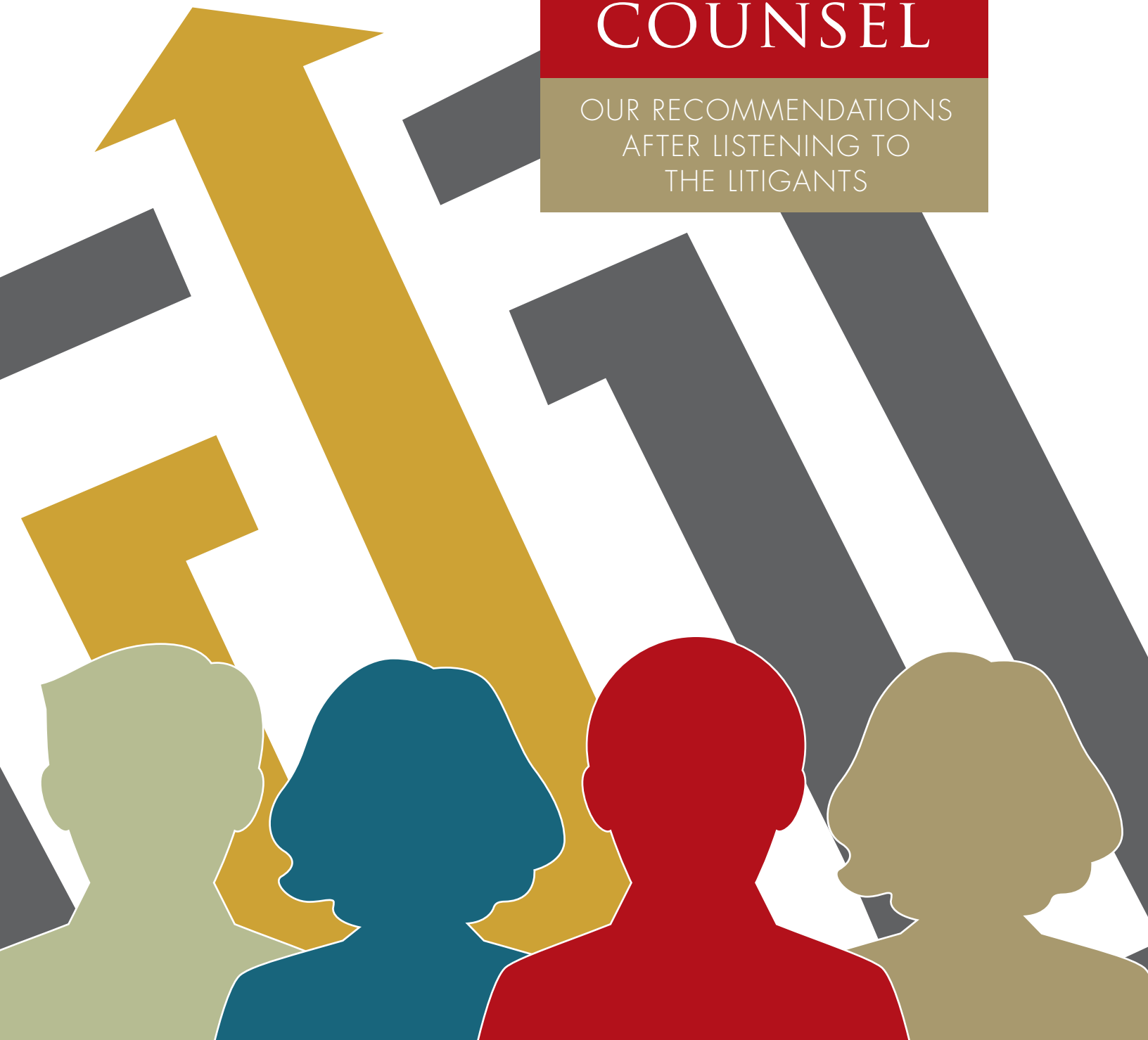


CASES WITHOUT COUNSEL

OUR RECOMMENDATIONS
AFTER LISTENING TO
THE LITIGANTS





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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a “think tank” that goes one step further—we are practical and solution oriented. Our mission is to forge innovative solutions to problems in our system in collaboration with the best minds in the country. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

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Honoring Families is an initiative of IAALS dedicated to developing and promulgating evidence-informed processes and options for families involved in divorce, separation, or parental responsibility cases that enable better outcomes for children and that provide greater accessibility, efficiency, and fairness for all parties, including those without counsel.

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Finally, this effort would not have been possible but for the Cases Without Counsel study participants. The stories and voices of self-represented litigants inspired us, and the narratives of court staff and judges reminded us that our family courts are comprised of a dedicated cadre of men and women. These voices shaped this report.

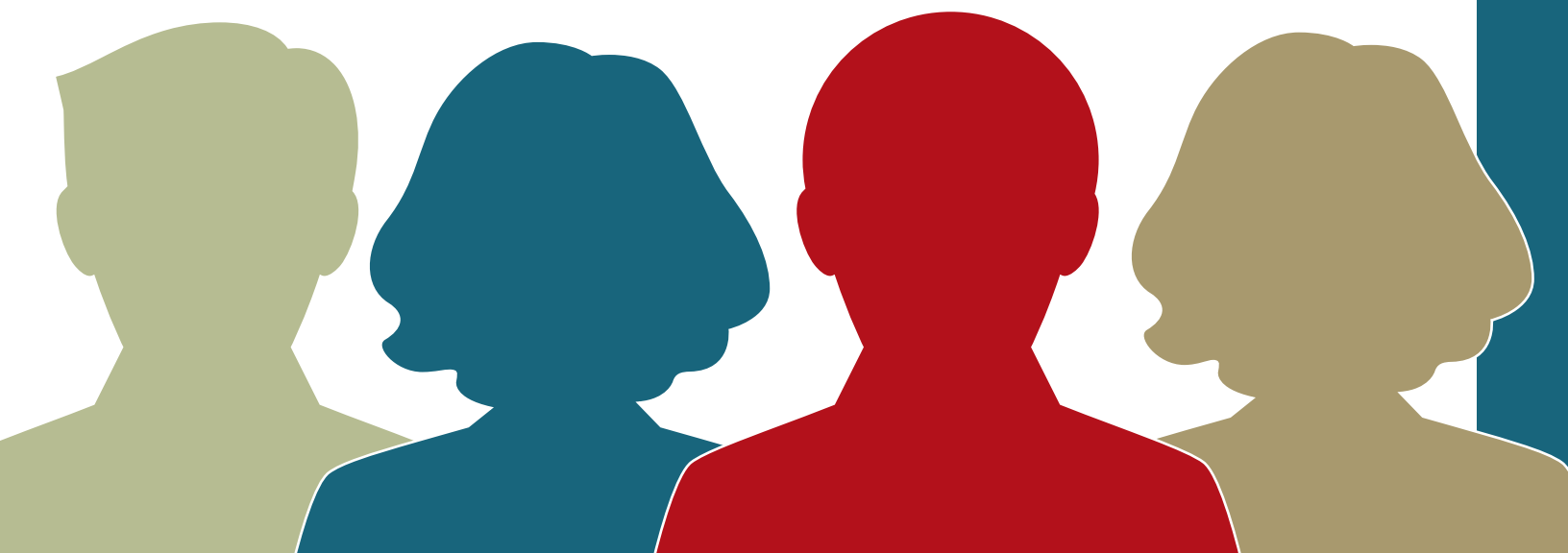




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EXECUTIVE SUMMARY

Many litigants navigating state family courts today are without attorney representation—in some courts, these numbers are increasing. Justice system stakeholders have made significant efforts in the last decade to develop self-help information, resources, and programs for those without representation. All too often, however, litigants are left out of conversations on how to improve the process for others like them. IAALS, through its Honoring Families Initiative, undertook a qualitative empirical research study designed to explore the issue of self-representation from the litigants' perspective.

Cases Without Counsel: Experiences of Self-Representation in U.S. Family Court gathered detailed narratives directly from family court self-represented litigants and those who engage with litigants in the court through one-on-one interviews. The study findings (detailed in an accompanying research report) present an array of suggestions for how to better serve litigants without lawyers:

FOR COURT COMMUNITIES

SELF-HELP RESOURCES FOR SELF-REPRESENTED LITIGANTS:

- Increase Availability of Targeted Self-Help Resources
- Explore Virtual & Innovative Means of Delivering Self-Help Resources
- Facilitate Litigant Awareness of Available Resources
- Assign a Liaison or Navigator to Guide Litigants through the Process

PROCESS & PROCEDURE CHANGES IN FAMILY COURT:

- Simplify Components of the Process
- Establish Triage/Differentiated Case Management Systems
- Incorporate Trauma-Informed Practices & Processes

TRAINING & EDUCATION FOR COURT STAKEHOLDERS:

- Guidance for Court Staff on Providing Legal Information
- Guidance for Judges on Navigating Hearings & Trials
- Guidance on the Unique Needs of Family Court Self-Represented Litigants
- Training on Vicarious Trauma & Stress Management

FOR LEGAL COMMUNITIES

AVAILABILITY & ACCESSIBILITY OF LEGAL SERVICES:

- Unbundled Legal Services
- Innovative Billing Structures
- Legal Aid & *Pro Bono* Services
- Non-Attorney Models of Legal Services Delivery

ENGAGING WITH CLIENTS & POTENTIAL CLIENTS

- Addressing Negative Perceptions of Attorney Involvement in Family Cases
- Messaging about the Role of the Family Law Attorney & Valued Added to the Process

FOR BROADER COMMUNITIES

FACILITATE ACCESS TO SELF-HELP RESOURCES & SERVICES FOR DIVORCING OR SEPARATING FAMILIES

The various stakeholder recommendations are presented alongside materials and resources for those interested in learning more or implementing various components in their respective jurisdictions.

Fundamentally, the report suggests a change in the conversation on self-representation. It is no longer enough to bemoan the fact that there are insufficient legal services dollars and people to serve these litigants or to naively assume that they will all find lawyers in some future-to-come. Rather, we must accept that these litigants are now the customers of the system and are on the increase. System stakeholders must accept the onus of shared responsibility for helping self-represented litigants through the process. IAALS, therefore, encourages court, legal, and broader community stakeholders to view these recommendations as blueprints for a coordinated response to better assist self-represented litigants in family court and a means through which to fulfill this shared responsibility.



INTRODUCTION

Many litigants navigating state family courts today are without attorney representation, and, in many jurisdictions, these numbers are growing. Anecdotes and data collected from judges, court staff, and others in the family court system show that self-represented litigants encounter numerous challenges navigating the system without an attorney. We also understand from family justice system stakeholders the impact that increasing numbers of litigants without lawyers are having on often overburdened and underfunded court systems.

In response to these challenges, courts and others who work in and with family courts have undertaken substantial efforts to increase resources and programs for self-represented litigants. All too often, however, the insights and experiences of the court system users are assumed or implied. Furthermore, despite the increasing dialogue on client-centric services and systems, litigants are rarely involved in stakeholder conversations on how to improve the process for people like them.

To encourage and facilitate a more client-centric justice system, the Institute for the Advancement of the American Legal System at the University of Denver² (“IAALS”) gathered narratives and experiences directly from self-represented litigants in family court and those in the courts who serve them. The Cases Without Counsel: Experiences of Self-Representation in U.S. Family Court (“Cases Without Counsel” and “CWC”) study complements decades of comprehensive research on self-representation that have yielded an array of expert recommendations and suggestions for how to better serve those who navigate our courts without lawyers. Engaging litigants in this conversation allows stakeholders in the family justice system to consider the issue in a more holistic and informed manner.

This report contains a variety of recommendations for how courts, legal services providers, and communities can best serve self-represented litigants in family cases, informed by the Cases Without Counsel study. We begin with a concise overview of the research methodology and process through which IAALS vetted the CWC study data and engaged additional experts to identify practical recommendations. The report then sets the stage by suggesting a change in the conversation on self-representation, away from a piecemeal stakeholder-by-stakeholder response and toward a comprehensive strategy in which all stakeholders—court, legal, and broader community partners—share the responsibility for ensuring that litigants without lawyers can meaningfully access our nation’s family courts.

Readers are encouraged, therefore, to view the recommendations for court communities, legal communities, and broader communities that follow, as blueprints for a coordinated response, as opposed to stand-alone suggestions. Interspersed in these sections are resources that stakeholders can reference to learn more about or leverage to implement the various recommendations. Finally, throughout the report, narratives from Cases Without Counsel interviews are referenced, both to support the commentary and to ensure that the voices of the court users are not lost.

1 FCS1.

2 IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. IAALS has four initiative areas, one of which is the *Honoring Families Initiative* (HFI). HFI is dedicated to promoting new ways to handle divorce, separation, and allocation of parental responsibility issues that ensure better outcomes for children, less-adversarial approaches for spouses/parents, and greater accessibility, efficiency, and fairness for everyone involved in the family court process, including those who navigate the system without a lawyer. Learn more about IAALS and HFI at <http://iaals.du.edu>.

“ We make assumptions about litigants and what their needs are without truly, truly knowing what they are. And, I think we all try to be very sympathetic to them, but we can’t know their experience.”

Cases Without Counsel Judge Participant



BACKGROUND & RESEARCH OVERVIEW

The National Center for State Courts (“NCSC”) recently analyzed the landscape of civil litigation, finding broadly that “[t]he idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion.”³ While the NCSC’s effort was focused on civil cases, evidence suggests that in many state courts, self-representation rates are among the highest in family cases.⁴ Despite the changing face of family court users, however, court systems continue to be structured on the assumption that both parties are represented.⁵

To contribute to the robust national conversation on how family courts and practitioners can best serve litigants outside of the traditional picture of two represented parties, the IAALS *Honoring Families Initiative* launched a qualitative empirical research study exploring the issue of self-representation in the United States from the litigants’ perspective. Cases Without Counsel involved one-on-one interviews with those who represented themselves in family court, as well as court professionals who routinely engage with self-represented litigants in the course of their work.⁶

Consistent themes emerged across the Cases Without Counsel interviews, providing a unique window of insight into the world of self-representation. The voices and experiences of the litigants and court participants with whom the IAALS study team⁷ spoke shed new light on potential solutions and innovations that would allow stakeholders to better serve

- 3 PAULA HANNAFORD-AGOR ET AL., NAT’L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS vi (2015), available at <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.
- 4 E.g., Thomas M. Clarke, *Litigant Portals Provide a New Approach to Help Self-Represented Litigants*, in TRENDS IN STATE COURTS: LEADERSHIP & TECHNOLOGY 41 (Carol R. Flango et al. eds., 2015) [hereinafter *Clarke, Litigant Portals*], available at <http://www.ncsc.org/~media/Microsites/Files/Trends%202015/Trends%20in%20State%20Court%202015%20Web.ashx>.
- 5 As part of a 2005 National Center for State Courts and State Justice Institute Summit on The Future of Self-Represented Litigation, Richard Zorza framed the issue as follows: “By making it effectively impossible for those without lawyers to assert their claims and defenses, or even tell their stories, the system both strips people of their rights and blocks the path for drawing attention to and removing the underlying inequities. Under this system, the promise of justice is therefore illusory for most, and the value of legislative attempts to improve the underlying substantive rules for a just society are undercut by the inability of so many to enforce those rules.” Richard Zorza, *Towards National Networking and Support for Innovation in Access to Justice for Self-Represented Litigants: An Analysis of Needs, Strategy, and Options*, in THE FUTURE OF SELF-REPRESENTED LITIGATION: REPORT FROM THE MARCH 2005 SUMMIT 119-132, 120 (Paula Hannaford-Agor ed., 2005), available at <http://www.srln.org/node/301>. A decade later, this continues to be the reality in some state courts.
- 6 The study was active in four U.S. jurisdictions: Multnomah County, OR; Larimer County, CO; Davidson County, TN; and Franklin County, MA. In total, across the four participating jurisdictions, the study included interviews with 128 self-represented litigant participants and 49 individuals who routinely interact with litigants in the course of their court duties in the study jurisdictions. NATALIE ANNE KNOWLTON, LOGAN CORNETT, CORINA GERETY & JANET DROBINSKE, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT (2016), available at http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf [hereinafter CASES WITHOUT COUNSEL: RESEARCH]. Cases Without Counsel was generally modeled on a qualitative research study undertaken by Dr. Julie Macfarlane in Canada. Dr. Macfarlane created the National Self-Represented Litigants Project, which began with interviews and focus groups with more than 250 self-represented litigants in civil and family cases. Dr. Macfarlane published study findings and recommendations in 2013, but since then, the Project has continued to collect data and information from Canadian self-represented litigants. JULIE MACFARLANE, THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT: IDENTIFYING AND MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS FINAL REPORT (2013), available at <https://representingyourselfcanada.files.wordpress.com/2014/05/nsrlp-srl-research-study-final-report.pdf>; ERIN CHESNEY ET AL., TRACKING THE CONTINUING TRENDS OF THE SELF-REPRESENTED LITIGANT PHENOMENON: DATA FROM THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT, 2014-2015 (2015), available at <https://representingyourselfcanada.files.wordpress.com/2015/05/nsrlp-intake-report-2015.pdf>.
- 7 The primary members of the IAALS study team were: Natalie Anne Knowlton (Director of the *Honoring Families Initiative*), Corina Gerety (Director of Research), Logan Cornett (Research Analyst), and Janet Drobinske (Legal Assistant and CWC Project Manager). IAALS and the study team would like to also thank the exceptional Research Assistants who helped with various aspects of the CWC data collection and analysis: Amanda Cloninger and Erica Merten at Smith College School for Social Work, and John Mallory at the University of Denver.

families who are without and/or need legal representation.⁸ High-level, preliminary findings from the study, in addition to other facets of HFI's work and research in the area of divorce and separation, formed the basis of a comprehensive IAALS convening of diverse stakeholders, including academics, social scientists, judges, psychologists, court administrators, private practitioners, and self-represented litigants.⁹ A range of recommendations for reform emerged from the two-day conversation, which was innovative in and of itself for actively engaging litigants in discussions of justice system improvements.¹⁰

The CWC study findings provide the foundation for an expansive compilation of recommendations and innovations, informed by a variety of sources.¹¹ Some of the forthcoming recommendations are not new. However, some of these programs also are not commonplace, suggesting that there is significant opportunity for innovation and improvement across jurisdictions. Accompanying the recommendations enumerated in this report are resources and existing examples that courts, family law practitioners, community partners, and others can leverage in continuing the conversation on how best to serve family court litigants. It is HFI's hope that these recommendations and resources help stakeholders ensure greater accessibility, efficiency, and fairness for everyone involved in the family court process, including those who navigate the system without a lawyer.

CHANGING THE CONVERSATION ON SELF-REPRESENTATION

SHARED RESPONSIBILITY & COORDINATED RESPONSE

The growing number of self-represented litigants in state family courts and the ongoing conversation about how best to serve them highlights a natural tension between the legal profession and the court community as to who bears responsibility for ushering litigants through the family justice system. One CWC court participant articulated the issue as follows:

Until they [self-represented litigants] get the information that they need to do what they need to do, it is going to always be an issue. And as long as we can't give it to them, it's going to always be an issue. So we're either going to have to change the system, its processes, or we're going to have to go back to the days you just need to get a lawyer ... right now we're just stuck in the middle.¹²

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- 8 The comprehensive, semi-structured interview protocol explored various facets of self-representation. In addition, participants were specifically asked the following question: "If you could make one major change with respect to the process and procedures that you experienced in your case, what would you want to tell policy-makers?" CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at Appendix A-C.
- 9 The IAALS process is at the core of the organization's success, and an inherent component of that process involves working with stakeholders to develop innovative models designed to address the areas of concern in our legal system. *About*, IAALS, <http://iaals.du.edu/about> (last visited April 5, 2016).
- 10 Natalie Anne Knowlton, *IAALS Meeting Highlights Experiences of Self-Represented Litigants*, IAALS ONLINE (Aug. 27, 2015), <http://iaals.du.edu/blog/iaals-meeting-highlights-experiences-self-represented-litigants>.
- 11 It will be clearly noted where specific recommendations comport with findings from the Cases Without Counsel study and suggestions for reform offered by self-represented litigant and court participants. The suggestions and resources contained in this report are also influenced by IAALS' ongoing monitoring of research, innovations, and expert commentary in the area of divorce and separation.
- 12 DCS4.

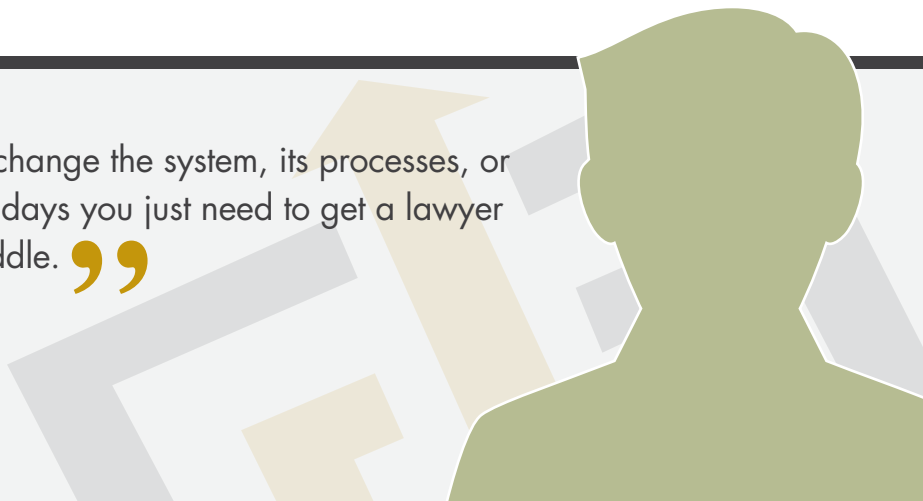
Court response to this issue generally falls somewhere on the spectrum between doing everything possible and doing virtually nothing to help self-represented litigants navigate the family court process.¹³ Bar organization and individual attorney responses similarly range from proactively developing solutions to increase the availability of legal services to entrenched resistance to court efforts and non-traditional suggestions for legal services delivery. And, the role and responsibility of the broader community in assisting those transitioning through divorce or separation is often overlooked. Regardless of where stakeholders in a particular jurisdiction fall on these spectrums, the overall impetus across jurisdictions arguably remains solely with the self-represented litigant to proceed knowledgeably and appropriately through the process.¹⁴ In essence, the responsibility is on the users of the system to figure out how to use a system that was fundamentally not designed for their use.

There are some litigants who choose to self-represent and knowingly take on this responsibility. Most research suggests, however, that these litigants are in the minority—the bulk of those who are facing the family justice system without an attorney are doing so out of financial necessity. To expect these individuals to be self-sufficient necessitates that courts put into place a structure that enables self-sufficiency, whether this is achieved through simplification, increased information, case-specific guidance, or another approach.¹⁵ Self-represented litigants should not bear responsibility for creating an infrastructure that facilitates self-sufficiency; rather, this is the responsibility of courts, legal service providers,

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- 13 Although bar associations in many jurisdictions are supportive of courts in their efforts to assist self-represented litigants, it is not uncommon for there to be criticism from members of the bar with respect to these efforts. See William Hornsby et al., *Self-Represented Litigants and the Ethics of Lawyers, Judges, and Court Staff*, in *THE FUTURE OF SELF-REPRESENTED LITIGATION*, *supra* note 5, at 74-75; see also Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 *J. LEGAL EDUC.* 531, 533 (2013) (“[t]he organized bar has a much stronger economic interest in promoting lawyers’ services than in promoting research and policies that support greater reliance on qualified non-lawyers and procedural simplification.”).
- 14 The definition of “self-help”—“the action or process of doing things to improve yourself or to solve your problems without the help of others”—squarely places responsibility on the individual needing help. *Self-help*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/self%E2%80%93help> (last visited April 5, 2016). Some commentators point to the desirability of litigant self-sufficiency—for example, the “Los Angeles Superior Court’s self-help model begins with the presumption that litigants have the capacity to make decisions, fill out their own paperwork and make wise choices as to the course of action to pursue.” Kathleen Dixon & Margaret Little, *Self-Help Centers: The Approach of the Los Angeles Superior Court*, in *INNOVATIONS FOR SELF-REPRESENTED LITIGANTS* 51, 60 (Bonnie Rose Hough & Pamela Cardullo Ortiz eds., 2011).
- 15 As Kathleen Dixon & Margaret Little recognize with respect to their work with self-represented litigants, “most people are more capable than the courts and attorneys, including legal aid attorneys, have traditionally assumed.” Dixon & Little, *supra* note 14, at 60. The CWC participants are fully representative of this sentiment. However, most state family courts are inherently complex and remain so even in the face of form, process, and language simplification efforts. *But see* John A. Clarke & Bryan D. Borys, *Usability is Free: Improving Efficiency by Making the Court More User Friendly*, in *FUTURE TRENDS IN STATE COURTS* 76 (Carol R. Flango et al. eds., 2011), available at http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/TRENDS_book2011.ashx (suggesting that self-help and self-sufficiency are not for every litigant).

“ [W]e’re either going to have to change the system, its processes, or we’re going to have to go back to the days you just need to get a lawyer ... right now we’re just stuck in the middle. ”

Cases Without Counsel Court Participant



and the community.¹⁶ While this is widely recognized conceptually, there are many more opportunities to put this shared responsibility into practice. Many of the recommendations discussed in this report echo those that commentators have been making for years. The fact that we are continuing to have these conversations illustrates the ongoing need for family justice system stakeholders to act in a more coordinated way.

The implications of failing to follow through on this fundamental responsibility are stark. Consistent with other research, a substantial portion of CWC self-represented litigant participants discussed feeling at a disadvantage and/or experiencing bias in the family court process as a result of being without representation.¹⁷ Perception is reality and the perceptions formed through a single negative experience can have long-term impacts on how that person views the system as a whole in the future.¹⁸

To the extent these perceptions of disadvantage and bias are accompanied by concrete, real impacts on outcomes potentially resulting from self-representation,¹⁹ the credibility of the family justice system and the promise for resolution it holds for countless families is jeopardized. IAALS encourages stakeholders to consider how the recommendations that follow can be leveraged in partnership with other justice system stakeholders as part of a coordinated, holistic response to best meet the needs of self-represented litigants in family cases.

RECOMMENDATIONS FOR COURT COMMUNITIES

SELF-HELP RESOURCES FOR SELF-REPRESENTED LITIGANTS

In the absence of or in addition to affordable legal services, self-represented litigants benefit from having legal information and resources to help them navigate the court process.²⁰ Broadly speaking, self-represented litigants who participated in the CWC study described actively working to research issues and identify resources; more than 90 percent of litigants reported using at least one resource and more than 85 percent leveraged multiple resources to help them understand and navigate the process.²¹ While the available resources differed by study jurisdiction and usage among interviewed family

16 Recommendations recently released by the Conference of Chief Justices (“CCJ”) Civil Justice Improvements Committee touch on a similar issue with respect to historical responsibility for driving the pace of civil litigation: “Our civil justice system has historically expected litigants to drive the pace of civil litigation by moving for court involvement as issues arise The wait-for-a-problem paradigm effectively shields courts from responsibility for the pace of litigation. It also presents a special challenge for self-represented litigants who are trying to understand and navigate the system.... It is time to shift this paradigm.... relying on parties to self-manage litigation is often inadequate.... the courts must be ultimately responsible for assuring access to civil justice.” CONF. OF CHIEF JUSTICES, CIVIL JUSTICE IMPROVEMENTS COMM., RECOMMENDATIONS TO REDUCE COST AND DELAY IN THE DELIVERY OF CIVIL JUSTICE 3 (Feb. 1, 2016) (on file with author) [hereinafter CCJ CJI RECOMMENDATIONS].

17 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at pp. 43-44.

18 See, e.g., Pamela Cardullo Ortiz, *Family Law Self-Help Centers: Access Enhancing Fairness*, in INNOVATIONS IN FAMILY LAW PRACTICE 87, 87-88 (Kelly Browe Olson & Nancy Ver Steegh eds., 2008) (“[I]t is the perception of fairness upon which the efficacy of the judiciary depends.”); KATHERINE VAUGHAN ET AL., CITIZENS ADVICE, RESPONSIVE JUSTICE: HOW CITIZENS EXPERIENCE THE JUSTICE SYSTEM (November 2015), available at <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Crime%20and%20Justice%20Publications/Responsivejustice.pdf>.

19 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at p. 44. LINDA KLEIN, ABA COALITION FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS (PRELIMINARY) 10-13 (July 12, 2010), available at <http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.authcheckdam.pdf>.

20 See, e.g., JOHN M. GREACEN, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 2 (2003), available at <http://www.srln.org/node/453/paper-self-represented-litigants-and-court-and-legal-services-responses-their-needs-what-we> (“Self represented litigants universally appreciate court and legal service programs that provide them with forms, information, or advice.”).

21 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at p. 26.

court users, the general sentiment was that the resources were more helpful than unhelpful.²² Access to resources of various types also played a positive role in CWC litigants' assessment of their ability to self-represent.²³ As stated by one court participant, self-represented litigants "are not attorneys so they are at a disadvantage already,"²⁴ and providing as much information as possible is a means through which to address the imbalance.

Increase Availability of Targeted Self-Help Resources

Across the study jurisdictions, CWC litigants cited substantial difficulty with key portions of the process: knowing what to expect, understanding the stages of the process, navigating required forms and other paperwork, and preparing for and participating in trial.²⁵ "It would have been nice," said one litigant participant, "to have had more information about what to expect or how to go through the process before the judge."²⁶ Similarly, another participant noted: "The more documents and information that could be provided to people like me would be super helpful."²⁷

Not surprisingly, then, a common recommendation emerging from CWC litigants and court participants centered on increasing the number and types of self-help resources available to self-represented litigants. Countless courts around the country have taken to developing and expanding self-help tools and the menu of potential services is broad, including: dedicated self-help staff/centers;²⁸ educational classes and workshops; facilitators; instructions; flowcharts; etc.²⁹ Commentators have acknowledged the benefits of making legal information and self-help resources available³⁰; research has also shown that these efforts are beneficial to courts in the form of cost savings.³¹

Furthermore, flow charts, instructions, informational videos, educational sessions, and other self-help resources should be tailored to actively address the particularly problematic components of the process. One-on-one self-help service providers, although needing to be versed in any aspect of the process with which litigants request assistance or information, should also be prepared to focus efforts on ensuring litigants are comfortable with these high-impact portions of the process.

22 The CWC research report discusses themes related to online resources, in-court resources, legal assistance, and the role of friends and family. *Id.* at pp. 26-30.

23 The second most commonly referenced factor influencing self-representation was the litigants' assessment of and/or confidence in their ability to represent themselves. *Id.* at pp.16-17.

24 LCS13.

25 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at pp. 30-32; *see also* *infra* page 23.

26 L53.

27 M14.

28 These have become fixtures in many courts, facilitating one-on-one interactions between court staff and self-represented litigants. *See, e.g.*, JUD. COUNCIL OF CAL., TASK FORCE ON SELF-REPRESENTED LITIGANTS, IMPLEMENTATION TASK FORCE: FINAL REPORT (Oct. 2014), *available at* http://www.courts.ca.gov/partners/documents/EA-SRLTaskForce_FinalReport.pdf.

29 *See* JOHN M. GREACEN, RESOURCES TO ASSIST SELF-REPRESENTED LITIGANTS: A FIFTY-STATE REVIEW OF THE "STATE OF THE ART" (2011); Ortiz, *supra* note 18.

30 *See, e.g.*, AM. BAR ASS'N, STANDING COMM. ON THE DELIVERY OF LEGAL SERVICES, THE SELF-HELP CENTER CENSUS: A NATIONAL SURVEY (Aug. 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/l5_del_self_help_center_census.authcheckdam.pdf.

31 Preliminary research on self-help services in the San Joaquin Valley (CA) courts found that "self-help services provided to self-represented litigants produce economic savings for courts and for litigants." John M. Greacen, *The benefits and costs of programs to assist self-represented litigants*, 50 JUDGES J. 15, 15 (2011).

RESOURCES:

- ✓ John M. Greacen's *Fifty-State Review of the "State of the Art"* presents a variety of tools and strategies that courts can leverage to ensure that a continuum of services is available to meet the needs of self-represented litigants.
- ✓ The Self-Represented Litigation Network *Best Practices in Court-Based Programs for the Self-Represented* is a thorough compilation of efforts that are worthy of broad replication. The guide includes references to and contact information for court self-help centers, forms/documentation reforms, training curricula, and post-decree practices, as well as bar efforts concerning unbundled legal services and pro bono/volunteer programs.
- ✓ The American Bar Association Standing Committee on the Delivery of Legal Services' *Self-Help Center Census* includes survey-based information on the structure and operation of self-help centers in states around the country, including staffing and funding models.
- ✓ The National Center for State Court's Self-Representation microsite contains a state-by-state compilation of self-help information and resources, with direct links to these centers and programs.

Explore Virtual & Innovative Means of Delivering Self-Help Resources

New technologies are changing the way courts, attorneys, and other service providers interface with self-represented litigants. While not all those who need resources have internet access³² nor is every self-represented litigant technologically savvy, a vast number of family court litigants access resources online. Among CWC litigants, online sources of information—including both court-affiliated and independent websites—were the most utilized source of information, and many participants indicated these resources were helpful.³³

Many courts already make some degree of information and self-help resources available online; others are moving beyond simply posting static information on websites, using virtual and interactive tools to assist self-represented litigants. For example, online document assembly programs enable self-represented litigants to compile and complete forms.³⁴ Virtual self-help centers facilitate information exchange and one-on-one interactions between staff and self-represented litigants. Additionally, game-like programs and applications are being developed to provide “hands-on” experience navigating the more procedurally difficult aspects of the process.³⁵

32 With onsite court computer terminals, the benefit of online information and interactive virtual tools are not limited to those with internet access at home.

33 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at pp. 26-27.

34 Many of these programs operate by posing easy-to-understand questions, the answers to which automatically populate court forms. *See, e.g.*, Claudia Johnson, *Online Document Assembly Initiatives to Aid the Self-Represented*, in INNOVATIONS FOR SELF-REPRESENTED LITIGANTS 97, *supra* note 14.

35 The NuLawLab at Northeastern University School of Law developed an interactive, online game that simulates various aspects of legal proceedings, helping players better understand how to get ready for a hearing, what happens in court, how to present evidence, and how to conduct cross-examination. The game is being hosted and tested in one jurisdiction, and usage data will be analyzed and results incorporated into new iterations in expanded jurisdictions. *RePresent: Online Game for Self-Represented Litigants*, NULAWLAB, <http://www.nulawlab.org/view/online-simulation-for-self-represented-parties> (last visited April 5, 2016).

RESOURCES:

- ✓ RePresent is an online, interactive game designed to teach self-represented litigants what to do before court and how to proceed in trial. Developed by the NuLawLab, the program is currently available through CTLawHelp.org with plans to expand to other jurisdictions in the future.
- ✓ The Contra Costa County Virtual Self-Help Law Center provides an online platform through which self-represented litigants can access comprehensive information and resources. A video library conveys the written information contained on the site through tutorials and videos.
- ✓ In February 2016, the Orange County Superior Court launched the Self-Help Portal and My Court Card online program, through which self-represented litigants can: access forms and instructions; sign up for workshops; and receive reminders of important case events. Self-represented litigants can reference their My Court Card during interactions at the self-help center, allowing staff to quickly pull up case-specific details and information.
- ✓ The Center on Court Access to Justice For All maintains a Technology microsite that contains articles, reports, and other information on how to best use technology to deliver information and services to court users.
- ✓ The *Legal Services Corporation Report of The Summit on the Use of Technology to Expand Access to Justice* and accompanying white papers enumerate a variety of ways in which courts and legal service providers can improve access to justice using technology.

For many experts working in this area, the litigant portal is the core strategy for best leveraging technology to serve self-represented litigants.³⁶ As a threshold matter, a litigant portal would help an individual identify whether s/he has a legal problem and, if so, what kind.³⁷ (A self-represented litigant in a family case, therefore, may engage with the portal at a different position than one who has yet to identify the legal problems.³⁸) Once a legal problem has been identified or for litigants who appreciate the nature of their legal issue, a litigant portal would then serve a variety of potentially non-linear functions centered on helping people identify options, potential outcomes, and available legal and non-legal resources.³⁹ Litigant portals also provide an opportunity for courts to “triage” litigants and cases.⁴⁰

36 See, e.g., Clarke, *Litigant Portals*, *supra* note 4; LEGAL SERV. CORP., REPORT OF THE SUMMIT ON THE USE OF TECHNOLOGY TO EXPAND ACCESS TO JUSTICE (2013), available at http://www.lsc.gov/sites/default/files/LSC_Tech%20Summit%20Report_2013.pdf. The National Center for State Courts is currently moving forward on developing technical standards to support litigant portal modules. THOMAS M. CLARKE, NAT'L CTR. FOR STATE CTS., BUILDING A LITIGANT PORTAL: BUSINESS AND TECHNICAL REQUIREMENTS 4-5 (2015), available at [http://www.srln.org/system/files/attachments/Report%20Building%20a%20Litigant%20Portal%20\(Clarke%202015\).pdf](http://www.srln.org/system/files/attachments/Report%20Building%20a%20Litigant%20Portal%20(Clarke%202015).pdf).

37 Clarke, *Litigant Portals*, *supra* note 4, at 41 (“Typically, the litigant needs to determine if their legal problem should be resolved through the court system at all.”); see also REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 13-14 (2014), available at http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf (exploring how many Americans do not perceive their civil justice situation as legal issues).

38 It is entirely feasible, however, that a family court litigant could present with additional civil and criminal legal problems.

39 See CLARKE, TECHNICAL REQUIREMENTS, *supra* note 36.

40 TOM CLARKE ET AL., NAT'L CTR. FOR STATE CTS., TRIAGE PROTOCOLS FOR LITIGANT PORTALS: A COORDINATED STRATEGY BETWEEN COURTS AND SERVICE PROVIDERS (2013) [hereinafter CLARKE ET AL., TRIAGE PROTOCOLS], available at http://www.srln.org/system/files/attachments/Triage_Protocols_for_Litigant_Portals__A_Coordinated_Strategy_Between_Courts_and_Service_Providers.pdf.

RESOURCES:

- ☑ In *Building a Litigant Portal: Business and Technical Requirements*, Thomas Clarke discusses how justice system stakeholders can move the litigant portal from concept to reality in a coordinated manner.
- ☑ *Triage Protocols for Litigant Portals* explores how formal court triage processes can be integrated into litigant portals. The authors propose a general approach to protocols for various case types, including divorce cases.

Facilitate Litigant Awareness of Available Resources

The CWC study jurisdictions naturally differed in the number and type of resources available to self-represented litigants, but in all four of the jurisdictions the IAALS study team spoke with litigants who were unaware of key resources offered in or through the court.⁴¹ Among the litigant participants' recommendations for policy-makers, one of the more commonly cited called on courts to make clearer—and as early as possible—the resources that are available to family court litigants. According to one participant, “I know they can't give legal advice, but if they could list the resources out there, that would be a big help because people would know where to look.”⁴²

This finding illustrated a fundamental reality for courts and other justice system stakeholders: information and resources are of no use to litigants who are not aware they exist. While seemingly obvious, this nevertheless highlights important considerations regarding the role of the court and other stakeholders in calling attention to and increasing awareness of existing resources for self-represented litigants.⁴³ For the most part, the onus is on litigants to research and locate self-help resources; however, this approach may disadvantage less-savvy or educated litigants. It is also in the court's best interest to have self-represented litigants armed with as many self-help resources as are available.

While many factors might contribute to gaps between existing resources and intended recipients, there is nevertheless an opportunity for courts and communities to make more explicit the entirety of resources available to help litigants move through and prepare for the family court process. To the extent that courts have allocated staff and funds to these efforts, clear and strategic placement, as well as outreach to litigants, would be beneficial.

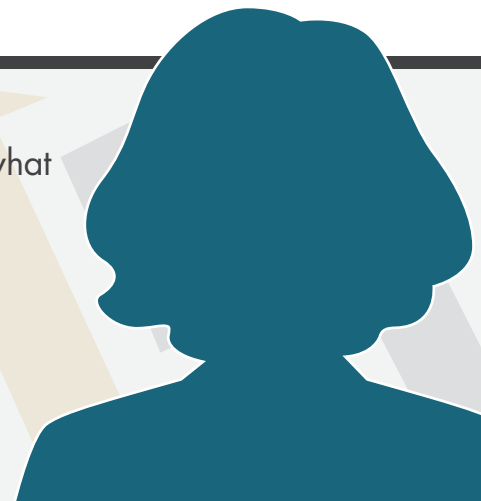
41 In the more extreme instances of this disconnect, a few study participants were not aware of in-court self-help staff that were steps away from where these litigants filed their forms.

42 L11.

43 According to one commentator, the logical flow of questioning to assess the effectiveness of programs designed to assist self-represented litigants begins with “Access to the service—did clients learn of the service and were they about to access it?” GREACEN, *supra* note 20, at 13-15.

“ It would have been nice to have had more information about what to expect or how to go through the process before the judge. ”

Cases Without Counsel Self-Represented Litigant Participant



RESOURCES:

- ☑ Suggestions from Cases Without Counsel Study Participants:
 - Require the filing party or the court to enclose information with the pleadings on where to find legal advice and other resources.
 - Hold a mandatory orientation session (which could be completed virtually) that focuses on, among other things: what litigants can expect; what the court expects litigants to prove; how the court expects individuals to present evidence; and what legal or other support resources are available in the jurisdiction.

Assign a Liaison or Navigator to Guide Litigants through the Process

As one of the functions that might be built into a litigant portal or as part of an in-person effort to provide one-on-one assistance, a number of CWC litigant and court participants alike referenced a similar concept: a navigator or advisor that could guide them through the process.

The concept that participants described can be distinguished conceptually from that of a self-help center or other one-on-one self-help resource in that a navigator would proactively work with self-represented litigants throughout the course of a case, as opposed to reactively assist litigants at discrete portions of a case in response to a specific request. Related programs, however, build on the self-help center model, dispatching assistance in response to a self-represented litigant inquiry or request. One CWC litigant remarked: “In the legal world, there should be a tour guide.”⁴⁴ Numerous courts are experimenting with or exploring this kind of assistance for self-represented litigants, some leveraging litigant portals or like technology.⁴⁵

RESOURCES:

- ☑ The New York City Housing Court Navigator Program provides self-represented litigants in landlord-tenant and consumer debt cases with a specially trained, non-lawyer Court Navigator. These individuals assist eligible litigants in understanding what to expect in the process, completing court forms, and accessing other services. A preliminary 2014 evaluation of the program found that navigators provided “valued practical assistance to litigants and to judges.”
- ☑ The Arizona Commission on Access to Justice has recommended the development of a Court Navigator Pilot Project for self-represented litigants in family cases. As envisioned, the Pilot Project would be implemented in Maricopa County and would leverage undergrads from Arizona State University.

44 D13.

45 *My Court Card Portal*, SUPER. CT. CAL. CNTY. OF ORANGE, <https://selfhelp.occourts.org> (last visited April 5, 2016).

PROCESS & PROCEDURE CHANGES IN FAMILY COURT

An increasing number of family courts are exploring ways in which court processes and procedures can be more responsive to the needs of litigants without lawyers in family cases. Some of these efforts are specifically intended to address self-represented litigants; others are more broadly responsive to the unique nature of family cases and the unique needs of family court litigants.

Simplify Components of the Process

Many courts are exploring simplification and related efforts designed to make the process and various components of the process more user-friendly. According to one commentator, “simplification is the heart of access to justice, and it is also the heart of profitable business practices.”⁴⁶ Simplification was a commonly cited recommendation among both CWC litigants and court staff, with one court participant remarking: “Simplify the process and make it easier. If you do that, I think you get rid of a lot of frustration, which gets rid of a lot of anger.”⁴⁷ A judge participant suggested that the process might be broken down “in plain language and manageable steps for people, so that they’re not so overwhelmed; so that things get accomplished versus throwing up their hands.”⁴⁸ Simplification in theory and in practice for the many courts that are moving down this path can take a variety of forms.

One of the more established tools is streamlined processes for “simple” or “non-complex” cases. These procedures vary significantly by state, but often necessitate that parties have no minor children and little to no shared assets, property, or debt.⁴⁹ Similar procedures are available in some states for uncontested cases more broadly—not just those without children or other issues.⁵⁰ CWC litigant and court participant narratives support the notion that parties with simple cases—e.g., those involving no assets, property, or children—are more confident navigating the court process without an attorney.⁵¹

46 Letter from Katherine Alteneider, Self-Represented Litigation Network Coordinator, to Katy Englehart, Am. Bar Ass’n (Dec. 20, 2014), available at http://www.americanbar.org/content/dam/aba/images/office_president/self_represented_litigation_network.pdf.

47 LCS11.

48 LCS4.

49 Other limitations might include years of marriage, no issues of material fact, no claims to spousal support, etc.

50 See, e.g., MASS. G.L. ch.208 §1A (2016) (setting forth a simplified procedure for joint petitions for divorce accompanied by a sworn affidavit to the effect that the marriage is irretrievably broken and accompanied by a notarized separation agreement).

51 See, e.g., ORE. REV. STAT. § 107.485 (2016) (setting forth a summary dissolution procedure for cases in which the duration of the marriage is under 10 years and in which there are no minor children, no interest in real property, no unpaid obligations in excess of \$15,000, no claims for spousal support, no interest in personal property over \$30,000); COLO. REV. STAT. § 14-10-120.3 (2016) (setting forth a simplified procedure for cases in which there are no minor children, no genuine issue as to any material fact, and either no marital property to be divided or parties have entered into an agreement on the division). In Tennessee, the Supreme Court has approved Agreed Divorce Instructions for parties a) with no children under 18; b) who do not own buildings, land, or a business together; and c) who do not have retirement benefits. *Court-Approved Divorce Forms-Instructions to Divorce Forms*, TENN. ST. CTS., http://www.tncourts.gov/sites/default/files/docs/agreed_divorce_instructions_-_march_2012.pdf (last visited April 5, 2016).

RESOURCES:

- ☑ Some state summary procedures are eligible to litigants meeting certain threshold criteria, such as Oregon’s Summary Dissolution of Marriage/Domestic Partnership and Tennessee’s Agreed Divorce process. Others are more broadly eligible to parties in agreement on all issues, such as Massachusetts’ simplified procedure.

Presenting evidence and participating in trial was one of the more frequently referenced sources of difficulty for CWC self-represented litigants.⁵² Only a few judge participants reported *not* encountering challenges applying the Rules of Evidence to cases involving self-represented litigants, and CWC judges also agreed that difficulties presenting evidence can disadvantage self-represented litigants and potentially impact outcomes.⁵³

A few family courts have addressed these challenges by introducing procedures that relax requirements for offering testimony and presenting evidence. Some of these processes envision the potential for limited attorney involvement through an unbundled legal services model;⁵⁴ others are designed specifically for two self-represented parties.⁵⁵ Many commentators suggest that the informal trial processes merely formalize the informal practices that judges have begun employing in hearings involving self-represented litigants. CWC judge participants similarly described relaxing evidentiary rules and processes in cases in which both parties are self-represented.⁵⁶

A related approach involves building presumptive relaxations into family court rules, putting the impetus on parties to opt into the full array of evidentiary rules rather than giving parties the opportunity to opt out.⁵⁷

52 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at pp. 34-37.

53 *Id.* at p. 36.

54 An attorney’s role in the Deschutes County Informal Domestic Relations Trial is to provide a brief narrative queuing potentially relevant issues and questions for the judge to explore with the litigant. *Informal Domestic Relations Trial*, DESCHUTES CNTY. CIR. CT. OR. JUDICIAL DEP’T, <http://courts.oregon.gov/Deschutes/services/famlaw/Pages/Informal-Domestic-Relations-Trials.aspx> (last visited April 5, 2016).

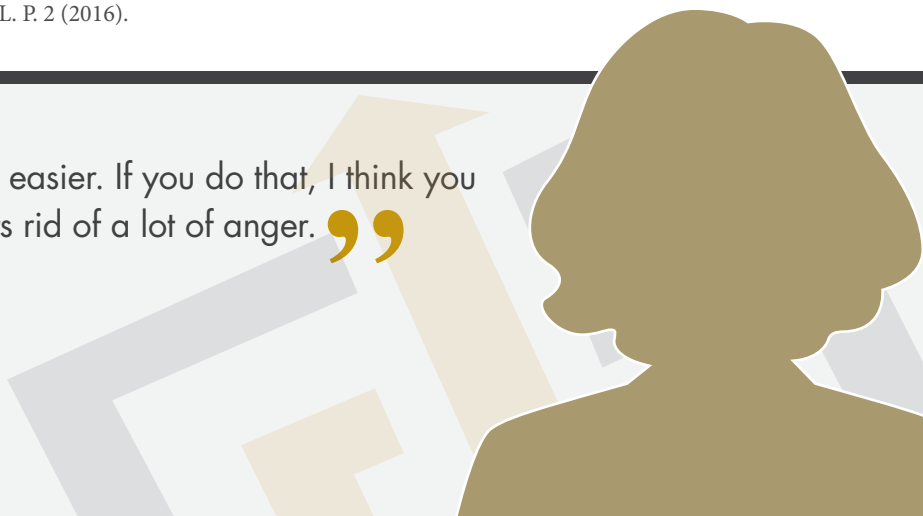
55 Rule 10 of the Wyoming Expedited Marriage Dissolution Pilot Project Rule applies when both parties are self-represented. *In the Matter of the Adoption of Temporary Rules for Expedited Marriage Dissolution Cases*, WYO. SUP. CT. (June 27, 2014), https://www.courts.state.wy.us/Documents/CourtRules/Orders%5Cexpmardis%5Cexpmardis_2014062700.pdf.

56 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at pp. 36-37.

57 IDAHO R. FAMILY L. P. 102.B (2016); ARIZ. R. FAMILY L. P. 2 (2016).

“Simplify the process and make it easier. If you do that, I think you get rid of a lot of frustration, which gets rid of a lot of anger.”

Cases Without Counsel Court Participant



RESOURCES:

- Streamlined Family Court Rules: Driven in part by an effort to increase self-represented litigants' access to and understanding of family court rules, the Idaho Rules of Family Law Procedure set forth in a complete and logical manner all the rules that are applicable to family cases, so that self-represented litigants (and others) do not have to dig through separate sets of rules to understand the family court process.
- Relaxed Standards of Evidence: The Arizona Rules of Family Law Procedure provide that, in most instances, parties must affirmatively opt into strict compliance with the Arizona Rules of Evidence. If neither party opts in, the presumption is that relevant evidence is admissible, with some restrictions. The Idaho Rules of Family Law Procedure establish a similar presumption, in addition to simplifying access to the complete body of rules governing family cases.
- Simplified and Informal Trial Processes: Several states now have enacted simplified or informal trial processes for litigants in family cases. Idaho's Informal Custody Trial is available if both parties consent and provides for a more free-flowing exchange between parties and the judge. Furthermore, any documents can be presented to the court, for judicial determination as to what weight, if any, to give submitted documents. Similar processes have been enacted in Oregon and Alaska.

Form simplification is a common effort in state courts,⁵⁸ which can encompass alterations to existing court forms, replacing complicated legal terminology with lay-friendly terms, streamlining the number of forms required for family court litigants, and pairing forms with detailed and easy-to-understand instructions. Additionally, there is a technology component to form simplification, as a number of state courts are exploring interactive and/or auto-fill-type forms designed to decrease the likelihood of self-represented litigant errors or omissions.⁵⁹

RESOURCES:

- With respect to simplifying the language used in rules, forms, and other court materials, the Federal Plain Language Guidelines provide a useful starting point for courts looking to make forms, instructions, and other court communications more accessible to self-represented litigants.
- The Superior Court of Orange County provides litigants with electronic, interactive Family Law Smart Forms that are independent of internet access. The Oregon Judicial Department recently introduced iForms which use an interactive interview tool to help litigants fill out court forms.
- The Washington Courts have converted the domestic relations pattern forms into plain language forms which self-represented litigants can begin filing May 1, 2016.

58 GREACEN, *supra* note 29, at 22 (finding in a review of state court websites that “virtually every state has made a serious, well-intentioned attempt to simplify the language of their forms.”).

59 See *infra* page 7.

Establish Triage/Differentiated Case Management Systems

It is widely recognized that not all family cases are alike or require commensurate levels of judicial and court staff involvement.⁶⁰ In order to best assist litigants, but also to maximize valuable court time and resources, many commentators have suggested a triage system for family cases and litigants. The goal of such a system is to identify, at an early stage in the process, the needs of each family and, as quickly and efficiently as possible, to put the family on the most appropriate path through the court system, including services and interventions that are tailored to the specific needs of each family.

Triage systems, also referred to as differentiated case management in some jurisdictions,⁶¹ can take on a variety of forms, from a court-wide, established structure for handling like cases to a case-by-case assessment by a judge. The look and feel of a family court's triage system will, of course, vary depending on the size, organization, and culture in a specific jurisdiction.

RESOURCES:

- ✓ The National Center for State Courts developed a model screening tool for courts interested in pursuing divorce case triage. The tool is specifically designed to help courts identify litigants and cases that need minimal or no court assistance—in other words, uncontested cases. It is intended to be flexible for purposes of easily adapting to the specific circumstances in a jurisdiction.
- ✓ In collaboration with the Association of Family and Conciliation Courts, Connecticut's Judicial Branch-CSSD Family Services Unit developed the Family Civil Intake Assessment Screen Project—a research-based screening instrument to identify efficient and appropriate paths through the court system based on each family's need.
- ✓ The Montgomery County Circuit Court (Maryland) has long had a comprehensive differentiated case management system in place for a variety of civil and criminal case types, and the Family Division Differentiated Case Management Plan establishes six distinct tracks for family cases.

Incorporate Trauma-Informed Practices & Processes

Divorce or separation is often an emotional and destabilizing event. Many CWC litigants discussed experiencing emotional difficulties navigating the family court process, including stress, nervousness, and anxiety.⁶² Participants who spoke unfavorably of their experience in the process also described feeling intimidated, isolated, scared, hopeless, and

60 A threshold CCJ Civil Justice Improvements Committee recommendation is: "Beginning at the time each civil case is filed, courts must match resources with the needs of the case." The triage framework that the Committee presents is centered on a three-pathway approach for Streamlined, Complex, and General cases. The assignment to one of these tracks would ideally be made upon filing, but flexibility would ensure that cases can be transferred to a more appropriate track if and when circumstances warrant a change. CCJ CJI RECOMMENDATIONS, *supra* note 16, at 5, 7-15. See also *The High Performance Court and Divorce Case Triage*, NAT'L CTR. FOR STATE CTS., <http://www.ncsc.org/divorcecasetriage> (last visited April 5, 2016); Dixon & Little, *supra* note 14, at 67-70.

61 For some commentators the two terms are distinct from one another. See, e.g., CCJ CJI RECOMMENDATIONS, *supra* note 16, at 7-8 (explaining that "[t]he right-sized case management approach recommended here embodies a more modern approach than DCM by (1) requiring utilization of court resources at all levels, including non-judicial staff and technology, to manage cases from the time of filing until disposition, (2) using case characteristics beyond case type and amount in controversy, and (3) recognizing the great majority of civil filings present uncomplicated facts and legal issues."); CLARKE ET AL., TRIAGE PROTOCOLS, *supra* note 40, at 1 (noting how "triage takes differentiated case management to new levels of sophistication.").

62 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at pp. 47-48.

vulnerable.⁶³ For some of the CWC participants, the courtroom and the courthouse contributed to feelings of stress and fear.⁶⁴ Furthermore, a few participants indicated that their compromised emotional state during the process affected what they were able to achieve through the court process.⁶⁵

Many would argue that the court system is largely ill-equipped (and perhaps not the venue through which) to manage litigants' emotional issues. Research and literature emerging in the criminal and juvenile court contexts, however, shed light on how trauma impacts litigants' interactions with and perceptions of the court system.⁶⁶ Courts moving to a trauma-informed approach recognize the role that trauma can play in how litigants experience the system and perceive those with whom they interact in the system.

Among the techniques courts might explore in furtherance of a trauma-informed approach: evidence-based tools to screen for trauma exposure and symptoms;⁶⁷ coordination of all cases involving one family;⁶⁸ and interdisciplinary and community-based partnerships.⁶⁹ Even small changes to the courtroom environment and the formality that characterizes this environment can foster a more welcoming, trust-inspiring, and healing environment for litigants in divorce and separation cases.⁷⁰ The U.S. Department of Health and Human Services recognizes that “[t]he courtroom setting can be intimidating, even for individuals who have not experienced violence and trauma in their lives. Many practices may be perceived as shocking and dehumanizing to someone experiencing the court for the first time.”⁷¹ “The courtroom is our home,” a CWC judge participant observed. “We’re very comfortable in our home, and everyone else who comes into our home is not nearly as comfortable.”⁷²

These and other trauma-informed processes may better enable family justice system stakeholders to assist all family court litigants, but especially those who do not have the logistical/administrative support and the emotional buffer from which many represented litigants benefit. While much of the literature on trauma-informed court practices is geared toward juvenile courts and treatment courts, there are direct applications for all courts who hear cases involving families. Additionally, being responsive to the trauma that parents in family court are experiencing may help in reducing the potentially detrimental impacts of divorce and separation on children.

63 *Id.* at pp. 47-48.

64 *Id.* at p. 47.

65 *Id.* at pp. 46-47.

66 Shawn C. Marsh & Carly B. Dierkhising, *Toward a Conceptual Framework for Trauma-Informed Practice in Juvenile and Family Courts*, 22 JUV. AND FAMILY JUSTICE TODAY 19, 19 (2013) (discussing how a “shift in how we view people in crisis reflects core values of a public health perspective which emphasizes health and well-being, and subsequently reframes what responses are likely to be most effective in promoting healing and recovery. Through the public health lens, when one views those appearing before the court as almost always injured in some way, a universal precautions approach then becomes necessary in our work.”).

67 *Family Court Tool Kit: Trauma and Child Development – Court Implications*, FLA. CTS., <http://www.flcourts.org/resources-and-services/court-improvement/judicial-toolkits/family-court-toolkit/court-implications.stml> (last visited April 5, 2016).

68 *See id.*; *In re Report of the Family Court Steering Comm.*, 794 So. 2d 518, 522 (Fla. 2001) (“Cases involving inter-related family law issues should be consolidated or coordinated to maximize use of court resources to avoid conflicting decisions and to minimize inconvenience to the families.”); *Project ONE Key Principles*, NAT’L COUNCIL ON JUV. & FAMILY CT. J., http://www.ncjfcj.org/sites/default/files/Project_ONE_Key_Principles_July_2012.pdf (last visited April 5, 2016).

69 KRISTINE BUFFINGTON ET AL., NAT’L COUNCIL OF JUV. & FAMILY CT. J., TEN THINGS EVERY JUVENILE COURT JUDGE SHOULD KNOW ABOUT TRAUMA AND DELINQUENCY 12 (2010), *available at* http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_0.pdf (“Trauma-informed systems require successful and respectful partnerships between youth, families, professionals, and other stakeholders.”).

70 For example, the physical placement of the judge behind the bench—often at a distance from litigants and elevated above those in the courtroom—can incite feelings of isolation, unworthiness, and fear in trauma victims/survivors. SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., ESSENTIAL COMPONENTS OF TRAUMA-INFORMED JUDICIAL PRACTICE (2013), *available at* http://www.nasmhp.org/sites/default/files/JudgesEssential_5%201%202013finaldraft.pdf [hereinafter ESSENTIAL COMPONENTS].

71 *Id.* at 7.

72 MCS1.

RESOURCES:

- ✓ The National Council of Juvenile and Family Court Judges' *Preparing for a Trauma Consultation in your Juvenile and Family Court* outlines a framework for a trauma-informed court which can be instructive for all courts routinely engaging with self-represented litigants in divorce and separation cases.
- ✓ The U.S. Substance Abuse and Mental Health Services Administration, through the National Center for Trauma-Informed Care, offers resources on trauma-informed care, including *Essential Components of Trauma-informed Judicial Practice*. This Guide contains specific explanations of how the courtroom environment (and other aspects of the litigant's experience) can come across to victims of trauma, and how processes might be modified to reduce these negative reactions.
- ✓ The Florida Courts Family Court Tool Kit: Trauma and Child Development contains online resources on trauma, how it impacts children and adolescents in the system, and how courts can move toward a more responsive and informed approach.
- ✓ The National Child Traumatic Stress Network has developed a Bench Card for the Trauma-Informed Judge. While geared specifically toward judges who work with children and youth, the questions and guidelines contained in the Bench Card have application to divorce and separation litigants.

TRAINING & EDUCATION FOR COURT STAKEHOLDERS

Litigants are not the only family justice system stakeholders facing challenges navigating the increasing numbers of self-represented litigants. Judges, court staff, and attorneys are also adjusting to the changing landscape of family court.⁷³ Training and continuing education efforts, therefore, have become an increasingly important means of providing guidance on and ensuring consistency in how stakeholders engage with self-represented litigants.

Guidance for Court Staff on Providing Legal Information

CWC self-represented litigants reported that they commonly accessed in-person court staff as a resource—filing clerks, judicial clerks, self-help center staff, and others who routinely interact with self-represented litigants.⁷⁴ Broadly speaking, participants were likely to express that these individuals were helpful. The most frequently referenced challenges, however,

73 Clarke & Borys, *supra* note 15, at 76 (“Over the past few decades, American trial courts have seen an explosion in the breadth of their responsibilities: from a focus on recordkeeping as clerk of court, to administration of a complex administrative support system, to support for managing the flow of cases through the court, to a sudden recent burgeoning of responsibilities, many of which are new to the justice system...”) (citations omitted).

74 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at pp. 27-28.

““ The courtroom is our home. We’re very comfortable in our home, and everyone else who comes into our home is not nearly as comfortable. ””

Cases Without Counsel Judge Participant



centered on court staff's reluctance to provide information—or at least what self-represented litigants perceived to constitute legal information as opposed to legal advice. Court staff study participants discussed the difficulties associated with providing information without crossing the line into advice, and several called for increased guidance and training on the issue. In the absence of such guidance, CWC narratives suggest that court staff may err on the side of caution and in the process deny litigants important information to which they are entitled and which may not be available elsewhere.⁷⁵

RESOURCES:

- ☑ In establishing the Self-Represented Litigant Coordinators positions, the Colorado Supreme Court enacted a Chief Justice Directive Concerning Colorado Courts' Self-Represented Litigant Assistance. The CJD provides detailed guidance both on what court staff may provide by way of information and also on the services that are prohibited on the grounds that they constitute legal advice. Additionally, the CJD contains a template notice for self-represented litigants, defining the information and services that staff can and cannot provide.
- ☑ The California Judicial Council manual *May I Help You? Legal Advice vs. Legal Information* serves as a concise resource for clerks with an accompanying sign display to which staff and litigants can refer during interactions.
- ☑ The Massachusetts Trial Court's *Serving the Self-Represented Litigant: A Guide By and For Massachusetts Court Staff* contains useful and practical information for best providing assistance to court users, including how to navigate the line between advice and information.
- ☑ **Strategies from Cases Without Counsel Study Participants:** Court participants acknowledged the often tricky line between providing litigants with legal information to which they are entitled and guarding against providing guidance that would constitute the unauthorized practice of law. Some of these individuals offered strategies for navigating this line that go beyond simply echoing an inability to give legal advice:⁷⁶
 - Direct litigants to available resources in the court.
 - Outline all possible options and avenues.
 - Steer away from any and all questions containing the word “should” or, alternatively, from using the word “should” in a response.

75 See also JOHN M. GREACEN, SERVICES FOR SELF-REPRESENTED LITIGANTS IN ARKANSAS: A REPORT TO THE ARKANSAS ACCESS TO JUSTICE COMMISSION 15-16 (July 26, 2013), available at <http://www.arkansasjustice.org/sites/default/files/file%20attachments/Arkansas%20Final%20Report%207-26-13.pdf> (finding that “[t]he instinctive reaction of Arkansas clerks that any inquiry constitutes a request for legal advice is so strong that they do not treat domestic violence petitions differently, even though they are required by state law to provide ‘clerical assistance’ with respect to those cases.”).

76 A number of CWC self-represented litigants discussed hearing court staff respond to questions with some version of “I cannot provide legal advice.” CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at p. 27. While an accurate and understandable disclosure, simply making this declaration without additional efforts proved to be less than constructive for a number of the study participants commenting on this issue.

Guidance for Judges on Navigating Hearings & Trials

Although the CWC study included a limited number of judge interviews, one of the fairly consistent themes that emerged from those participants was that applying the Rules of Evidence can be problematic in cases involving self-represented litigants.⁷⁷ It also appears that while relaxing evidentiary rules and trial procedures is a common strategy—both among CWC participants and beyond—there is arguably little consistency from jurisdiction to jurisdiction, let alone from courtroom to courtroom. Most importantly, it is here that outcomes can be affected, and CWC findings were consistent with other research suggesting that self-represented litigants’ difficulty or inability getting evidence before the court can and does impact final case outcomes.⁷⁸

RESOURCES:

- ☑ National judicial education leaders, the National Council of Juvenile and Family Court Judges and the National Judicial College frequently offer courses—online and in person—for judges on best practices handling cases with self-represented litigants.
- ☑ The National Center for State Courts *Ensuring the Right to Be Heard for Self-Represented Litigants: Judicial Curriculum* contains a series of modules designed to assist judges in managing cases involving self-represented litigants. The Self-Represented Litigation Network Judicial Curricula builds on this effort.
- ☑ Judicial ethics and education are among the programs explored in the Self-Represented Litigation Network’s *Best Practices in Court-Based Programs for the Self-Represented*.
- ☑ **Strategies from Cases Without Counsel Study Participants:** Judge participants offered numerous strategies for handling cases with one or more self-represented litigants:
 - Actively asking questions during a hearing was among the most commonly referenced practiced. “If I don’t have the information I need, I ask,” one participant explained, “because I feel that the decision needs to be made on full information, not information just because the attorney knows what to ask.”⁷⁹
 - Similarly, many of the CWC judges make a point of explaining rules and processes to self-represented litigants. One interviewee noted: “I explain a lot from the bench ... I explain a lot and if anybody seems like they don’t understand, I explain it again and I answer any questions they have.”⁸⁰
 - A few judge participants mentioned the benefit of using cases with represented parties to serve as an example for how trial is conducted. A participant described, “If I have a case with a lawyer and a self-represented litigant ... I let the lawyer go first, even if it’s not the way I normally do it, to give them a model.”⁸¹

77 *Id.* at p. 36.

78 *Id.* at p. 44.

79 LCS4.

80 LCS3.

81 *Id.*

Guidance on the Unique Needs of Family Court Self-Represented Litigants

Without an attorney serving as an intermediary, self-represented litigants in family cases frequently and directly interact with court staff, judges, opposing counsel, and other family justice system stakeholders. These case types involve highly emotional issues and high stakes. Those who interact with self-represented litigants in family cases, therefore, would benefit from education and training geared specifically to the unique needs of and challenges faced by these individuals.

Trauma-Informed Approach to Litigant Interaction— Several CWC litigant participants gave policy-maker recommendations that centered on sensitivity-related factors, with one individual urging:

This isn't just a number that you're pushing through; this is people's lives. And I know they've been doing that a really long time ... but I haven't, it's my first or second time going through this and I'm scared and I'm really intimidated. And people being rude at the courthouse ... it doesn't help.⁸²

As previously discussed, litigants benefit from court processes that are sensitive and responsive to the trauma they may have experienced. Similarly, judge and court staff attitudes, behaviors, and communication habits can either alienate self-represented litigants or engage them in a meaningful and emotionally safe manner.⁸³

Domestic Violence—Relatedly, all system stakeholders should receive education in domestic violence; for example, how to identify domestic violence, what procedures are and are not appropriate for domestic violence survivors, and how to best interact with victims. One CWC litigant described interacting with numerous attorneys (court-provided and privately retained) and judges who did not exhibit an adequate understanding of or appreciation for the violence characterizing her situation. This individual explained: “Things a DV victim does do not make sense unless someone is trained in domestic violence.”⁸⁴

82 M13.

83 ESSENTIAL COMPONENTS, *supra* note 70, at 2-8. See also Fern A. Fisher, *Educating the Judiciary on Self-Represented Litigant Issues*, in INNOVATIONS FOR SELF-REPRESENTED LITIGANTS, *supra* note 14.

84 M24.

“ Things a DV victim does do not make sense unless someone is trained in domestic violence. ”

Cases Without Counsel Self-Represented Litigant Participant



RESOURCES:

- ☑ The U.S. Substance Abuse and Mental Health Services Administration's *Essential Components of Trauma-informed Judicial Practice* contains practical suggestions for how judges can communicate with litigants and behave in the courtroom, in a manner that is sensitive to litigants' trauma.
- ☑ The National Judicial Institute on Domestic Violence conducts interactive, skills-based domestic violence workshops for judges and judicial officers. The Institute is a partnership among the National Council of Juvenile and Family Court Judges and the U.S. Department of Justice, Office on Violence Against Women, and Futures Without Violence.
- ☑ The Battered Women's Justice Project provides technical assistance and training on domestic violence that includes ideas for implementation and showcases the work of innovative jurisdictions.

Training on Vicarious Trauma & Stress Management

Several CWC court participants spoke of encountering distressed or disgruntled litigants in the course of their day-to-day work. These narratives highlight that court personnel can be on the receiving end of poor treatment and disrespectful behavior—not just litigants. Just as judges and court personnel should be sensitive to the trauma court users have experienced, family justice system stakeholders, including attorneys, should be aware of the vicarious trauma they can experience from interacting and working with families and individuals under extreme stress.⁸⁵

RESOURCES:

- ☑ The National Center for State Court *Judicial Stress Resource Guide* is a compilation of literature on a variety of stress-related topics, including materials on stress management.

85 Peter G. Jaffe et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54 Juv. & Fam. Ct. J. 1 (2003).



RECOMMENDATIONS FOR LEGAL COMMUNITIES

AVAILABILITY & ACCESSIBILITY OF LEGAL SERVICES

In a justice system fundamentally premised on the involvement of attorneys, exploring innovations designed to facilitate involvement of attorneys and/or increase the availability and accessibility of legal services remains of paramount importance. In terms of suggestions for policy makers, court and litigant CWC participants most commonly cited availability of affordable legal services. “Nobody should ever have to go through a case involving their children alone, ever,” said one self-represented litigant. “When you’re battling over—litigating over—somebody’s life, something so important as that, nobody should be unrepresented.”⁸⁶

The cost of representation, however, is prohibitive for many family court litigants. Issues of cost and affordability featured prominently in the vast majority of CWC participants’ stories. Financial considerations were the most consistently referenced motivation for proceeding without an attorney, with approximately 94 percent of litigants indicating that the decision to represent themselves was influenced or driven by these issues.⁸⁷ Furthermore, a strong majority of CWC litigants questioned on the issue expressed a desire for legal assistance. In short, the study findings are consistent with the picture painted by other research that self-representation is largely a necessity borne by financial circumstances as opposed to a preference.

Unbundled Legal Services

Unbundled legal services or limited scope representation is spreading as a viable practice model⁸⁸ that holds the potential to be attractive to a wide range of family court litigants who might otherwise self-represent for a variety of reasons. As previously discussed, for many CWC participants, full-scale representation was simply cost prohibitive or it did not take priority over other financial obligations.⁸⁹ Some participants, however, described interactions with an attorney short of securing representation, and the most common strategy cited for obtaining legal advice was taking advantage of initial

86 L32.

87 Nearly three-quarters of self-represented litigant Cases Without Counsel participants for whom income data is available reported an annual income of \$40,000 or less. Just under half indicated an annual income of \$20,000 or under and approximately 27 percent indicated an income between \$20,000 and \$40,000. CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at pp. 13-15.

88 Little research has been done on the efficacy of this practice model. One recent study, however, found that practitioners offering unbundled legal services cited benefits, including attracting new clients and opportunities for full representation where a matter turned out to be more complex than the client initially estimated. IPSOS MORI, QUALITATIVE RESEARCH EXPLORING EXPERIENCES AND PERCEPTIONS OF UNBUNDLED LEGAL SERVICES 48-49 (2015), available at <https://www.ipsos-mori.com/Assets/Docs/Publications/sri-crime-unbundled-legal-services-2015.pdf>.

89 The notion that one might be able to afford legal services but prioritizes other uses for the money (referred to as “cost priority” in the CWC research reports) resonated with approximately 20 percent of participants. CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at p. 15.

““ Nobody should ever have to go through a case involving their children alone, ever. When you’re battling over—litigating over—somebody’s life, something so important as that, nobody should be unrepresented. ””

Cases Without Counsel Self-Represented Litigant Participant



or periodic consultations.⁹⁰ While none of the participants used the terms “unbundled legal services,” “limited scope representation,” or related iterations, the Cases Without Counsel narratives suggest that some litigants are already taking advantage of non-traditional models of receiving legal advice. An option for attorney involvement on a more limited guidance or task basis could increase the probability that individuals could afford legal services or would want to pay for such services, whichever the case may be.

Findings from the CWC study also highlight a number of discrete, high-impact areas with which self-represented litigants struggled. For family law attorneys looking to establish an unbundled legal services practice, understanding the points of tension in the process can provide a useful starting point from which practitioners can develop service plans and message to potential clients about those services:

- Forms, filings, and other required paperwork were a common source of difficulty, and self-represented litigants struggled with the volume of forms, knowing what to include in the forms, and compiling accompanying documentation. Several interviewees reported that their forms were returned (sometimes repeatedly).⁹¹
- Litigant comments with respect to preparing for and participating in hearings or trial demonstrate that participants often found this aspect of the process difficult and/or frustrating. Discussions often included reference to knowing what to expect in court, knowing what was expected of them by the court, and understanding how to present evidence.⁹²
- Broadly, many CWC participants had difficulty navigating the process and knowing what to expect at various stages of the process.⁹³

While the ethics rules in most states allow attorneys to offer unbundled legal services,⁹⁴ the model appears slow to take hold, despite a nationwide surplus of attorneys on one hand and a nationwide demand for legal services on the other.⁹⁵ According to one Cases Without Counsel judge participant: “I think it’s ‘all or nothing’ with the attorneys. They’re taking the whole case or they’re not As far as a change, attorneys really need to look at a way to unbundle their services so that they could counsel people; advise them on what the basic issues are.”⁹⁶

90 *Id.* at pp. 28-29.

91 *Id.* at pp. 32-33.

92 *Id.* at pp. 34-37.

93 *Id.* at pp. 30-32.

94 *Pro Se Unbundling Resource Center – Ethics Opinions*, AM. BAR ASS’N STANDING COMM. ON THE DELIVERY OF LEGAL SERV., http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/ethics_opinions.html (last visited April 5, 2016).

95 See, e.g., Elizabeth Olson, *Burdened With Debt, Law School Graduates Struggle in Job Market*, N.Y. TIMES, Apr. 26, 2015, http://www.nytimes.com/2015/04/27/business/dealbook/burdened-with-debt-law-school-graduates-struggle-in-job-market.html?_r=0; Dimitra Kessenides, *Jobs Are Still Scarce for New Law School Grads*, BLOOMBERG BUS. (June 20, 2014, 6:44 AM), <http://www.bloomberg.com/news/articles/2014-06-20/the-employment-rate-falls-again-for-recent-law-school-graduates>; Mark Koba, *Courtroom Drama: Too Many Lawyers, Too Few Jobs*, CNBC (Mar. 21, 2013, 12:01 PM), <http://www.cnbc.com/id/100569350>.

96 LCS5.

RESOURCES:

- Unbundling Legal Services: Options for Clients, Courts & Counsel*: In partnership with the Association of Family and Conciliation Courts, the IAALS *Honoring Families Initiative* developed a series of guides and toolkits on unbundled legal services, each tailored to a specific family justice system stakeholder.
 - **Lawyers:** This FAQ-styled toolkit is a resource for family law practitioners who are interested in learning more about unbundled legal services and/or implementing this service delivery model into an existing practice.
 - **Court Leadership:** The support of the courts is essential in order for unbundled legal services to take hold, and this guide can assist chief justices, chief judges, and other court leaders in helping close the justice gap through hands-on encouragement and support of this service delivery model.
 - **Non-Legal Professionals:** Self-represented litigants in family court come into contact with a variety of non-legal professionals, such as custody evaluators. This guide aims to help these family justice system stakeholders understand unbundled legal services and how to leverage this model in order to best serve their clients.
 - **Consumers:** This toolkit aims to educate the self-represented litigant with an understanding of the legal services options available through unbundled legal services, so that litigants are empowered to locate and take advantage of affordable legal services.
- The American Bar Association Standing Committee on the Delivery of Legal Services Pro Se/Unbundling Resource Center is designed for all justice system stakeholders, and contains information and guidance on unbundled legal services and related issues in self-representation. Subpages provide practitioners with targeted information on discrete tasks:
 - Providing advice and counseling
 - Document preparation
 - Limited appearances
- The American Bar Association Standing Committee on the Delivery of Legal Services issued *An Analysis of Rules that Enable Lawyers to Serve Self-Represented Litigants*. The white paper explores state rules of conduct and procedure, and other laws that enable attorneys to provide limited scope representation.
- The Justice Café by The Manely Firm, PC is a growing practice model, offering à la carte services for \$75 an hour to family law litigants, including research, advice, document drafting, and representation in various settings.

Innovative Billing Structures

Unbundled legal services-type practices change the model through which legal services are delivered; alternative billing structures change the manner through which legal services are priced.⁹⁷ Flat- or fixed-fee billing is an emerging practice model, with some practitioners arguing this model encourages efficiencies in the process as compared to, for example,

⁹⁷ This is part of a larger trend in legal services. See, e.g., Robert E. Hirshon, *The Billable Hour is Dead. Long Live ...?*, 30 GP SOLO (2013), available at http://www.americanbar.org/publications/gp_solo/2013/january_february/billable_hour_dead_long_live.html; Leigh McMullan Abramson, *Is the Billable Hour Obsolete?*, ATLANTIC (Oct. 15, 2015), available at <http://www.theatlantic.com/business/archive/2015/10/billable-hours/410611>.

hourly billing.⁹⁸ There is an ongoing debate among family law practitioners as to whether these matters are appropriate case types in which to diverge from the billable hour, given the highly variable nature of family cases, which makes accurately estimating legal costs difficult.⁹⁹ However, some practitioners have tried it and successfully so.¹⁰⁰ Another emerging billing model—perhaps less institutionalized than flat-rate billing—purports to give clients an opportunity to suggest deviations from the agreed-upon fees in response to whether clients believe an attorney has delivered on the value promised.¹⁰¹

While these and other alternatives to the traditional hourly based billing model do not necessarily entail a reduction in the cost of legal services, they do provide a degree of cost predictability for family court litigants. The CWC interviews with judges and court staff in study jurisdictions suggested that some litigants may perceive legal help to be unattainable, and the uncertainty of legal fees may play into the discussion of affordability.¹⁰² To the extent that alternative billing structures are transparent at the outset of a case, family court litigants may be better able to prioritize and devote limited resources to legal services. Furthermore, billing structures that are responsive to litigant perceptions of value could foster increased trust and confidence in attorneys and legal services providers.

RESOURCES:

- ☑ The American Bar Association Legal Access Job Corps Task Force Resource Center is a repository for innovative legal projects and programs focused on improving access to legal services, including incubators/residency programs, solo/small firms, modest means programs, and mentoring projects. The Center is also continuously updated with latest developments from the Task Force Catalyst Grant program.
- ☑ The Chicago Bar Foundation, in conjunction with the Justice Entrepreneurs Project, published a step-by-step toolkit to assist practitioners in pricing services for low- and moderate-income clients.

98 Some argue that hourly billing, at best, does not actively drive efficiencies, and, at worst, encourages inefficiencies. *E.g.*, Michael Sherman, *Fixed-Fee Engagements in Litigation Cases: Why and How*, LAW PRACTICE TODAY (July 2010), available at <http://apps.americanbar.org/lpm/lpt/articles/ftr07104.shtml> (“If I am billing by the hour, I have no incentive to implement internal procedures to complete work efficiently. In fact, I have a major disincentive from implementing such procedures! If my prices are set on a fixed-fee basis, I have an incentive to put systems in place to complete the work as efficiently as possible. Obviously, efficiency should not trump effectiveness when representing the client’s interests. But, as long as we are not being efficient at the expense of effectively representing our clients’ best interests, then implementing such internal processes and procedures will allow us to become more profitable.”).

99 *See id.*

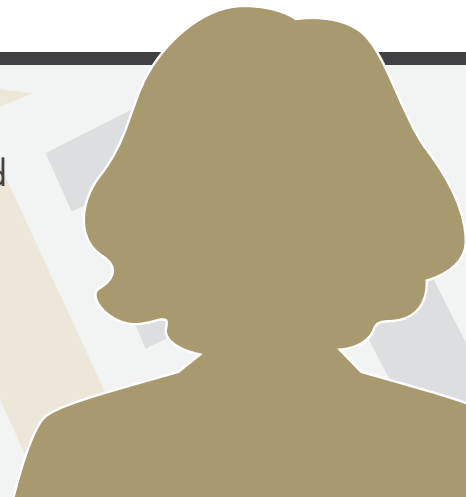
100 Said one practitioner who offers flat fees in family cases: “When other lawyers try to convince me that you can’t charge fixed fees in litigation cases because they are too unpredictable, it makes me wonder how many cases they have litigated. Of course, the cases are often unpredictable. But they are predictably unpredictable within predictable parameters! So, factor that in to your fee.” *Id.*

101 Valorem Law Group, with firms in Chicago (IL) and San Jose (CA), practices what the firm calls “Value Adjustment Line” billing. *Value Adjustment Line*, VALOREM LAW GROUP, <http://www.valoremllaw.com/value-adjustment-line> (last visited April 5, 2016); see also *Pricing*, SUMMIT LAW GROUP, <http://www.summitlaw.com/our-story/pricing> (last visited April 5, 2016).

102 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at p. 14.

“ I think it’s ‘all or nothing’ with the attorneys. They’re taking the whole case or they’re not.... As far as a change, attorneys really need to look at a way to unbundle their services so that they could counsel people; advise them on what the basic issues are. ”

Cases Without Counsel Judge Participant



Legal Aid & Pro Bono Services

Among CWC participants, very few reported receiving legal advice or representation through legal aid services, private *pro bono* services, and/or law school clinics. Of those who indicated they attempted to access these resources, many reported that they could not due to issues of ineligibility or unavailability. In order to increase the availability of legal aid and *pro bono* services—without increases in financial and human resources to staff these services¹⁰³—some commentators are calling on family law practitioners and other stakeholders to explore amendments to the rules of professional responsibility that are responsive to the growing reality of self-representation.

With respect to legal services organizations, conflict of interest realities arguably hinder the already-limited ability of these organizations to serve people. In a 2011 survey, two-thirds of poverty-lawyer respondents indicated that “the Rules of Professional Responsibility were inadequate in addressing their particular needs, citing the failure to address conflict of interest questions when representation is of limited scope [and] when the respondent’s legal aid organization is the only resource for the prospective client.”¹⁰⁴ One commentator succinctly articulates the issue as follows:

Unfortunately, the Model Rules infrequently acknowledge the unique challenges of providing legal services to indigent clients in settings that do not resemble the traditional lawyering model. The rules provide very little guidance about fulfilling professional responsibilities when lawyers attempt to serve poor or disadvantaged litigants in high volume settings that occur outside of traditional law offices.¹⁰⁵

Furthermore, with respect to *pro bono* programs and efforts by the private bar to increase low- or no-cost legal services, the ABA Model Rules of Professional Conduct impart on attorneys “a professional responsibility to provide legal services to those unable to pay.”¹⁰⁶ This responsibility is couched, however, in a voluntary service requirement. While a few states have more robust *pro bono* requirements, most states broadly follow the Model Rule’s aspirational service suggestion¹⁰⁷—the result of which is that there are arguably few concrete incentives in the Model Rules for practitioners to provide *pro bono* services, short of altruistic motivators.¹⁰⁸

103 Increasing funding for legal aid or increasing *pro bono* resources is undoubtedly a valid and highly desired outcome, explaining why it is an oft-cited avenue of reform. Recommendations centered on an increase in funding for legal aid services are laudable, but cannot alone comprise a realistic response to the growing justice gap. According to Legal Services Corporation (“LSC”) President Jim Sandman, funding for LSC is at an all-time low compared to the need, and national legal aid offices turn away an estimated 50 percent of the people who come to them seeking help. Rachel Lippmann, *Legal Services Corporation president: U.S. has defaulted on pledge of equal justice under law*, ST. LOUIS PUB. RADIO (Mar. 2, 2016), <http://news.stlpublicradio.org/post/legal-services-corporation-president-us-has-defaulted-pledge-equal-justice-under-law>; *LSC Funding*, LEGAL SERVICES CORPORATION, <http://www.lsc.gov/lsc-funding> (last visited April 5, 2016). See also David W. Stark, *Colorado Survey on Pro Bono Participation*, 45 COLO. LAW. 57, 57 (2016) (“For every two income-eligible Coloradoans who find their way to Colorado Legal Services, one is turned away”). Similarly, the supply of *pro bono* services is also not filling the need for affordable legal services that exists today. While the availability and rate of *pro bono* services is a bit more difficult to determine than legal aid sources, some evidence exists that the rate of these services has actually declined over the last decade. *The American Lawyer* reported that *pro bono* hours of Am Law 200 firms in FY2008 was approximately 5.56M, compared to approximately 4.89M in FY2011. Scott Cummings and Rebecca Sandefur suggest that “[t]he drop in total hours is tantamount to losing roughly 340 full-time lawyers dedicated to *pro bono* service. In a legal aid system with roughly 7900 lawyers total, that is a significant loss.” Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers; What We Know—and Should Know—About American Pro Bono*, 7 HARVARD L. & POL’Y REV. 83, 110 (2013) (citations omitted). See also *Standing Committee on Pro Bono & Public Service and the Center for Pro Bono*, AM. BAR ASS’N, <https://apps.americanbar.org/legalservices/probono/reporting/pbreporting.html> (detailing state *pro bono* reporting policies) [hereinafter Center for Pro Bono].

104 Marcia Henry, *Poverty Law Advocates are Wrestling with Ethics Questions in Their Legal Aid Practice*, SHRIVER BRIEF, Mar. 14, 2011, <http://www.theshriverbrief.org/2011/03/articles/legal-aid/poverty-law-advocates-are-wrestling-with-ethics-questions-in-their-legal-aid-practice/>.

105 Louis S. Rulli, *Roadblocks to Access to Justice: Reforming Ethical Rules to Meet the Special Needs of Low-Income Clients*, 17 U. OF PENN. J. LAW & SOCIAL CHANGE 348, 357-58 (2014), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1175&context=jlasc>.

106 MODEL RULES OF PROF’L CONDUCT 6.1 (2016).

107 Center for Pro Bono, *supra* note 103.

108 See, e.g., Richard Zorza, *The Need for Economic and Regulatory Incentives for Access to Justice*, ACCESS TO JUSTICE BLOG (Jan. 1, 2016), <http://accessjustice.net/2016/01/01/the-need-for-economic-and-regulatory-incentives-for-access-to-justice/>.

While there are a variety of complicated factors feeding into the limited availability of public and private low- to no-cost legal services, the reality is that these models are not currently viable options for most litigants. To the extent that these models appear among potential solutions in justice gap conversations, legal and court communities most likely must move beyond reliance on illusory suggestions of funding increases. Regulatory changes may better allow these tools to serve families who need or would benefit from attorney assistance in their family case.

RESOURCES:

- ☑ The American Bar Association Standing Committee on Pro Bono & Public Service and the Center for Pro Bono maintains a comprehensive listing of state pro bono reporting requirements. The site also includes a variety of resources for individual attorneys and bar leaders interested in increasing and regulating *pro bono* activity in their jurisdiction.
- ☑ New York has made great strides in *pro bono* services, and the New York State Courts Access to Justice Program 2015 Report details the myriad programs through which state pro bono and other volunteer providers are working to expand access.
- ☑ Probono.net provides *pro bono* and legal services attorneys with resources that are regional, national, and international in scope. The organization also directs individual attorneys to volunteer opportunities in their state and hosts a blog dedicated to connecting justice communities.

Non-Attorney Models of Legal Services Delivery

There are important conversations occurring around the country with respect to creating new categories of legal services providers. Generally driven by concerns over substantial unmet legal needs in state jurisdictions, these proposals envision authorizing non-attorneys to provide limited-scope legal advice. In a first of its kind role, the Washington State Bar Association regulates the nurse-practitioner-like Limited License Legal Technicians (LLLTs), who are now currently active in providing family law litigants with document assistance, support navigating the process, and perform other discrete tasks enumerated by the Washington State Bar Association.¹⁰⁹ A number of other states are exploring this innovation, in light of the pressing need for affordable legal services.¹¹⁰

109 *Limited License Legal Technician Program*, WASH. ST. BAR ASS'N, <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> (last visited April 5, 2016).

110 The Utah Supreme Court has greenlit the development of a similar program. UTAH ST. CTS., SUP. CT. TASK FORCE TO EXAMINE LIMITED LEGAL LICENSING (Nov. 18, 2015), available at http://www.utcourts.gov/committees/limited_legal/Supreme%20Court%20Task%20Force%20to%20Examine%20Limited%20Legal%20Licensing.pdf; see also Debra Cassens Weiss, *Utah Supreme Court backs licensed paralegal practitioners*, ABA J. (Dec. 16, 2015), available at <http://www.abajournal.com/news/article/utah-supreme-court-backs-limited-practitioner-paralegals>. Colorado, Connecticut, Florida, Michigan, and New Mexico, among others, are also exploring this model. AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERV., ISSUES PAPER CONCERNING NEW CATEGORIES OF LEGAL SERVICES PROVIDERS (Oct. 16, 2015); see also Anna L. Endter, *State Activities Related to Limited License Legal Professionals*, GALLAGHER LAW LIBRARY: UNIV. WASH. SCHOOL OF LAW (updated June 21, 2014), <https://lib.law.washington.edu/content/guides/StateLimLicLegPro> (last visited April 5, 2016).

The Cases Without Counsel semi-structured interview protocol included a line of inquiry designed to assess whether study participants might have been receptive to receiving assistance from an authorized non-attorney professional. Large numbers of self-represented litigants across jurisdictions responded favorably to this proposition. “It’s better to have someone that at least has some working knowledge of the system,” said one individual, rather “than trying to navigate it alone when you know nothing.”¹¹¹ Another remarked, “When you’re going through it, honestly, at that point, anybody—whether they’re a lawyer or not—if they’re qualified to give you that advice, you would appreciate it.”¹¹²

While the CWC data is limited to the perspectives of study participants, it nevertheless supplements this conversation, by highlighting a broad desire for in-person assistance from someone who has experience in and/or knowledge of the family court process and can provide case-specific advice. There are too few examples to reference best practices with respect to this model; however, regulation, training, and oversight are important components of these conversations.

RESOURCES:

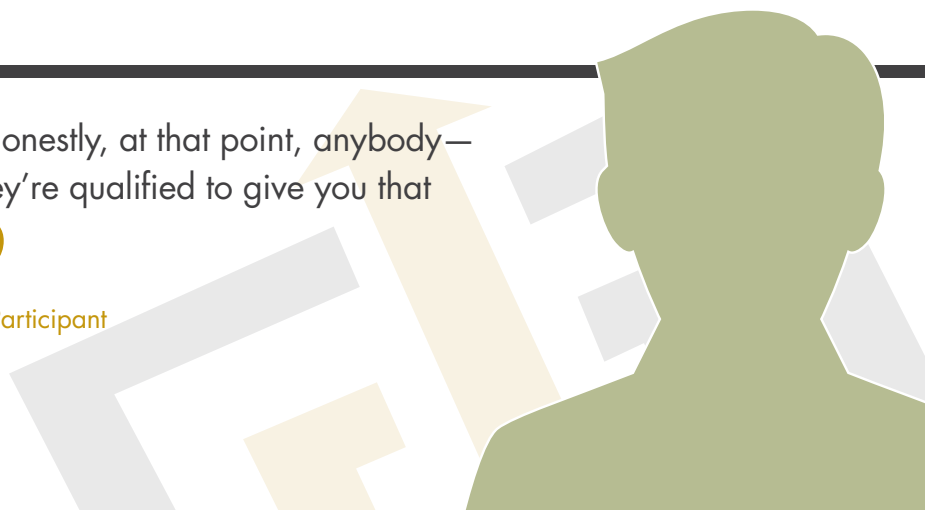
- ✓ The Washington State Bar Association is a pioneer in this area, having authorized and regulated Limited License Legal Technicians (LLLTs) as non-lawyer providers of discrete and limited legal advice. The Bar’s LLLT website can serve as a resource for other jurisdictions exploring this service model; it also maintains an up-to-date directory of practicing Technicians.
- ✓ In fall of 2015, the American Bar Association Commission on the Future of Legal Services published an *Issue Paper Concerning New Categories of Legal Services Providers* that concisely summarizes various models of providing litigants with legal services and law-related services that jurisdictions have implemented.
- ✓ In February 2016, the American Bar Association House of Delegates approved Resolution 105 enumerating Model Regulatory Objectives. Proposed by the Commission on the Future of Legal Services, the Objectives seek to guide states in regulating traditional and non-traditional legal services models.
- ✓ Rebecca L. Sandefur and Thomas M. Clarke, through the *Roles Beyond Lawyers Project*, have begun the dialogue on creating a framework for evaluating programs in which non-lawyers provide assistance traditionally offered only by attorneys.

111 D32.

112 L39.

““ When you’re going through it, honestly, at that point, anybody—whether they’re a lawyer or not—if they’re qualified to give you that advice, you would appreciate it. ””

Cases Without Counsel Self-Represented Litigant Participant



ENGAGING WITH CLIENTS & POTENTIAL CLIENTS

Addressing Negative Perceptions of Attorney Involvement in Family Cases

Overwhelmingly, the self-represented litigants who participated in the CWC study would have welcomed an attorney's assistance for parts of or the whole case. A few litigants did, however, raise issues and concerns with respect to perceptions of and prior interactions with attorneys. For some, these experiences and perceptions influenced the decision to self-represent.

One of the themes emerging from the CWC narratives on this front is a sense—resulting from actual experience or perception—that attorneys increase conflict and animosity between parties.¹¹³ Relatedly, of the one quarter of CWC litigants who expressed a preference for self-representing, a majority indicated this preference was influenced by the desire to maintain or achieve an amicable relationship with the other party.¹¹⁴ Family cases are unique in that, when children are involved, the parties are guaranteed to have a long-term relationship with one another, increasing the importance of fostering an ongoing amicable relationship between parents.

Perceptions of attorneys and attorney involvement in the court process is important and presents an opportunity for the legal profession—as individual members and as a whole—to reframe the value that an attorney adds to the process. Individual practitioners can better message to clients about services that are appropriate for, and would appeal to, individuals wishing to maintain or foster an amicable relationship. Furthermore, family law practitioners can better message to clients about their approach to family cases, highlighting an emphasis on non-adversarial, problem-solving-focused resolution to disputes.¹¹⁵

Messaging about the Role of the Family Law Attorney & Value Added to the Process

Furthermore, the CWC findings highlight opportunities for family law attorneys to reframe the way in which they message about their role, which extends beyond simply litigating family cases.¹¹⁶ Some CWC participants who described their case as straightforward or simple seemed to convey more confidence in their ability to proceed without an attorney. Similarly, a number of those who had reached an agreement with the other party or believed an agreement could be reached indicated a preference for handling the matter themselves. There is an opportunity for family law attorneys to highlight the administrative, information-gathering, and problem-solving roles from which these litigants in particular benefit.

Relatedly, the emotional stress that divorce litigants experience is often high, and one of the roles of the family law attorney is to “help [] a client in emotional turmoil to engage in effective planning despite the fact that it is difficult.”¹¹⁷ Some CWC litigants explicitly discussed how having an attorney may have reduced some of the emotional distress associated with the family court process. The “attorney as buffer” concept highlights an important role for family law practitioners to consider in messaging about how they can best serve family law clients.

113 CASES WITHOUT COUNSEL RESEARCH, *supra* note 6, at p. 21.

114 *Id.* at pp. 18-19.

115 Research on attorney negotiation styles indicates that “the perceived effectiveness of lawyers drop rather dramatically as the level of adversarial behavior rises.” Andrea Kupfer Schneider & Nancy Mills, *The Ineffective Family Lawyer*, in INNOVATIONS IN FAMILY LAW PRACTICE 13, 17 (Kelly Browe Olson & Nancy Ver Steegh eds., 2008).

116 See, e.g., AM. ACAD. OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS (2000), available at <http://www.aaml.org/library/publications/19/bounds-advocacy>. With decades of well-established research on the impact on children of parental conflict during divorce or separation, it is well-understood that a family law attorney does so much more for clients than resolve cases through litigation. There are important implications for legal educators, therefore, on curricula for law students that address the various roles that a family law attorney must fill. Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524 (2006).

117 O’Connell & DiFonzo, *supra* note 116, at 528.

RECOMMENDATIONS FOR BROADER COMMUNITIES

There is an important but often overlooked role for communities and community partners in responding to the needs of self-represented litigants in the family justice system. Courts and legal professionals serve and rely on the communities in which they sit. Because whole communities are impacted by how members of a family reorganize through divorce or separation, communities also have a responsibility to assist family justice system stakeholders in developing solutions that serve self-represented litigants.¹¹⁸

Facilitate Access to Self-Help Resources & Services for Divorcing or Separating Families

Churches, neighborhood groups, and other community-based organizations and service providers can play an important role in helping self-represented litigants navigate both the process and personal aspects of a family case—for example, providing or facilitating access to self-help resources, hosting informational workshops, and offering support groups for those experiencing divorce or separation. Furthermore, the emotional issues underlying many family cases present an opportunity for mental health professionals to partner with court and legal communities to deliver therapeutic services.

There is also a role for the community in facilitating and/or providing a forum for out-of-court models for resolving divorce- and separation-related matters. While out-of-court mediation services are now commonplace in communities, new holistic and interdisciplinary models are being developed that fit well in the community setting.¹¹⁹

RESOURCES:

- ☑ The Center for Out-of-Court Divorce model that IAALS developed and implemented is designed to operate in the community, serving families through a holistic, interdisciplinary approach. While the model does not foreclose attorney participation, it is a promising solution for self-represented litigants transitioning through divorce or separation.

118 See KOURLIS ET AL., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., IAALS' HONORING FAMILIES INITIATIVE: COURTS AND COMMUNITIES HELPING FAMILIES IN TRANSITION ARISING FROM SEPARATION OR DIVORCE (2013), available at <http://iaals.du.edu/honoring-families/publications/courts-and-communities-helping-families-transition-arising-separation>.

119 The Center for Out-of-Court Divorce – Denver: Positive Solutions for Families in Transition offers Denver-area families a proven family centered approach, working in partnership with the local courts. Through the Center, families with children can take advantage of financial and legal education, mediation, and individual family counseling. The Center also provides post-decree support services. CTR. FOR OUT-OF-COURT DIVORCE – DENVER, <http://centerforoutofcourtdivorce.org/> (last visited April 5, 2016).

CONCLUSION

The Cases Without Counsel narratives highlight that self-represented litigants frequently encounter challenges navigating the family court process without an attorney—and further, that many of those who self-represent do so out of financial necessity, not choice. Narratives from those who work in the courts with self-represented litigants also suggest that case outcomes can be affected as a result of self-representation.

These findings supplement commentary and research on self-representation that are more than a decade old and suggest that, while many stakeholders are solution oriented, the fundamental issue—how to best help users access a system that is not designed for their direct use—has gone largely unaddressed in many jurisdictions. Fortunately, the CWC study also highlights an opportunity for family justice system stakeholders in the courts, legal profession, or broader community to work together in a coordinated fashion to better meet the needs of self-represented litigants. Piecemeal approaches by a single stakeholder group alone will not preclude us from having the same conversations a decade from now on the deleterious impacts of self-representation on those who have no options other than to self-represent.

Finally, the CWC study provides unique, first-hand insight into how self-represented litigants experience the family court system. A threshold matter in redesigning a client-centric family court system is soliciting the perspective of the user and taking it into consideration during conversations on how best to serve others like them. The recommendations contained in this report leverage those perspectives, and it is IAALS' hope that family court users will become an integral part of conversations on the family justice system going forward.





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