REVISED PRO SE POLICY RECOMMENDATIONS
FROM THE AMERICAN JUDICATURE SOCIETY
Based on "Proposed Recommendations" in *Meeting the Challenge of Pro Se Litigation—A Report and Guidebook for Judges and Court Managers* (Chicago: AJS, 1998)
Approved by AJS Executive Committee March 2002

The following revised recommendations relating to pro se litigation reflect changes in the scope of self-representation and court practice and policy since publication of the original recommendations in *Meeting the Challenge* in 1998. For example, in response to a survey conducted prior to the 1999 National Conference on Pro Se Litigation, court professionals reported that self-representation had increased moderately or dramatically in the preceding five years; the greatest increase in pro se litigation was evident in family-law cases; and most, although not all, self-represented litigants were proceeding on their own because they could not afford an attorney.

However, survey respondents also reported an increase in self-representation in other types of cases, landlord-tenant and small civil, for example. And we have learned that in some states small business owners are litigating without legal counsel. This information is based on best professional estimates, and there is a need for reliable statistical information on a number of dimensions about pro se litigation.

In addition, while *Meeting the Challenge* highlighted about a dozen illustrative pro se assistance programs, the 1999 preconference survey yielded information about 150 programs in 40 states, and more are being established every year. Based on the results of forthcoming evaluations of existing assistance programs, we can expect to further refine the following recommendations.

1. COURTS SHOULD PROVIDE SELF-REPRESENTED LITIGANTS WITH INFORMATION AND SERVICES TO ENABLE THEM TO USE THE COURT, AND COURTS SHOULD SECURE THE RESOURCES AND STAFFING TO PROVIDE THOSE SERVICES.

The justice system must take steps to address the growth of pro se litigation and its effect upon the litigants themselves as well as the court and court staff. This phenomenon and the courts' response to it—or lack thereof—is critical in that it directly affects the public's trust and confidence in the courts. Simply put, we can no longer tolerate a justice system that consists of procedures, forms and practices that are known to only a select few in our society.

Constitutional principles protecting the rights of due process, access to courts, open courts, and self-representation require that all litigants be provided a meaningful opportunity to be heard. At the same time, sound court management practices are necessary to maximize both efficient caseflow and the fairness of all court proceedings. Providing self-represented litigants with information regarding appropriate court procedures is not inconsistent with the court's organizational interest in efficiency. Rather, providing such needed and often-requested information to the

public will not only improve the efficiency of a judge's pro se caseload, but also will enhance the time to disposition of the remainder of the docket.

Courts should, therefore, secure and allocate resources (including staff) and render assistance in a variety of forms to persons who represent themselves and seek judicial relief on their claims or defenses. Such assistance might include instructional programs, referrals to lawyer and dispute resolution professionals and services outside the courtroom, policies and protocols to assist judges in managing pro se litigation inside the courtroom, and appropriate statutes and rules to enable courts to adapt to the growth of self-representation.

Many courts are providing a range of services to the self-represented. For examples, visit www.ajs.org, click on *Pro Se*, and go to the *Resources* and *Links* pages.

2. COURTS SHOULD STUDY THE CHARACTERISTICS AND NEEDS OF THE SELF-REPRESENTED LITIGANTS THEY SERVE, AND DESIGN SERVICES AND MATERIALS TO EFFECTIVELY MEET THOSE NEEDS.

A wide range of pro se assistance programs and services already exists in many states, some examples of which are available on the AJS pro se website referred to above. In determining what form of assistance program is most appropriate, it should be recognized that the needs of each jurisdiction will be unique. Gathering statistics about the self-represented and the cases in which they appear is critical to effective program design and use of resources. Careful analysis of the data and consultation among relevant stakeholders and groups should precede any design or implementation of a pro se assistance program. Pilot programs should first be established that target areas of greatest need from the standpoints of litigants and the courts.

Members of the public, the judiciary, court managers and support staff, the bar, self-represented litigants, and other relevant groups or entities should be included in the process of designing and improving pro se assistance programs.

3. DEVELOPMENT OF PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS SHOULD BE A COLLABORATIVE EFFORT OF COURTS, THE BAR, LEGAL AID PROVIDERS, THE PUBLIC AND RELEVANT GOVERNMENT AGENCIES.

Pro se litigation affects the judiciary, court staff, the bar, legal aid providers, the public and relevant government agencies such as state and local governments. While it may seem obvious that representatives of the aforementioned groups should participate in the development of programs and policies in this area, it also is true that self-represented litigants' views regarding their experiences with the justice system can contribute to the design of effective pro se assistance programs.

Since the nature of cases and the pro se assistance programs implemented for these case types may differ, judges' and lawyers' input on the needs of the litigants and the court should be considered in the design and implementation of such programs.

Court resources in many jurisdictions, however, are inadequate to support the design and implementation of pro se assistance programs. The bar and its members, as officers of the court, have valuable human resources and should collaborate with the court to develop effective programs. Local government bodies such as county boards and state legislatures should be consulted and provided with appropriate information to support program funding requests. Community groups, law schools, volunteers and others also should participate in the collaborative effort to establish programs.

4. COURTS SHOULD WORK WITH THE BAR TO ESTABLISH POLICIES TO GUIDE COURT STAFF IN ASSISTING SELF-REPRESENTED LITIGANTS.

Court staff are prohibited—by unauthorized practice of law rules and court policies—from practicing law or providing legal advice. These prohibitions have deterred court staff from rendering assistance to the public regarding court forms, procedures and court practices, to the detriment of self-represented litigants and the general public. The prohibition of unauthorized practice of law is a laudatory goal based upon protection of the public. Such prohibitions, however, when applied to court staff, discourage them from rendering assistance to self-represented litigants that does not constitute the giving of legal advice or the practice of law. The unauthorized practice of law prohibitions, while necessary, should be modified to take into consideration the necessity for court staff to assist the self-represented. They should not preclude legal and procedural information pertinent to litigants' cases.

Judges and court staff should work with the bar to delineate appropriate guidelines for court staff assistance. The guidelines should include adequate examples of assistance that are either permissible or impermissible. An excellent example of detailed guidelines are those promulgated by the Iowa Supreme Court in July 2000. The guidelines include recommended answers to the most frequently asked questions posed by the self-represented. [For the full text of the Iowa guidelines, see the *Resources* page of the AJS pro se website.]

5. ALL COURT SYSTEMS SHOULD TRAIN COURT STAFF ON HOW TO ASSIST SELF-REPRESENTED LITIGANTS.

Not only do most courts lack specific guidelines to guide court staff in assisting self-represented litigants—aside from the admonition "do not give legal advice"—until very recently they also provided no training on how court staff should assist pro se litigants. With the growth in pro se litigation, however, there is now a greater need for it. Court systems are beginning to supplement guidelines [where they exist] with training programs for court staff to enhance the quality of service court staff are able to provide, and to teach staff what they can and cannot do and say.

6. COURTS SHOULD DEVELOP FORMS THAT ARE UNDERSTANDABLE TO AND EASILY UTILIZED BY SELF-REPRESENTED LITIGANTS.

Self-represented litigants should be expected to be familiar with the relevant legal practices and procedures pertaining to their case. Current rules of procedure and evidence, however, are far too complex to be understood by laypersons. Yet it is essential to due process and the protection of the rights to accessible and open courts and of self-representation—as well as to the efficient management of the courts' caseload—that self-represented litigants understand the process of making a claim or a defense, and that they receive the opportunity for a meaningful hearing.

One way of addressing this dilemma is to develop simplified court forms that are understandable to and easily utilized by the self-represented. This will not only serve to enhance the efficiency of the litigation process by saving time for court staff, litigants and judges, but also will enhance the fairness of legal proceedings.

7. JUDGES SHOULD ASSURE THAT SELF-REPRESENTED LITIGANTS IN THE COURTROOM HAVE THE OPPORTUNITY TO MEANINGFULLY PRESENT THEIR CASE. JUDGES SHOULD HAVE THE AUTHORITY TO INSURE THAT PROCEDURAL AND EVIDENTIARY RULES ARE NOT USED TO UNJUSTLY HINDER THE LEGAL INTERESTS OF SELF-REPRESENTED LITIGANTS.

Judges have a duty to maintain impartiality with respect to the parties in litigation. Judges also have a duty to ensure litigants' rights to a meaningful opportunity to be heard. One of the major challenges to courts from pro se litigation is to balance these rights and obligations appropriately.

In the case of self-represented litigants who are unfamiliar with the law, the rules of procedure and the rules of evidence, out-of-court assistance programs alone may be inadequate to assure their right to a meaningful hearing. Judges should insure that procedural and evidentiary rules are not used to hinder the legal interests of self-represented litigants. For example, in order to protect a self-represented litigant's legal interests, a judge may need to directly question witnesses for pro se litigants more frequently than for those represented by counsel, and may be more lenient in the content of opening and closing statements. Ultimately, judges should determine the limits of such assistance in light of their duty to remain impartial and the litigants' right to represent themselves in a meaningful hearing.

8. ALL COURTS SHOULD ASSIST JUDGES IN MANAGING CASES INVOLVING SELF-REPRESENTED LITIGANTS.

Many judges currently use individual strategies for handling pro se litigants, but there appears to be no uniformity among judges and courts on managing these cases. Judges need guidance on the most effective and ethically permissible strategies for

managing litigation involving self-represented litigants. No matter how small, a court system should be able to initiate uniform court protocols to make case processing more efficient and assure uniformity and fairness in the treatment of self-represented litigants among all the judges of a given court.

9. JUDICIAL EDUCATION PROVIDERS SHOULD DEVELOP EDUCATIONAL PROGRAMS FOR JUDGES ON METHODS OF MANAGING CASES INVOLVING SELF-REPRESENTED LITIGANTS.

The issue of appropriate management of self-represented litigants has only recently come to the fore. Until recently, judges have not received training on managing cases involving self-represented litigants in the courtroom.

The management of self-represented litigants may differ depending on case type, relief sought, type of litigant, and the availability of an assistance program and the kinds of services it offers. As research into this subject and our understanding of it develops, judges need to be provided the results of that research, information about the impact of assistance-program services on pro se litigants' readiness to proceed, and the latest techniques regarding the most effective and ethical manner of managing proceedings involving self-represented litigants. Courts and judicial educators should develop such judicial education programs.

10. THE LEGAL PROFESSION SHOULD ASSIST THE COURT IN DEVELOPING PRO SE ASSISTANCE PROGRAMS.

Lawyers have recently encountered a growing number of self-represented litigants as their adversaries. They have sometimes complained that some judges have breached their duty of impartiality by assisting these litigants in the courtroom. As officers of the court, lawyers have a duty to assist the court in improving the administration of justice. While expansion of pro bono representation is worthwhile, this should not be the sole means by which the bar is involved in addressing the pro se phenomenon.

The development of assistance programs will benefit the litigants by providing them with needed information, and will likewise enhance efficient processing of the court's caseload. Reaching that goal will also be in the interest of members of the bar. Such programs will also serve to provide self-represented litigants with information regarding access to available legal representation. Lawyers have resources and knowledge that will benefit pro se assistance programs. The better pretrial assistance programs are, the less assistance judges will need to provide to pro se litigants. Lawyers, therefore, can and should assist in the development of pro se assistance programs.

THE LEGAL PROFESSION SHOULD EXPLORE ALTERNATIVES TO FULL LEGAL REPRESENTATION TO HELP MEET THE LEGAL NEEDS OF SELF-REPRESENTED LITIGANTS.

From what is known about self-represented litigants, the majority proceed without representation because they cannot afford, or believe they cannot afford, to pay an attorney. One way the legal profession is beginning to respond to this reality (or perception) is by offering unbundled legal services, also known as discrete task representation. Limited legal assistance may be provided on a *pro bono* basis or at regular or reduced fees for an attorney to handle only a part of the case, such as consultation with the litigant or preparation of pleadings. The profession should address and resolve potential ethical concerns to facilitate more widespread offering of limited services.

COURTS AND THE LEGAL PROFESSION SHOULD DEVELOP ALTERNATIVE DISPUTE RESOLUTION PROGRAMS TO HELP ADDRESS THE LEGAL NEEDS OF SELF-REPRESENTED LITIGANTS.

From information currently available, most self-represented litigants appear in family law cases. Some disputed issues, such as those involving child custody and visitation, may be particularly amenable to an ADR process such as mediation. An analysis of local unrepresented litigants and the types of cases in which they appear may suggest the need for other ADR mechanisms. In considering ADR mechanisms for use in family law or other types of cases, courts and the legal profession should weigh the costs as well as the benefits of less formal proceedings, and should ensure that any such mechanisms are more likely to alleviate than exacerbate the power imbalance that so often disadvantages pro se litigants.

PUBLIC AND PRIVATE FUNDING SHOULD BE EXPANDED TO ESTABLISH PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS.

Adoption of a pro se assistance program like those described in *Meeting the Challenge of Pro Se Litigation—A Report and Guidebook for Judges and Court Managers* will enable courts to more efficiently manage their caseloads and ensure litigants will be afforded an opportunity to be heard. Such programs could enhance public trust and confidence by providing meaningful access to the courts.

Based on the experience of some courts with pro se assistance programs, funds can be secured by reallocating resources, or convincing state legislators and local government officials of the need for an assistance program, or both. Some courts also have found that when they engage a variety of partners in their assistance programs they build a constituency for the programs and services, which in turn attracts private contributions and grant money for program expansion.