pro se litigants. The fundamental issue in unbundled legal services is complete representation vs. limited representation and, further, *under what circumstances and how* to limit the representation. Unbundled legal services permit an attorney to provide representation on a discrete legal matter or piece of litigation without the attorney being held responsible for

representation on an entire legal matter or the entire case. Examples of unbundled legal services can include representation at a specific hearing, drafting of a single pleading such as a complaint, answer, or motion and proposed order, or a limited consultation where the litigant then has the responsibility to ensure the desired results.

During the course of the working group it was acknowledged that there are currently many examples of unbundled legal services under existing rules. For example, in 1992 the Coordinated Advice and Referral Program for Legal Services hotline provided legal advice, brief services and referrals in Illinois. Many informational websites now exist such as [Askthelawyers.com](http://Askthelawyers.com) or [Attorneyonline.com](http://Attorneyonline.com), which charge fees. Bar associations often provide no cost [call-in@sessions](http://Call-in@sessions) such as the State Bar Association's wildly popular "ALAWLINE4" and the Young Lawyer Division's twice-a-year call-in program. The various legal services agencies in New Mexico have been providing clinics to assist litigants prepare forms since at least 1996. Whether for fees or pro bono, in each instance litigants are advised by counsel (which may or may not create an attorney-client relationship) yet counsel are not anticipated to provide continuing representation.

Current rules present *unintended* barriers to unbundled litigation services. For example, once an attorney enters an appearance in a case the attorney may not withdraw without the court's permission. As a result attorneys are understandably reluctant to enter appearances for limited purposes. The working group concluded that clarification or changes in existing rules were necessary, particularly in representation involving litigation, to permit attorneys to provide limited representation in court proceedings.

Concurrent with amended rules the working group believes that judicial officers must accept unbundled services before provision of unbundled services by the bar can become commonplace. The ways in which the judiciary react are crucial. If judges do not accept unbundled legal services in litigation, but respond by requiring counsel to continue the representation throughout the case, then attorneys will be reluctant to offer unbundled litigation services.

The working group believes that rule amendments would provide both attorneys and judges with specific references and guidelines. Since a multitude of procedural rules would be affected by a revision of unbundled concepts the working group cannot possibly form a complete response to this issue in the time allotted. The Ethics 2000, Commission on the Evaluation of the Rules of Professional Conduct, Center for Professional Responsibility is set to issue model rules on unbundled services. Although this document contains a recommendation regarding RPC 16-102(c), the opinion of the working group is to await the recommendations of Ethics 2000 for model rules before adopting wholesale rule changes in New Mexico. The working group also is of the opinion that the Supreme Court should adopt such rules changes after they have been considered by the appropriate rules committees.

## **The Judicial Dilemma**

A large area of disagreement concerns the ethics of judicial assistance to self-represented litigants.

Judges face a dilemma in dealing with the self-represented. On the one hand, they must maintain their neutrality; on the other hand they must keep the wheels of justice turning. They are forced into many currently unethical considerations on a daily basis and have largely been left with no direction as to the most appropriate resolution. Some judges will explain process and procedure to the self-represented, but feel restrained from doing so when the opposing party is represented. Other judges make a determination on a case-by-case basis. Still others reject the notion of assistance to the self-represented on the principle that the self-represented should be held to the same standard as trained counsel. All of them are acting correctly in the judgment of the working group until judicial ethics rules are revised. All of them recognize the ethical barriers; some make distinctions on the basis of process or procedure.

Staff face similar issues. Staff are guided by a distinction between information and advice. The former is information that has been authorized by the New Mexico Supreme Court for court personnel to dispense while the latter remains off limits as a clear court intrusion into neutrality.

Court systems should recognize that the ethical dilemma can be ameliorated somewhat by the effective implementation of self represented litigant assistance. Litigants who are better prepared for what will transpire in the courtroom will require less intervention or assistance on the part of the court. Discretionary guidelines and protocols for considering relaxing rules of procedure and evidence and thereby removing obstacles presented to a self represented litigant should be considered.

## **Concerns and Perceptions.**

A concern expressed by some members of the bar is that if the courts provide pro se services then more pro se litigants will appear. The general consensus of court officials is that pro se litigants already use the courts in great numbers. Any further service delivery methods employed may or may not bring additional litigants. This consensus by court officials is based on the number of cases filed for domestic relations reasons. Already approximately 60% of divorce actions are filed with both parties unrepresented. An additional 25% of these cases have one party unrepresented. This leaves a total of 10-15% of domestic cases with both parties represented. If more litigants are to come to the courts unrepresented then they will probably come in another case type.

A second concern expressed is that providing pro se services will remove a source of income from attorneys. A survey was conducted by the working group and some conclusions can be drawn. The survey responses show that only 4% of litigants with incomes greater than \$60,000 are self represented and that the vast majority of pro se services are being used by the

working poor or indigents. 41% of the litigants surveyed reported income of less than \$15,000 annually and an additional 33% report incomes between \$15,001 and \$30,000 annually. This is consistent with prior anecdotal reports. It is interesting to note that those 41% reporting less than \$15,000 in annual income would probably qualify for Legal Aid, *if Legal Aid had the resources to accept them.*

A perception to dispel is that individual lawyers and bar associations have been uncooperative with the courts regarding pro se litigants. For the State Bar this perception is absolutely false. The State Bar has a staff devoted to pro bono and referral programs which constitute a significant portion of its annual budget outlay.

When analyzing the substance of pro se litigation the perception is that the majority of pro se needs are family and domestic related. This is still true at the District Court level and becoming true at the appellate level. Not surprisingly, however, the jurisdiction of the court determines the needs of self represented litigants. Traditionally, many litigants in Landlord-Tenant disputes are self-represented when proceeding at the magistrate and Metropolitan Court. One finding at the district level that has escaped detailed scrutiny is that a high amount of litigation is being initiated by self represented convicts in the form of petitions for habeas corpus. Thus, this perception is correct, although there is a growing pro se use of the courts in other areas as well.

## **WHAT WOULD A COMPREHENSIVE LEGAL SERVICES DELIVERY SYSTEM FOR SELF REPRESENTED LITIGANTS LOOK LIKE?**

All of the assumptions, responses, learnings, and litigant needs beg the question; what would a comprehensive legal delivery system for self represented litigants consist of? In the opinion of the working group the following components would be included.

- 1) education concerning services available
- 2) educational materials
- 3) extensive referral systems
- 4) no cost forms available in many modes
- 5) assistance from volunteer attorneys at court clinics
- 6) assistance from private attorneys at reduced fees
- 7) rules providing attorneys with incentives to assist the self represented
- 8) supportive courts with pro se clinics and staff

## **PRODUCTS AND RECOMMENDATIONS OF THE WORKING GROUP**

During the working group's proceedings sub-groups discussed the topics of **Judicial Responses** and **Bar Responses**. After several discussions and meetings a remarkable convergence of opinion began to emerge. Perhaps the strongest theme that emerged was that of attempting to replace trained counsel into the self represented process. When are trained counsel most useful, effective and in what capacity? The following section presents recommendations and descriptions of working group products which are suggested to further the integrated responses of the bar and the court.

### **Results of Surveys**<sup>10</sup>

A unscientific user survey was conducted during the month of October 2000. The results present a snapshot of self-represented litigants in New Mexico. Data were collected from all geographic regions of the state. One can make some conclusions from the data but must be careful to realize that the results are self-reported so that some conclusions might be different under scientific scrutiny.

The demographics of the self represented present a cross-section of New Mexico, a state which routinely ranks among the poorest of the United States. The vast majority of the litigants (54%) are in the age group 22-40. In terms of self reported ethnicity or race they are 47% Hispanic American, 38% Caucasian American, 6% Native American, and 3% African American.

For income they report that 41% earn less than \$15,000 annually and that 33% earn less than \$30,000 annually. This is significant when you realize that fully 74% of the self-represented earn less than \$30,000 per annum. The working group believes that this group is not pro se by choice, but by the reality of the high cost of legal fees in the current market. The other significant aspect of the income indicators is that 6% of the self-represented earn between \$45,000 - \$60,000 per year and an additional 5% earn over \$60,000. The significance is that they probably can afford legal fees, but choose to be self represented for other reasons such as **no real dispute** **all parties in agreement**.

The majority of pro se litigants are female. 61% had children and 66% had graduated from high school. In keeping with New Mexico's population patterns 58% reported they lived in an urban area.

Two other points can be gleaned from the survey. First, in the New Mexico district, magistrate, and appellate courts, as well as the Worker's Compensation Administration 30% of

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<sup>10</sup> See Exhibit E.

litigants reported that they consulted an attorney before proceeding pro se. Fully 79% of the litigants reported that they couldn't afford an attorney. This is consistent with the income data received. Second, at all court levels the self represented reported that they had not used any of the tools or resources available to them such as brochures, videos, or resource centers. This presents a clear task for the courts and bar to educate the self-represented as to the tools available for use.

## Rule Amendments

In order to return more attorneys into the process the working group recommends the following rules changes or amendments.

1) The working group recommends the legislature and the courts adopt legislation and rules providing for pro se hearing officers to assist judges in dealing with pro se litigants. Model language amending NMRA 1-053 to add Section 1-053.3 A Pro Se Hearing Officers duties. is attached as Exhibit D.

2) The working group recommends amending the Rules of Minimum Continuing Legal Education, specifically 18-203 A Accreditation; course approval. The motivation of this proposal is to provide educational credit to counsel who participate in court sponsored pro se programs thereby providing incentives for attorneys to assist the courts. The relevant changes are:

18-203 A 2, A approve individual programs of continuing legal education. The content of the instruction provided may include but not be limited to, participation in education activities involving the use of computer-based resources, live seminars, audiotapes and videotapes; a court pro se assistance program.

AH. Pro se assisted program credit. Assistance credit for one hour may be earned for each fifty (50) minutes of assistance to a court pro se program, provided:

(1) the assistance is not performed in the ordinary course of the attorney's practice of law or the performance of regular employment; and

(2) the credit hours of assistance are certified by the court pro se program director.

No more than five (5) hours of credit may be given during one compliance year for assistance activities.<sup>11</sup>

3) The working group recommends amending the Rules of Professional Conduct 16-

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<sup>11</sup> An initial response to this proposal was provided by Jan Gilman-Tepper, Chair, Minimum Continuing Legal Education board by letter dated 12-11-00 and is attached as Exhibit H.



601.<sup>12</sup>

*A16-601. Pro bono public service*

COMMITTEE COMMENT

For the purposes of this rule, A a court pro se assisted program@shall qualify.

4) the working group made a referral to the Code of Professional Conduct Committee for some direction regarding unbundled legal services. They have reported out a proposed amendment to Rules of Professional Conduct 16-102 and 16-303 regarding the scope of representation. The relevant section of their recommendation is as follows:<sup>13</sup>

**16-102. Scope of representation.**

C. **Limitation of representation.** A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

**ABA COMMENT AS MODIFIED BY THE CODE OF PROFESSIONAL CONDUCT COMMITTEE:**

**Services Limited in Objectives or Means**

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may

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<sup>12</sup> Entire text published for comment in the Bar Bulletin, Vol. 39, No. 41, October 12, 2000.

<sup>13</sup> Entire text published for comment in the Bar Bulletin, Vol. 39, No. 50, December 14, 2000.

exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

Although this rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 16-101 NMRA .

Although Paragraph C does not require that the client's informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of the lawyer's written communication of the rate or basis of the lawyer's fee as required by Rule 16-105(B) NMRA.

#### 16-303. **Candor toward the tribunal.**

3. **Limited entry of appearance; lawyer-s duty.** In all proceedings where a lawyer appears for a client in a limited manner, that lawyer shall disclose to the court the scope of representation.

#### **CODE OF PROFESSIONAL CONDUCT COMMITTEE COMMENT**

The purpose of Paragraph E of this rule is to permit lawyers to appear for clients in a limited manner and to alert the court and opposing counsel of that limited role.

#### **Pilot Sites**

In order to test some of the learnings of the working group, especially the concept of getting more lawyers into the process, the working group is partnering with several courts and bar associations.

##### **1) Attorney Sponsored Clinics**

The working group recommends that courts partner with local bar associations and local legal aid societies to provide legal clinics.

Attorneys in the 5th Judicial District have organized with the court to provide low income pro se litigants with direction and assistance through divorce seminars at clinics.

In Eddy County seminars are proposed for low-income litigants. They will be income screened and if family income is less than \$25,000 the litigants will be eligible for free services. Litigants will be required to complete income statements. The seminars will be held once a month in the evening where a volunteer attorney will present a general seminar on the process and substantive requirements of divorce in the Fifth District Court of Eddy County. The volunteer attorney would then move on to assisting litigants with a prepared package of divorce forms. The volunteer would assist litigants to place information in the forms, check the forms for completeness and sufficiency, and then sign-off on the forms. It would be made clear to the litigant that no attorney-client relationship would be created and the attorney would not represent the litigant in the court. The sign-off procedure would be to reassure the judge that an attorney has reviewed the documents. A small fee estimated at \$35.00 will be charged in order to cover supply expenses.

The litigant will be responsible for filing the documents. The clerk will then assist the judge in adding the case to the default docket or setting the case for further hearings if contested matters are involved.

If litigants do not meet the income restrictions because of too much income they will be allowed to attend the general portion of the seminar, but will not be provided further assistance by volunteer attorneys. They will, however, be provided with a referral list of attorneys willing to work for reduced fees. If successful, this pilot could represent an unusually strong context for partnership with legal services agencies.

The clinic is expected to be operational by January 1<sup>st</sup>, 2001. For further information contact Barry Crutchfield at Templeman and Crutchfield PC, 113 East Washington, Lovington, NM 88260, 505-396-4927, fax 505-396-5481.

## **2) Designated Court Employees**

The working group recommends designation of court employees who are responsible for pro se matters and who have extensive authority to provide pro se assistance.

In the Eleventh District Court an attorney has been hired on a part-time, experimental contract and is assigned domestic relations cases at the time of filing if the litigants are pro se. The contract attorney is charged with bringing the cases to disposition by assisting litigants with court procedures and forms, reviewing documents, conducting hearings when necessary, and making final recommendations to a judge.

The first lesson to emerge from this pilot is the struggle with ethical problems which have been plaguing judges. The ethical issues are coming into a clear focus based on day-to-day examples. For example, in a recent divorce proceeding it was clear that a litigant requesting divorce needed to serve an absent respondent by publication. The hearing officer related that A service had not been perfected,@ and then that A the other party needs to get notice.@ Since it was clear that the litigant did not understand service the officer was confronted with the dilemma of how much help to provide while still attempting to remain neutral and avoid providing legal advice. These types of relatively simple pro se needs happen every day, but the ethical concerns remain. As a partial resolution of some of the ethical issues presented by self represented litigants the part-time contract attorney=s services are being integrated with the Self Represented Resource Centers. The litigant can be referred to the Centers for assistance, explanations, and procedural direction.

For further information contact Gregory T. Ireland at the Eleventh District Court, 103 South Oliver Drive, Aztec, NM 87410, 505-334-6151, fax 505-334-1940, [aztdgti@nmcourts.com](mailto:aztdgti@nmcourts.com).

In the Sixth District Court an attorney has been hired as a part-time, position and is assigned domestic relations cases if the judge believes the hearing officer would be helpful. The attorney is charged with bringing the cases to disposition by assisting litigants with court procedures and forms, reviewing documents, and making final recommendations to a judge. If a hearing is necessary then the hearing officer will transfer the case back to the judge.

For further information contact Judge V. Lee Vesley, P. O. Box 2339, 201 North Cooper, Silver City, NM 88061 505-538-2975.

The fundamental differences in the two hearing officer models of the Eleventh District versus the Sixth District are in the use of the hearing officer to conduct hearings. There is concern in the Eleventh that if the officer assists parties and then conducts hearings that a conflict may arise. The Sixth avoids the possibility of conflict by giving the case back to a judge, but doesn't reap the full benefit of assisting the judge.

### **3) Attorney Referrals**

The working group recommends that courts cooperate with their local bar associations to provide litigants with referrals to attorneys who are willing to perform low or no cost legal services for common problems. The working group survey results demonstrate that many of the self-represented do, in fact, consult an attorney before deciding that they cannot afford an attorney. This referral technique will test the effectiveness of providing low cost referrals at the court counters and pro se programs where many litigants seek service. It is a natural extension of the Lawyers Care program

of the state bar employed on the local level by the courts; a [Amini@Lawyers Care](mailto:Amini@Lawyers Care).

#### **4) Screening Attorney**

The working group recommends that a screening attorney be hired on contract basis by a district court which has a prison facility within its jurisdiction to review habeas corpus petitions filed by pro se convicts incarcerated in the state prison system.

When the working group was initiated many assumed that the vast majority of pro se litigants would be family law oriented. While that assumption is still true the working group became aware that a large amount of pro se litigation was being directed to the criminal courts by incarcerated convicts in the state prison system. Petitions for Habeas Corpus which allege a violation in the defendant's case process, procedure, or conviction are reviewed by the court in which the case was heard. However, many petitions allege some violation of law in the prison facility or terms of incarceration. Like other pro se litigation these petitions create stress on the court system and steal valuable time from judges. The vast majority of claims are found to be groundless. The United States District Court for the District of New Mexico approached a similar problem many years ago by creating a pro se law clerk position to assist in initial review of prisoner civil rights complaints and habeas corpus petitions. The pro se law clerk makes recommendations to judges on preliminary considerations of claims and processing of complaints and petitions.

The First, Third, Fifth, and Thirteenth districts represent New Mexico's judicial districts with a prison facility within their boundaries. For this reason any of them would present a good test site to determine if the federal model will work to the satisfaction of the judges of the state courts. The working group recommends, assuming funds are available, that a private attorney knowledgeable in these types of matters be contracted for a six-month period to test the model. The contract attorney will attempt to screen frivolous allegations from substantive allegations and report the same to the judge. If appropriate, the contract attorney would prepare a memorandum for the judge's review and may prepare an order pursuant to the recommendation. Evaluation by the judges as to the success of the screening attorney will be based upon timesavings and quality of decisions rendered. In their customary display of collegiality the United States District Court has agreed to allow the pro se law clerk to be available for consultation regarding organization and procedures during the initiation period.

#### **Statewide Pro Se Conference**

One of the earliest goals of the working group was to create a statewide conference. The statewide conference is scheduled for January 19-20, 2001 in Albuquerque. Several important functions of the working group will be accomplished by the conference. Disparate programs and activities of courts and the bar can be mined for

the best practices and procedures. More consensus and momentum can be built by local teams. The teams from many local jurisdictions can formulate a plan to take back to their localities. Strategic alliances between local courts, local bar associations, and other local agencies can be secured and strengthened. Hence, a more unified state plan with local variety can be put in place.

The conference will also provide for greater understanding of important issues by the local bar associations, some of which are still reluctant to assist local courts. The conference will begin to grapple with the enormous ethical issues that face judges when dealing with pro se litigants. The conference will showcase the very best in contemporary national responses to pro se issues.

The Judicial Education Center (JEC) is the chief facilitator of the conference. The pro se issues discussed and developed will dovetail with the JEC's own strategic plans to provide regional Amini@seminars on local levels in 2001. They will be ideally suited to follow-up on local plan development.

The conference is funded by a grant from the State Justice Institute, which was also a partial sponsor of the national conference in Scottsdale in November 1999.

## **Educational Efforts**

In addition to the statewide conference the working group is sponsoring additional long-term education through established educational forums.

### **1) Clerk training**

A session has been requested and confirmed for the statewide clerk=s conference in March 2001. In a format to be determined presenters will heighten all clerks knowledge of current pro se efforts, planning, details of litigant needs, and available resources. The presentation of resources available must include the bar efforts such as Lawyers Care. Materials from the statewide Pro Se conference in January will be condensed. The presenters will use personal experiences of litigants to provide examples and comic relief.

### **2) Judge training**

A session has been requested at the statewide judicial conclave in June 2001. The topic of the session will be the ethics of many situations judges face daily. Judges have been facing the ethical conundrum without direction, each making individual decisions on how much assistance to provide. Are judges deviating from impartiality by providing Aassistance@to the self-represented? How does the judge preserve impartiality in reality and perception? Does the Code of Judicial Conduct adequately address ethical considerations judges face in cases with the self-represented? How do judges preserve

neutrality and still preserve an obligation to ensure equal access to justice?<sup>14</sup> One of the techniques employed to explore this topic is to use a panel of magistrate judges who have traditionally dealt with the self-represented.

### **Grant Request from the Soros Foundation**

The Administrative Office of the Courts is pursuing funding from the Soros Foundation for what it is calling the **AFirst Monday@**project. The submission document will not be completed in time for inclusion in this document. The **AFirst Monday@**project is a fusion of many of the working group's recommendations into a statewide comprehensive pro se effort. Modeled after the legal services clinics, the pro se clinic being started in the Fifth District, and the one-stop-shopping Self Represented Resource Centers of the Eleventh District, the grant request will seek to build statewide infrastructure to support comprehensive pro se efforts in all New Mexico districts. Funds requested would go to hire 13-15 coordinators who will have primary responsibility for matching public court based programs with private volunteers in each of New Mexico's judicial districts. Funds would be used to help start programs where none exist. Funds would be used to create small local conferences to create interest and recruit volunteers. Each local area would determine the best plan to match volunteer lawyers, accountants, mediators, clerks, state agencies, and others to the needs of local pro se litigants. The proposed submission is entitled the **AFirst Monday@**project because once in place all New Mexico districts would schedule these services for the first Monday of each month and then begin a statewide marketing effort that would become well known such that all pro se litigants would know to come to the courthouses in any jurisdiction on the **AFirst Monday.@**

### **A Standing Commission**

The working group recommends that the Supreme Court of New Mexico authorize and adopt a Standing Commission on Self Represented Litigants with wide representation from interested groups. Meaningful continuing assistance of the self-represented will require constant diligence and innovation. The working group has agonized at prioritizing the issues involved with self-representation and is regretful at recognizing much work left undone. Many of the following suggestions for continued study are of such a nature that they require extended comment periods and simply could not be accomplished within the six months of the working group. A standing commission,

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<sup>14</sup> Position Paper on Self Represented Litigation, Conference of State Court Administrators, August 2000, Government Relations Office, 2425 Wilson Boulevard, Suite 350, Arlington, VA, 22201, 703-841-0200.

with many of the same interests as the working group, but including additional interests, could be formulated with these issues as the opening tasks and then be able to afford them the attention they deserve.

1) Study a system already in place in the State of Washington whereby social service agencies such as women's shelters can train individuals and then obtain a limited license in the relevant law for their agency. Once trained and certified by the state bar association they can then assist pro se litigants who request legal advice from that agency.

Is this system appropriate for New Mexico?

2) How to define, redefine, or reject attorney-client relationships for attorneys who volunteer at court sponsored pro se programs?

3) Recommendations of Ethics 2000.

4) Develop discretionary guidelines and protocols for judges and attorneys to use when a) a judge is faced with two opposing pro se litigants, and, b) when one party is represented and one party is pro se. Evaluate the relaxation of procedural and evidentiary rules for pro se litigants.

5) Continue to encourage and support local planning for those districts or agencies that develop pro se programs at the statewide conference in January 2001.

6) Publicize the Volunteer Protection Act<sup>15</sup> as a supplement or alternative to malpractice insurance for those attorneys who volunteer their services to the courts and other non-profit organizations.

7) Since New Mexico has a high percentage of poor litigants would unbundled legal services help them buy a piece of representation? Would unbundled legal services also help attorneys to sell a piece of representation to those who would not otherwise attempt to obtain legal services?

8) Evaluate and implement a Pro Se Hearing Officer system

## CONCLUSION

As the working group has gone about its work it has clarified efforts of courts and bar associations to assist the self represented. While in the past these two groups have been uneasy partners it is now clear that improved coordination between the two is the clearest path to a

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<sup>15</sup> See Exhibit H.



comprehensive legal services delivery system for the self-represented in New Mexico. While the right to self-representation is firmly established, the working group believes the right is most effectively enjoyed and utilized with attorney involvement at some level. The working group's recommendations endeavor to ensure attorney availability for all pro se litigants at the level which best meets their needs. The integrated, comprehensive approach of bench and bar embodied in this report is believed to offer the best set of solutions.

## **ACKNOWLEDGMENTS**

The co-chairs would like to publicly thank all the members of the Self Represented Litigant Working Group. Working with people of such high aspirations when focused on the best for the citizens of New Mexico is exhilarating! They are listed on a special roster which is included as an attachment. A special note of thanks is extended to Joey Moya and Julia Barnes who were able to produce stellar work despite sometimes ambiguous direction. And, as always, a very large debt of gratitude exists to John Greacen who provides the highest caliber intellectual leadership matched with a realistic, constant, sense of direction.

# EXHIBIT A

## NATIONAL CONFERENCE ON PRO SE LITIGATION November 18-20, 1999

### SUMMARY

The New Mexican conference team arrived with the dual goals of learning from pro se efforts nationally and to reflect upon improvement of New Mexico's pro se service modes. My sense is that we were somewhat reassured in that many local and state courts have not initiated any efforts to assist pro se litigants. New Mexico's efforts are strong, varied, and local.

The current team is composed of Chief Justice Pamela B. Minzner, Judge William C. Birdsall, Judge Grant L. Foutz, Judge V. Lee Vesley, Judge Tommy Jewell, Judge Angela Jewell, John M. Greacen, Rebecca Thomas, Melissa Reeves, Victoria Garcia, Tanya DeWees and Gregory T. Ireland.

It appears that the courts making the most progress on a statewide basis (and with the highest degree of motivation) are Florida, Arizona, and California. Arizona appears to have a high degree of funding and commitment at their highest levels of court authority. Florida has made formal rule changes providing for self-help. California is *mandating* pro se assistance by full-time personnel at the county level funded by Federal IV-D funding.

Some states report a larger volume of pro se litigants than others. The Western states reported the highest rates while the Midwestern states reported the lowest. For instance, Arizona (primarily Maricopa County) is reporting that 60% of family law cases have both sides self-represented with an additional 20-30% having one side self-represented. Only about 10% of their family law cases have both parties represented by counsel. Alternatively, the Midwestern states report only about 10% of parties are self-represented. New Hampshire reports that 41% of the litigants at the appellate level are self-represented. In an unscientific straw poll of the conference team, New Mexico fits into the Western pattern of approximately 60% self-represented litigants in family matters at the general jurisdiction level.

The Eleventh District Court was requested to present its **Pro Se Clinic** and its one-stop-shopping approach as a spotlight session. Other spotlights included the Ventura County Pro Se **Amobile** station, (a large RV converted into a roving office with forms and Internet access to the local courts) and the New Britain, Rhode Island, Court Service Center which devotes research materials, reference personnel, and areas for public use in the courthouse. Several non-profit associations of attorneys also presented spotlights of their service methods in representing the poor. Many of the spotlighted presentations had common features such as floor space set aside in the courthouse for forms, research, and making knowledgeable people available. In addition,

many pro se programs are moving their services such as forms to the Internet or have already done so.

It seems clear that the limited jurisdiction courts have traditionally operated with self-represented litigants and there may be significant learning opportunities from them for the general and appellate jurisdiction courts.

In a last minute substitution for the summary plenary session John Greacen was asked to provide an overview of the history of pro se efforts and new efforts to assist pro se litigants. It was complete, well grounded, reality based, and struck an emotional tie with the conference participants. (It was WOW!) Among Mr. Greacen's remarks was the observation that "We have done nothing to start the trend of self-represented litigants and it is unlikely that there is anything we can do to stop it." Mr. Greacen's remarks are attached to this summary and should be used as a framework for a statewide initiative.

Finally, the State Justice Institute has specifically allocated grant funding for the purpose of furthering pro se efforts. THE DEADLINE IS MARCH 17<sup>TH</sup>, 2000 and the Administrative Office has grant requirement forms.

**RECOMMENDATION:**

The preliminary recommendations of the Pro Se team, as attached, are varied and present a plan which fully anticipates that the state and local bar associations are partners with the Supreme Court and local courts. It is also recommended that accomplishment of these goals would be best served by a statewide task force.

Respectfully submitted on behalf of the New Mexico Pro Se team,

Gregory T. Ireland  
Court Administrator  
Eleventh District Court

## SELF-REPRESENTED LITIGANTS: A STATEWIDE EFFORT

### The Bar Association:

PROPOSED ACTION		RESOURCES AVAILABLE	PERSON RESPONSIBLE	NOTES
enhance reputation of the BAR	encourage pro bono activities on behalf of litigants (at the courthouse) without income qualifications	volunteers from the BAR	Melissa Reeves	
change the perception of price by creating attorney availability sheets	a) often litigants perceive the price of attorneys to be too high, but haven't shopped for an attorney whose fee may be reasonable b) introduce more competition	Maricopa examples	Melissa Reeves	needs local steering committees
clarify insurance coverage for pro bono activities		42 USC Sec.14-501 Volunteer Protection Act (1997)	Melissa Reeves and Judge Tommy Jewell	

### The Courts:

PROPOSED ACTION		RESOURCES AVAILABLE	<u>PROPOSED</u> PERSON RESPONSIBLE	NOTES
educate legislators as to the special needs of litigants and the additional burden placed on the courts to assist them			John Greacen	
incorporate the special needs into unified budget planning			Judiciary Budget Committee, Gregg	

such as the weighted caseload study			Ireland, John Greacen	
bring litigants into the planning process			Judge T. Jewell	
Propose Rule Changes	A) Unbundled Legal Services * ghostwriting * representation	Colorado Self-help rule	Chief Justice Minzner	
Provide official Pro Bono recognition for assistance to court self-help efforts	Amend Rule 16-601 to accept attorneys helping court efforts when the litigants are not income qualified		Judge Birdsall	
Publicize the Supreme Court Administrative Order which clarifies the exceptions to Unauthorized Practice of Law for court clerks				
Incorporate continuous self help training into Court clerks conferences * this effort should include judge's personal staff		materials	Victoria Garcia Judicial Education Center, Paul Biderman	
provide additional self-help forms - accelerate development of contested Domestic Relations		Civil Rules Committee	Deborah Dungan, Julia Barnes	
build self-help information center - statewide tiers including videos, Interactive Voice Response Systems, interactive automation, referrals, person		suggestion to include the law school in development	John Greacen	
Seek IV-D funding for facilitators		California model	Julia Barnes	
<b>Grant deadline - March</b>	SEND OUT	Grant	John Greacen	

<p><b>17<sup>th</sup>, 1999</b></p>	<p>NOTICE TO LOCALITIES</p>	<p>requirements are available form the Administrative Office of the Courts</p>		
<p>Integrate Self-help concepts and practices into Judicial conclave (June 2000)</p>			<p>Chief Justice Minzner, John Greacen, Judicial Education Center, Paul Biderman</p>	<p>Judges to recognize limited representation</p>
<p>Integrate Self-help concepts and practices into BAR convention</p>				
<p>Incorporate into training sessions a change in the basic lexicon we use to describe this effort. For example change Apro se@ to ASelf-represented@ or ACourt Clinic@ to ASelf-Represented Resource center.@</p>				

## **EXHIBIT B**

### **IN YOUR OWN WORDS**

Outline of Discussion Points at Self Represented Working Group Meeting  
June 6, 2000

(\* means more than one person identified this issue)

#### **A. Reasons to Act**

- 4 The self represented people are here. \*
- 5 Judges don't treat self-represented litigants with respect. Courts need to be accessible.\*\*
- 6 Attorneys fees are \$\$\$\$/ access is right. Cost vs. quality
- 7 Our job first is to ensure that we do no harm
- 8 Stop sense of court vs. bar
- 9 Frustrated staff and public
- 10 Experience as self represented person very frustrated
- 11 Political reality for judges to deal effectively with pro se people
- 12 Pro se movement gives people dignity
- 13 Systems that force attorney use not most helpful

#### **B. Clarity of Mission is Essential**

- 1 Define what we are doing. Provide sufficient checks
- 2 Provide a mission/goal/ very detailed plan \*\*\*\*\*
- 3 ID successful arenas for pro se. Help this
- 4 ID nightmare arenas for pro se. Hinder this
- 5 Then work on middle issues.
- 6 Different areas have different needs. Define areas that could be helped. Local, county, state.

#### **C. Limited Help Can Be Problematic**

- 1 Clerks giving advice. Judges giving advice. Clerks and baliffs giving advice.
- 2 Need checks/ balances. Protections.
- 3 Forms can mislead. Can't do this by form. Can't practice law by form \*\*
- 4 AMalpractice@by leaving out things (like your kids!) for ease

- 5 Very hard to walk the line between advice and not advice
- 6 Pro se issues can be very complex
- 7 Appellate process is too complicated
- 8 Lawyers are qualified. No qualifications for self represented litigation support.
- 9 With ease of forms without more could encourage lawyers not to help marginal clients \*\*

## **D. What to do**

### **Separate System**

- 1 Square peg in a round hole??? Separate track for self represented litigants.\*\*

### **Use Lawyers Better**

- 2 Structure a system to get lawyers for people who can't afford it. Guide
- 3 Bar/ lawyers need to get involved here. Provide quality control. Get lawyers back in the process.\*\*
- 4 Look at system that takes lawyers out
- 5 Unbundled services
- 6 Need to provide hand holder
- 7 AScreening@attorney to provide check
- 8 How to provide limited service without violating professional service rules
- 9 Insulate lawyers if unbundled.
- 10 How to deal with invalid claims

### **Use Court Staff Better**

- 11 How we provide access to services matters. See 2<sup>nd</sup> as example and 11<sup>th</sup>
- 12 Work with clerks on how to deal with front line
- 13 Court to check that boxes are properly done.

### **Look to Other Examples**

- 14 Use statutory ombudsman project better (Workers Comp example)
- 15 Magistrate Court is a good example
- 16 Mediation as an option. \*\*

### **Separate processes and simplify them**

- 17 No kids. Limited property go to pro se clinic
- 18 Summary books outlining law.
- 19 Plain english handbook
- 20 Even more simple forms



- 21 Process for appellate procedure simplified.
- 22 DV help has helped in area of need Provide access
- 23 Illiterate people: how to get help.
- 24 Non english speakers: how to get help

### **Start early**

- 25 Educate kids on basic rights. Before you need to know.

### **E. General Thoughts**

- 1 Add court clerks/ community member to committee
- 2 Ease may increase filings (criminal civil rights)
- 3 Bad lawyers don't represent people well.
- 4 Why spend taxpayer \$\$

## **EXHIBIT D**

ALL NEW MATERIAL      DRAFT - FOR DISCUSSION PURPOSES ONLY

REVISED 10-11-00

### **1-053.3.      Pro Se Hearing Officers; duties**

- A. **Appointment.** Pro Se Hearing Officers shall be appointed by and serve at the pleasure of the Chief Judge.
- B. **Qualifications.** Any person appointed to serve as a Pro Se Hearing Officer pursuant to this rule shall:
  - 1. be a lawyer licensed to practice law in New Mexico and who has at least three (3) years experience in the practice of law; and
  - 2. be knowledgeable in the areas of domestic relations and other civil or probate areas of law.
- C. **Authority.** A Pro Se Hearing Officer may perform the following duties:
  - 1. receive case assignments from a judicial officer when at least one party is a self-represented litigant.
  - 2. encourage self-represented litigants to seek and obtain legal advice from qualified counsel;
  - 3. provide information about available pro bono legal services or low cost legal services;
  - 4. refer self-represented litigants to other court provided services such as mediation;
  - 5. provide information about approved forms without providing advice or recommendations as to a specific course of action;
  - 6. distribute court approved forms;
  - 7. provide instructions on how to complete the forms;
  - 8. provide assistance in completing statutorily mandated forms such as child support guidelines;
  - 9. provide, orally or in writing, definitions of legal terminology found in accepted legal dictionaries;

10. provide, orally or in writing, citations of statutes, rules, or local rules without providing interpretations of same;
11. provide general information about court processes, practices, procedures or local operations without advising as to applicability or strategy;
12. facilitate setting and hearing of contested matters;
13. examine all pleadings, documents, support schedules or other relevant materials prior to conducting hearings on contested or uncontested matters;
14. conduct hearings;
15. prepare recommended orders and conclusions for review by a district judge.

- D. **Limitations on private practice.** Full time Pro Se hearing officers shall devote full time to domestic relations matters and shall not engage in the private practice of law or in any employment, occupation, or business interfering with or inconsistent with the discharge of their duties. Part-time Pro Se hearing officers may engage in the private practice of law so long as in the discretion of the appointing judge it does not interfere with nor is it inconsistent with the discharge of their duties as a pro se hearing officer and subject to the Code of Judicial Conduct rules enumerated in Paragraph E of this rule.
- E. **Code of Judicial Conduct.** A Pro Se hearing officer is required to conform to Rules 21-100 through 21-500 and 21-700 of the Code of Judicial Conduct.

**REPRESENTED LITIGANTS WORKING GROUP ROSTER**

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# EXHIBIT I

Volunteer Protection Act of 1997 (Enrolled Bill) S.543

One Hundred Fifth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the seventh day of January, one thousand nine hundred and ninety-seven

An Act

To provide certain protections to volunteers, nonprofit organizations, and governmental entities in lawsuits based on the activities of volunteers. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Volunteer Protection Act of 1997'.

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS- The Congress finds and declares that--

- 1) the willingness of volunteers to offer their services is deterred by the potential for liability actions against them;
- 2) the contribution of these programs to their communities is thereby diminished, resulting in fewer and higher cost programs than would be obtainable if volunteers were participating;
- 3) because Federal funds are expended on useful and cost-effective social service programs, many of which are national in scope,

depend heavily on volunteer participation, and represent some of the most successful public-private partnerships, protection of volunteerism through clarification and limitation of the personal liability risks assumed by the volunteer in connection with such participation is an appropriate subject for Federal legislation;

4) services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce;

5) due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance, through interstate insurance markets, to cover their activities; and

6) clarifying and limiting the liability risk assumed by volunteers is an appropriate subject for Federal legislation because--

A) of the national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits;

B) the citizens of the United States depend on, and the Federal Government expends funds on, and provides tax exemptions and other consideration to, numerous social programs that depend on the services of volunteers;

C) it is in the interest of the Federal Government to encourage the continued operation of volunteer service organizations and contributions of volunteers because the Federal Government lacks the capacity to carry out all of the services provided by such organizations and volunteers; and

D) i) liability reform for volunteers, will promote the free flow of goods and services, lessen burdens on interstate commerce and uphold constitutionally protected due process rights; and

ii) therefore, liability reform is an appropriate use of the powers contained in article 1, section 8, clause 3 of the United Constitution, and the fourteenth amendment to the United States Constitution.

(b) PURPOSE- The purpose of this Act is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.

### SEC. 3. PREEMPTION AND ELECTION OF STATE NONAPPLICABILITY.

- (a) **PREEMPTION-** This Act preempts the laws of any State to the extent that such laws are inconsistent with this Act, except that this Act shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for nonprofit organization or governmental entity.
- (b) **ELECTION OF STATE REGARDING NONAPPLICABILITY-** This Act shall not apply to any civil action in a State court against a volunteer in which all parties are citizens of the State if such State enacts a statute in accordance with State requirements for enacting legislation—
- (1) citing the authority of this subsection;
  - (2) declaring the election of such State that this Act shall not apply, as of a date certain, to such civil action in the State; and
  - (3) containing no other provisions.

### SEC. 4. LIMITATION ON LIABILITY FOR VOLUNTEERS.

- (a) **LIABILITY PROTECTION FOR VOLUNTEERS-** Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if—
- (1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;
  - (2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;
  - (3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and
  - (4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to—
    - (A) possess an operator's license; or
    - (B) maintain insurance.

- (b) **CONCERNING RESPONSIBILITY OF VOLUNTEERS TO ORGANIZATIONS AND ENTITIES-** Nothing in this section shall be construed to affect any civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.
- (c) **NO EFFECT ON LIABILITY OF ORGANIZATION OR ENTITY-** Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.
- (d) **EXCEPTIONS TO VOLUNTEER LIABILITY PROTECTION-** If the laws of a State limit volunteer liability subject to one or more of the following conditions, such conditions shall not be construed as inconsistent with this section:
- (1) A State law that requires a nonprofit organization or governmental entity to adhere to risk management procedures, including mandatory training of volunteers.
  - (2) A State law that makes the organization or entity liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees.
  - (3) A State law that makes a limitation of liability inapplicable if the civil action was brought by an officer of a State or local government pursuant to State or local law.
  - (4) A State law that makes a limitation of liability applicable only if the nonprofit organization or governmental entity provides a financially secure source of recovery for individuals who suffer harm as a result of actions taken by a volunteer on behalf of the organization or entity. A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the organization or entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified.
- (e) **LIMITATION ON PUNITIVE DAMAGES BASED ON THE ACTIONS OF VOLUNTEERS-**
- (1) **GENERAL RULE-** Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.
  - (2) **CONSTRUCTION-** Paragraph (1) does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.
- (f) **EXCEPTIONS TO LIMITATIONS ON LIABILITY-**

1) IN GENERAL- The limitations on the liability of a volunteer under this Act shall not apply to any misconduct that—

A) constitutes a crime of violence (as that term is defined in section 16 of title 18, United States Code) or act of international terrorism (as that term is defined in section 2331 of title 18) for which the defendant has been convicted in any court;

B) constitutes a hate crime (as that term is used in the Hate Crime Statistics Act (28 U.S.C. 534 note);

C) involves a sexual offense, as defined by applicable State law, for which the defendant has been convicted in any court; involves misconduct for which the defendant has been found to have violated a Federal or State civil rights law; or

D) where the defendant was under the influence (as determined pursuant to applicable State law) of intoxicating alcohol or any drug at the time of the misconduct.

2) RULE OF CONSTRUCTION- Nothing in this subsection shall be construed to effect subsection (a)(3) or (e).

## SEC. 5. LIABILITY FOR NONECONOMIC LOSS.

(a) GENERAL RULE- In any civil action against a volunteer, based on an action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity, the liability of the volunteer for noneconomic loss shall be determined in accordance with subsection (b).

(b) AMOUNT OF LIABILITY-

(1) IN GENERAL- Each defendant who is a volunteer, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.

(2) PERCENTAGE OF RESPONSIBILITY- For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm.

## SEC. 6. DEFINITIONS.

For purposes of this Act:

- (1) **ECONOMIC LOSS**- The term `economic loss' means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State law.
- (2) **HARM**- The term `harm' includes physical, nonphysical, economic, and noneconomic losses.
- (3) **NONECONOMIC LOSSES**- The term `noneconomic losses' means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature.
- (4) **NONPROFIT ORGANIZATION**- The term `nonprofit organization' means—
  - (A) any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note); or
  - (B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C. 534 note).
- (5) **STATE**- The term `State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, any other territory or possession of the United States, or any political subdivision of any such State, territory, or possession.
- (6) **VOLUNTEER**- The term `volunteer' means an individual performing services for a nonprofit organization or a governmental entity who does not receive—
  - (A) compensation (other than reasonable reimbursement or allowance for expenses actually incurred); or
  - (B) any other thing of value in lieu of compensation, in excess of \$500 per year, and such term includes a volunteer serving as a director, officer, trustee, or direct service volunteer.

## SEC. 7. EFFECTIVE DATE.

- (a) **IN GENERAL**- This Act shall take effect 90 days after the date of enactment of this Act.

(b) APPLICATION- This Act applies to any claim for harm caused by an act or omission of a volunteer where that claim is filed on or after the effective date of this Act but only if the harm that is the subject of the claim or the conduct that caused such harm occurred after such effective date.

Speaker of the House of Representatives.  
Vice President of the United States and  
President of the Senate.