REPORT OF NEBRASKA SUPREME COURT COMMITTEE ON PRO SE LITIGATION
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INTRODUCTION

The United States Supreme Court recognized that natural persons have a right to represent themselves, which it described as "a basic right of free people." *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Nebraska has said that an individual may represent him or herself and participate in trials and legal proceedings on his or her own behalf. *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992) (citing *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986). The Nebraska Constitution at art. I § 13 provides that "all courts shall be open, and every person, for any injury done him or her in his or her lands, goods, persons or reputation, shall have a remedy by due course of law and justice administered without denial or delay." This provision is often referred to as the "open courts" clause.

Neb. Rev. Stat. § 7-101 deals with the unauthorized practice of law, making it a Class III misdemeanor for any person to

> . . . practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his

> own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record in this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state.

This statute also makes it the express duty "of the judges of such courts to enforce this prohibition." There is an obvious interplay and tension between the open courts provision, the right of self-representation, and the statute prohibiting the unauthorized practice of law. But, no Nebraska appellate decision comprehensively discusses these three concepts.

If every Nebraska resident who had a legal problem also had a lawyer to assist them, irrespective of their economic circumstances, this report would likely be unnecessary. "[Equal justice] is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status." Lewis Powell, Jr., Former President, The American Bar Association. However, the reality is different.

Committee member Douglas German, Executive Director of Nebraska Legal Services (NLS), which provides legal services for the Nebraska's poor, estimates that in the year 2001 NLS was able to provide legal services to only 15% of those who asked

for assistance and were likely eligible under NLS guidelines. His detailed analysis of the present state of legal services to the poor is included hereafter in the section entitled "*Needs Assessment*." While it is impossible to know precisely what happens to the large numbers of unserved people seeking legal services, the Committee concludes that large numbers find their way to the unfamiliar and likely foreboding confines of our courtrooms as pro se litigants--whose need for the assistance of counsel has not disappeared.

This report seeks to recount the history and work of the Supreme Court's Committee on Pro Se Litigation, to answer the question of whether there should be some measure of "official" assistance to pro se litigants, and if so how such assistance can and should be rendered.

FORMATION OF COMMITTEE

The Nebraska Supreme Court Committee on Pro Se Litigation (Committee) has its roots in the National Conference on Pro Se litigation in November of 1999 in Scottsdale, Arizona, arranged by the American Judicature Society via a grant from the State Justice Institute. Chief Justice Hendry appointed Judge Sievers as the team leader, along with District Judge Luther, then president of the Nebraska Bar Association John Guthery, and Judith Leech of the Lancaster County District Court as team members to attend this conference. A report was submitted by

Judge Sievers to the Nebraska Supreme Court in March 2000 describing some of the work of the team in preparation for the Scottsdale meeting, reporting on the Scottsdale conference, and setting forth some very basic information about what other states were then doing in the area of assistance to pro se litigants (PSL).

The core recommendation of that report was the team's consensus reached at the end of the Scottsdale meeting that the Nebraska Supreme Court should appoint a representative committee to study the matter of pro se litigation in Nebraska followed by a report to the Court with recommendations for possible action. As a result, the Nebraska Supreme Court, at its consultation of September 12, 2001, appointed Judge Sievers as chairperson of the Committee, Judge Luther as vice-chairperson, and named the other members of the Committee. A complete listing of the Committee is found at Appendix A.

While the Committee's "lifetime" was to be three years, the Committee concluded at its meeting on July 11, 2002, that sufficient work and study had been accomplished so that a report to the Court should now be prepared with appropriate recommendations for future action. This report as submitted has now by been adopted by the Committee by action on October 16, 2002, and incorporates the revisions made by the Committee on that date.

The Work of the Committee.

The work of the Committee has been organized around its meetings held November 12, 2001; March 11, July 11, and October 16, 2002. Apart from those meetings, most of the work was done by subcommittees and individuals. Nonetheless, it is of some importance to emphasize that these meetings have made it clear that the subject of PSL assistance generates controversy and a diversity of opinion on a number of fronts. That divergence of thought reaches the core issues of how the organized Bar and the judiciary should respond, if at all, to the challenges presented to our court system by self-represented litigants. There is, however, scant disagreement, on this committee as well as in a national context, that pro se litigants are going to continue to be part of the judicial landscape and that they present many challenges which are not going to go away. If equal justice for all is the ultimate goal of the bench and bar, as the committee believes it should be, then the challenges presented cannot be ignored. In that vein, after considerable discussion, the Committee agreed at its first meeting to the following mission statement:

> To study the extent and nature of pro se litigation in Nebraska's courts, to identify challenges created by pro se litigation for court staff, judges, and opposing counsel and barriers to justice posed by the existing system to pro se litigants and to propose innovations and solutions to the Supreme Court which insure equal access to the

courts while maintaining the impartiality, dignity, and efficiency of the judicial process.

In an attempt to find a manageable way to carry out its mission, the Committee decided to approach its work from the standpoint of the various "stakeholders." We defined that term broadly as those groups or organizations which have an interest in the subject of the Committee's work. The Committee felt that those stakeholders were: (1) court personnel such as clerks of courts, bailiffs, and court reporters; (2) the judges within the Nebraska judiciary who all, to greater or lesser degrees, must deal with self-represented litigants; (3) the litigants who choose to or need to represent themselves; and (4) the organized Bar. Subcommittees were organized around the issues and challenges posed by each stakeholder group.

NEEDS ASSESSMENT

***Introduction*.**

The Court system is, by nature and design, an adversarial system. To insure justice and promote administrative efficiency it is necessary to have "rules" in our courts--of practice, procedure, and evidence. These rules promote the orderly conduct of hearings, operate to insure a basic fairness between all litigants, and aid the search for the truth by admitting into evidence that which is material, relevant, and probative on an issue before the court. One of our judicial system's

cornerstones is the thought that when the claims of the parties are challenged and tested in the crucible of the adversary system, the truth emerges.

However, it is the very nature of the adversarial system along with the practical necessity for a system of rules of procedure and evidence to produce a fair and efficient truth seeking device that gives rise to a fundamental paradox. That paradox is that although a citizen has a right of self-representation, the very nature of the system through its complexities creates an environment which virtually demands that an individual be represented by a lawyer.

Thus, while the system does not require all litigants to be represented, the need for representation is obvious plus that need is "promoted" by the system. This logically gives rise to the assumption that all who access the system will be represented. In turn, the premise follows that if counsel is beyond the individual's means, that counsel will be provided either at no cost, or at a cost reflective of that person's means. This, if course, is not today's reality and given present societal priorities, it appears unlikely to become a national priority.

***Funding and Eligibility*.**

Based on the level of resources presently committed to providing free civil legal services and the present demand, it

has been estimated that it would take $15,000,000 (Nebraska State Planning Group/Equal Access Project) to meet the demand for legal services from those at or below the 125% federal poverty level of $8,860 or $11,075. At most, the present total resource commitment is approximately $4.5 million.

To qualify for most of the services from the providers of free legal services, a single client must earn less than $11,075 gross per year or 125% of the poverty level. A family of four must earn less than $22,625 gross. (Income eligibility for Legal Services Corporation funded programs is established by federal regulation, 45 CFR 1611, and a person earning minimum wage ($5.15/hour) earns $10,712 annually.)

Nebraska has a total population of 1,711,263 (Census 2000) of which 225,545 persons have incomes below 125% of the Federal poverty guideline. And 413,314 persons (24% of the population) have incomes below 185% of the Federal guideline ($16,391/yr.), which is used to qualify for certain services. (Report compiled by J. Deichert, Center for Public Affairs Research, University of Nebraska at Omaha.)

The Legal Needs of the Subject Population.

A recent study by the American Bar Association of low- and moderate-income households found that approximately one-half of all households surveyed faced at least one legal issue each year. Approximately half of those people face more than one

legal issue each year. This was true for both low- and moderate-income households. (Comprehensive Legal Needs Study, Major Findings, at page 3, American Bar Association's Consortium on Legal Services and the Public, prepared by Institute for Survey Research, Temple University, 1994.) There are 225,545 Nebraskans living at or below 125% of the federal poverty guideline. This converts to approximately 90,580 households (estimate based on Census 2000, Nebraska data, reflecting the average household size is 2.49 people).

Applying the ABA's findings to this figure, one would expect this population to experience a minimum of **67,935** legal issues each year. "Legal issue" is obviously a somewhat subjective term, but generally we can say that we are referring to a person who has a problem, question or case requiring some level of legal assistance, and of course we recognize the difference between getting a divorce and asking how to get the landlord to fix a faulty hot water heater. In any event, this figure represents the legal issues arising from just the low-income households (those living at or below 125% of the federal poverty guidelines, that is, those people who are income-eligible for free legal services under federal regulations).

In addition to those persons who qualify for free legal aid, there are the "near-poor" and the "near-middle class," those who have too much income to qualify for free legal

services but typically not enough to be able to afford private legal counsel. If we define this group as people earning at or between 125% and 185% of the federal poverty guideline ($11,076 to $16,391 gross annual income for an individual), then there are approximately 187,769 Nebraskans in this category. Thus, the total number of Nebraskans living at or below 185% of the federal poverty guidelines is approximately 413,314, and realistically, these people are largely unable to afford legal services. Applying the ABA findings, this group of Nebraskans would be expected to generate 124,491 legal issues each year.

How These Needs are Presently Being Addressed.

The principal civil legal aid providers in Nebraska include the NSBA's Volunteer Lawyers Project, Creighton University Milton R. Abrahams Legal Clinic, University of Nebraska Law School Clinic, Nebraska Appleseed Center for Law in the Public Interest, and Nebraska Legal Services. A survey of the five providers reveals that at present capacities, structures and funding levels, Nebraska's five civil legal providers are able to handle approximately **7,500** extended cases annually (meaning more involved than just an inquiry or simple service). But the above extrapolation shows approximately 117,000 unserved legal issues which this group of Nebraskans face each year. We should note that of those households having legal needs that involved formal legal/judicial action, family/domestic cases constituted

65% in the low-income households and 84% in the moderate-income households. (See Table 4-1, Comprehensive Legal Needs Study, Report on the Legal Needs of the Low- and Moderate-Income Public, American Bar Association's Consortium on Legal Services and the Public, prepared by Institute for Survey Research, Temple University, 1994.)

What Happens to Those People with Unmet Legal Needs?

The same ABA study mentioned above shows that when a person cannot access the civil justice system he or she typically does one of two things, "takes no action at all" (38% low-income, 26% moderate-income) or "handle by own initiative outside of civil justice system" (41% low-income, 42% moderate-income). These results seem unacceptable when the professed goal of the American legal system is "equal justice for all."

Considerable effort is being made by leaders in the legal profession, the judiciary, law schools, civil legal aid providers, and other stakeholders to increase the resources available. Working through the State Planning Group/Equal Access Project, under the auspices of the Nebraska State Bar Association, these leaders have begun a process to make access to the civil justice system a high priority within the political and economic system of Nebraska. Present projects include a campaign to make Nebraskans aware of the problem and need; work coordinated with the Nebraska Supreme Court Minority Taskforce

to meet multi-lingual needs in the court system; the location of more legal aid offices throughout the State; and a student loan forgiveness program to encourage more attorneys to work with legal aid programs.

The Committee recognizes that providing everyone with counsel is not a viable option to serve unmet needs at this time. Therefore, if we do not seek to accommodate and assist the pro se litigant, we may increasingly deny a significant number of Nebraska residents meaningful access to the justice system in violation of the principles upon which the system is structured.

EXISTING RESOURCES FOR A PRO SE LITIGANT IN NEBRASKA

At the outset of the Committee's endeavors we attempted to collect all of the printed material which is presently available to one who might seek information about the Nebraska courts, as well as substantive areas of the law (excluding the traditional sources of legal research such as the law libraries or Westlaw).

We found that there are 18 pamphlets published by the Nebraska State Bar Association which will be listed by title, and they are currently available unless otherwise noted.

1. No Fault Divorce
2. What to do in Case of an Auto Accident
3. When you Need a Lawyer
4. Landlord-Tenant Law
5. Legal Fees
6. Custody and Visitation
7. Living Trusts
8. Client Security Fund (being revised & now unavailable)
9. Bankruptcy

10. Be a Good Witness
11. Joint Tenancy
12. Employment Law
13. Buying a Home
14. Wills
15. Contracts and Credit
16. Living Will and Durable Power of Attorney for Health Care
17. Your Legal Rights in Nebraska
18. Child Support (being revised & now unavailable)

Additionally, the Nebraska County Judges Association, in cooperation with a number of other groups, has prepared "A Guide to Small Claims Court." Also available is the publication, "Citizens Guide to Nebraska Courts," which was first printed in July 1983 and apparently last updated over the signature of Chief Justice Hendry in August 1999. The foregoing appear to be the major "official" publications.

Turning to the matter of "approved" forms, meaning Supreme Court approved, we found first of all that there is no complete "master list" of everything in this category, although the creation of such is a current project within of the Court Administrator's office. Nonetheless, there is a list of commonly used forms available on the Court's website, and a copy of that list is attached as Appendix B. Appendix C lists a number of forms, some on the web, some not, which were identified in January 2002 as forms that people outside the judicial system might need, according to information from Joseph Steele, Court Administrator. Finally, we note that there are other

publications which a motivated citizen could access, such as reports of the various Supreme Court committees, for example, the Court's Gender Fairness Committee, but which probably would not do much to actually assist an effort at self representation.

THE EXTENT OF PRO SE LITIGATION IN NEBRASKA

Another subcommittee worked at trying to gather information on the extent of pro se litigation in the courts of Nebraska. This subcommittee concluded that there are substantial numbers of people, typically driven by economic circumstances, who are representing themselves in the Nebraska court system. Empirical research would be needed to precisely identify the numbers of people and their demographic characteristics or to learn the percentages, for example, in dissolution actions where at least one party is self-represented. But, the Committee lacks funding for such research. However, Committee members feel that PSL litigation is known to be pervasive enough by Committee members themselves and from anecdotal evidence from judges and court staff that we are comfortable in saying that the extent of pro se representation is frequent enough that the Committee's work is justified, as is the Court's attention to these issues and challenges. While gathering precise empirical data could be done, the Committee does not feel that the associated costs would produce enough new information to justify the cost. Put another way, since the Scottsdale conference and continuing to

the present with this Committee's work, the suggestion has not been made that the frequency of pro se litigation is declining or that the subject does not warrant the Committee's attention.

Nonetheless, we do reference some other work in this area as "supporting authority." Nationwide research indicates a dramatic increase in the number of self-represented litigants throughout the court systems of the United States and while the proportion of self-represented litigants remains relatively modest in general jurisdiction courts, filings by self-represented litigants often constitute the majority in limited jurisdictions courts, especially in domestic relations courts. See Bryan J. Ostrom, et al., Examining the Work of State Courts, 1999-2000, a National Perspective from the Court Statistics Project. In the mid 1990's, a study showed that at least one party was self-represented in more than two-thirds of domestic relations cases in California and in nearly 90% of divorce cases in Phoenix, Arizona, as well as in Washington, D.C. See Jonah Goldsmith, et al., Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers (1998). While the frequency of self-representation in Nebraska may not approach the levels referenced above from California or Arizona, self representation is increasing and makes up a substantial portion of county court litigation. Additionally, a number of

Nebraska district judges report that family law matters increasingly involve at least one pro se litigant.

***The Subject Matter of Pro Se Litigation*.**

In Nebraska, our work reveals that self representation occurs primarily in cases involving domestic relations and family law, misdemeanor criminal matters, landlord-tenant, and collection matters. We note that these findings are in accord with the findings of similar committees in other jurisdiction.

The vast majority of pro se litigants, particularly in domestic matters, would prefer to be represented by counsel but economic factors such as the rising cost of legal services and decreases in funding for legal services for low income people drive increasing numbers of people to self-representation. We acknowledge that a small group of pro se litigants choose self-representation from a desire to "do it themselves," or distrust of lawyers and the legal system rather than lack of economic means. In short, the lack of economic resources remains the prime motivation for the great majority of self-represented litigants. We should comment that while prisoner litigation in postconviction and prison discipline matters generate a fair number of pro se cases in Lancaster and Douglas Counties, and now in Johnson County, plus the appellate courts, the focus of the Committee is the civil system.

***Implications of Self Representation*.**

Some implications of this trend of increasing self representation are readily apparent. Self-represented litigants are not trained in procedure, substantive law, or evidence. As a result, a self-represented litigant clearly presents additional challenges to (1) court staff, i.e., at the clerk's counter in the form of "how do I do _____?", (2) to bailiffs who attempt to manage a judge's time and docket, (3) to trial judges who seek to guarantee access to the courts while preserving their impartiality and controlling their courtrooms and who must deal with the question of how much help, explanation, prodding, or hinting can I properly provide, and (4) to court reporters who must deal with a pro se litigant who seeks a record for an appeal.

But, it is not just the trial courts that face difficulties. At the appellate level, the staff of the office of the Clerk of the Supreme Court/Court of Appeals devotes a substantial amount of time to dealing with self-represented litigants as they attempt to comply with the rather precise rules for litigation at the appellate level, which in turn often requires the attention of an appellate judge to untangle the sometimes endless stream of motions, letters, and other documents which many people representing themselves think will be helpful if filed in their cases at the appellate level. It

seems worth noting that it has been the experience of the Committee's chair, with a few exceptions, that self-represented people are unfailing polite and respectful in their dealing with our staff, and when they are in court.

But, in the final analysis, study of this subject in each of the settings mentioned above generates the conclusion that the self-represented litigant typically imposes far greater demands on the time and resources of court clerks, bailiffs, judges and reporters, than do litigants with counsel. But, in addition to the time and resources issue, we must remain mindful of the difficult judicial balancing act between insuring "access" to the courts and handling and deciding cases with impartiality. A recurring theme in any discussion of this subject is the inherent difficulty in attempting to insure that a self-represented litigant has meaningful access to the judicial system without judges having to violate their fundamental obligation to maintain neutrality to all litigants. In short, how much can a trial judge assist a pro se litigant, for example to get the statutory prerequisites for a divorce in the record. The answer to that question becomes more difficult when the case is contested, but it is apparent that the facts necessary to make out the pro se litigant's prima facie case exist but the litigant lacks the knowledge to get them before the court in a proper fashion. And, in an impartial system if an

attorney were in the same spot, would we not expect that the attorney and the PSL would be treated precisely the same? Hopefully, some of the Committee's recommendations address some of these challenges.

The National Pro Se Litigation Movement.

While perhaps a slight digression from a report of this Committee's work, some information must be provided about the status of the national pro se litigation movement. The term "movement" is used loosely and is intended to encompass a variety of players such as anti-lawyer/anti-court individuals, local and state bar associations, lawyers who see an economic opportunity to be tapped, and organized committees, such as this Committee, typically formed under the auspices of a state Supreme Court. Our research shows that around the country a number of vehicles are being used to provide pro se assistance, and that six broad categories can be delineated.

1. Standardized forms with instruction.
2. Explanatory materials: brochures, videos, pamphlets.
3. Increased Assistance from court staff after development of standardized manuals and training.
4. Clinics for pro se litigants often conducted by
5. Legal Services which is part of the unbundling of legal services which will be discussed in more detail later.
6. Bar programs to facilitate pro bono or reduced fee work.
7. Self Help Centers which provide hands on assistance from a court or bar employee in the nature of "pro se facilitators," or "coordinators" to help pro se litigants prepare their paperwork and get ready to appear before the judge.

Within these categories are a good number of variations on these six themes ranging from divorce packets, interactive kiosks, to the California mobile self-help center (a modified RV) which travels to various locations within the population centers of southern California such as the discount store parking lot. Nonetheless, there can be little doubt that the primary medium of the "movement" is more and more the Internet.

The interested reader can quickly grasp the import of the foregoing statement by a simple "experiment." If one performs a internet search using the well known search engine, "Google" using the term "pro se litigation assistance," 479 "hits" are revealed in less than a second. The sites uncovered will range from the webpage for the Self-Service Center of the Superior Court of Maricopa County, Arizona, to the "Outlaws Legal Service" website which has the subheading "All Rights Preserved--All Wrongs Revenged." There are 13 states as of early October 2002 whose court systems maintain pro se assistance websites. They range from the largest and most heavily populated such as Florida and California to their opposites, Idaho and New Mexico. Additionally, a number of Legal Services Offices provide assistance on their websites. Attached to this report as Appendix D is a listing of such websites reproduced from the American Judicature Society's Pro Se Forum website which the Society maintains as an outgrowth of the Scottsdale conference.

An Internet search of this nature also reveals that there are lawyers seeking paying clients under the guise of offering Internet assistance to pro se litigants. But we also find local bar associations such as King County, Washington (Seattle) maintaining self-help websites. And, if one seeks "state of the art," reference must be made to the Waukesha County Family Court Self-Help Center. Their brochure is reproduced as Appendix E.

Based on extensive internet research, the Committee's feels comfortable in making a number of generalized conclusions about what is available through that medium. Those conclusions are: (1) virtually all Supreme Courts presently maintain a website and by our current count 13 of those presently contain some form of assistance to a self-represented litigant, (2) the principle area of the law where assistance is offered on websites is divorce/family law; (3) "good" websites contain downloadable forms as well as instructions for their use; and (4) most websites normally caution against self-representation and recommend seeking counsel, particularly when the matter at issue goes beyond the most fundamental and simple legal problem, and many of such sites provide names, addresses and phone numbers of organizations where legal services for such problems can be had.

The Committee believes that when assistance is provided via a state's Supreme Court official website there are clear benefits because doing so allows the court to maintain control

and insure quality, imparts respectability, and probably provides the most assistance at the least cost.

In the opinion of the Committee, the provision of pro se assistance is largely a matter of providing information, unless procedure, evidence and substantive law is to be revamped to accommodate the lack of training, experience and sophistication on the part of the great majority of pro se litigants. This Committee does not advocate such wholesale changes or the creation of a special system for pro se litigants other than what already exists in the small claims arena.

While the Committee believes that assistance to pro se litigants goes hand in hand with courts' obligation to insure access, the Committee is also fully aware that frivolous or bad faith litigation by pro se litigants occurs. When it occurs, it ultimately falls to the courts to take action to end it. See *Tyler v. Stennis*, 10 Neb. App. 655, 635 N.W.2d 550 (2001). The Committee believes that the remedies available to the judiciary, particularly those found in Neb. Rev. Stat. § 25-824 for frivolous or bad faith actions or pleadings, presently provide sufficient sanctions, but there are instances where judges could and should be more proactive in this regard.

The Committee believes that the foregoing discussion and information provide the foundation for the recommendations which follow.

RECOMMENDATION 1: THAT THE NEBRASKA SUPREME COURT AUTHORIZE THE DEVELOPMENT OF A COURT STAFF MANUAL IN A "FREQUENTLY ASKED QUESTION AND ANSWER" FORMAT FOR COUNTY AND DISTRICT COURTS WHICH WOULD BE APPROVED BY THE COURT IN ORDER TO PROVIDE UNIFORM AND SPECIFIC GUIDANCE TO COURT CLERKS AND THEIR STAFFS ABOUT WHAT INFORMATION AND ASSISTANCE CAN BE PROPERLY PROVIDED TO A SELF-REPRESENTED LITIGANT.

The pro se litigant typically has found that counsel is unavailable to them, usually because of economic circumstances. But, irrespective of the reason a person is self represented the process starts with a search for information. The litigant can turn to a number of potential sources: the Internet, the courthouse staff, the public library, (where a large section of "how to" or "self-help" books are available and of course those same books are available for purchase from a variety of sources, including bookstores and office supply stores).

The Committee directs its first recommendation at the courthouse because we believe that court clerks and their staff have the greatest amount of face-to-face contact with a self-represented person. And, this may be the place where the work of the Committee can have its greatest impact on both litigants and people who work within the judicial system, and do so for the least cost.

An understanding of the present system is necessary. Court clerks are typically operating under a time-honored directive from their judges and/or their associations that "thou shalt not give legal advice." Because of the obvious breadth of that

prohibition, it is not uncommon that a simple request for information about the court or how it operates is rejected and unanswered. We are informed that court clerks frequently find themselves in the position of knowing the answer to a person's question, but feeling constrained from providing the information by the "commandment." In the end, they refuse to share the information they have. This situation has the potential to create a stressful situation for everyone concerned. Court staff, by their nature, want to help people to the extent they can and they feel frustrated when they are unable to provide information which is well known to them. The person at the counter seeking information, who is essentially a "customer," cannot help but feel frustrated, confused, and perhaps angry, when requests for help from public employees are largely rejected.

***Court Clerks: Legal Advice No; Information Yes*.**

The familiar injunction: "Thou shalt not give legal advice" finds its way onto highly visible posted signs in the clerk's office and every person who has worked in a court clerk's office for any length of time has undoubtedly uttered the words, "I'm sorry I cannot give you legal advice." The prohibition is actually well grounded in the duty of the clerk of the court to maintain impartiality and neutrality. Additionally, most court staff are not lawyers and cannot engage in the practice of law.

The Committee finds that the fundamental concept has a good and sound reason and rationale, and the basic prohibition must be maintained. Nonetheless, definitional details can and should be refined to improve interaction with the public, relieve stress on court staff, and provide a measure of assistance to the pro se litigants who will continue to arrive at the clerks' counters to ask questions and seek help.

The Committee recognizes that a great variety of questions are asked of court staff. Simple logistical questions such as the location of the courtroom or the judge's chambers or another department in the building may be asked. But, a self-represented litigant may also ask whether a proposed filing is adequate or needs to be under oath or whether it must be served, and if so, how. The clerk may be asked to tell the judge something or to ask the judge something. Court staff may be asked how a witness is subpoenaed, what has to be listed on a "property statement," or how a judgment is collected. The Committee's research convinces us that most of such requests from a pro se litigant go unanswered. Nonetheless, by some clerks' own admissions, it is not uncommon for court staff to provide answers to similar questions from young lawyers, out of town lawyers, or lawyers who may not be particularly experienced in a certain court system.

As the national pro se movement has gathered steam, one of the primary focuses, and properly so, is this initial encounter with the court system through the office of the clerk of the court. There has been a considerable body of writing about what clerks can and cannot do, for example, see John Greacen, "No Legal Advice from Court Personnel: What Does that Mean?" The Judges Journal (Winter 1995) at p. 10.

Turning to Greacen's writings on this subject, he suggests that the blanket prohibition against "giving legal advice," actually vests

> unguided discretion in the [court] clerk to answer what he or she wishes to answer and feels comfortable answering, and to refuse to answer any questions he or she decides not to answer. The result, as with all unconstrained discretion, is the potential for abuse, favoritism and undesired consequences.

Id. at 10. Greacen also suggests that because self-represented litigants present challenges to court clerks in terms of asking questions which are not normally tendered, or expecting services or help that is not normally demanded, court staff uses the "cannot give legal advice" injunction as a way of dealing with new issues or people they see as demanding or unpleasant. Of course, not all pro se litigants are impolite or disrespectful in their communications with court staff; nonetheless, we

understand that some pro se litigants are difficult and can become frustrated, angry, and abusive to court staff.

Greacen suggests that there are five principles which court staff should keep in mind:

> 1. Court staff have an obligation to explain court procedures and processes to litigants, the media, and other interested citizens.
> 2. There is an obligation to inform litigants and potential litigants of how to bring their problems before the court for resolution.
> 3. Court staff cannot advise litigants whether to bring their problems before the court or what remedies to seek.
> 4. Court staff must always remember the absolute duty of impartiality so that they never give advice or information for the purpose of providing one party an advantage and what they provide to one, they must provide to another.
> 5. Court staff should be mindful of the principle that counsel or litigants may not communicate with the judge ex parte and should avoid letting themselves be used to circumvent that principle.

Id. at 12.

From these five principles, John Greacen then suggests that the following represent "staff guidelines for providing information."

- Provide information contained in court dockets, case files, indexes and other reports.
- Answer questions concerning court rules, procedures, and typical practices which usually involve questions such as "Can I?" or "How do I?"
- Provide examples of forms or pleadings for the guidance of litigants.
- Answer questions about the completion of forms.
- Explain the meaning of terms and documents used.
- Answer questions concerning deadlines or due dates.

Id. at 14. The Committee does not fully embrace Greacen's guidelines on this difficult issue, but his suggestions illustrate the nature and extent of assistance advocated by a prominent author who has been working in this field for a good number of years. What the Committee feels is most valuable from close examination of Greacen's guidelines is the realization that without written and more finely tuned guidelines, as well as examples of proper and improper handling or questions, there is the potential of great differences in treatment of litigants from venue to venue, as well as undue discretion being lodged in court staff to withhold information which may quite properly be given.

The State of Michigan has developed a set of guidelines for court clerks and they include the following examples of assistance which should not be provided to self-represented litigants:

- Provide legal interpretation.
- Provide procedural advice.
- Research statutes, court rules, cases, orders.
- Provide confidential case information.
- Provide confidential information about core of operations.
- Provide opinions.
- Deny access, discourage access, or encourage litigation.
- Provide subject or biased referrals.
- Fill out forms for a party.

Attached as Appendix F to this report is a document used by the Indiana courts providing guidance on what court clerks can

and cannot provide. Attached as Appendix G is a draft statement from the Supreme Court of Virginia's Pro Se Planning Committee to be given to a pro se litigant visiting the court clerk's office which explains what the court staff can and cannot do. While the inclusion of this draft does not suggest that Nebraska court staff should do all of the items listed, the Virginia model shows what another jurisdiction's committee has in mind. One of the Committee's key recommendations is the development of the court clerks manual. The Committee's study of this preeminent issue convinces us that in terms of impacting court staff, this is the keystone. In the Committee's view, it is the one thing which has the highest likelihood of producing significant improvement in the way pro se litigants are dealt with when they approach the court directly for assistance.

The Committee has gained access to a draft of a set of guidelines and instructions for court clerks prepared by the Iowa Judicial Branch Customer Service Advisory Committee dated June 30, 2000, and entitled "Guidelines and Instructions for Clerks who Assist Pro Se Litigants in Iowa's Courts." The format of this manual, in addition to some initial philosophical discussion and foundation, is principally that of frequently asked questions with acceptable answers. The Committee recommends this type of manual because our study shows that it best responds to what court staff seem to want, plus it enhances

the likelihood of uniformity throughout the state. Committee member Janice Walker has headed a subcommittee which is working on the development of a court clerks manual, entitled "Guidelines and Instructions for Court Employees who Assist Pro Se Litigants in Nebraska's Courts." A proposed Table of Contents detailing the subject areas to be covered has been developed by the subcommittee and is attached as Appendix I. The Committee recommends that the Court commit to the concept of the manual as an approved official publication of the Court, after the Court has approved the final content, to be later written and submitted to the Court by the Committee, if the Court accepts this recommendation.

RECOMMENDATION 2: THAT THE NEBRASKA SUPREME COURT, AFTER CONSULTATION WITH THE DISTRICT JUDGES' AND COUNTY JUDGES' ASSOCIATIONS, PLACE ON THE NEBRASKA JUDICIAL BRANCH WEBSITE UNIFORM PLEADINGS AND INSTRUCTIONS FOR A SIMPLE DIVORCE INVOLVING NO CHILDREN AND NO PROPERTY OF CONSEQUENCE, AND AUTHORIZE THE DISTRIBUTION OF SUCH MATERIALS IN HARD COPY FORMAT.

As stated before, the official court websites in many states contain downloadable forms and instructions in areas of the law where pro se litigation is most prevalent, which virtually always includes family law. See sample Material from California Courts Self-Help Center, Arizona Supreme Court's Self-Service Center Website, and Indiana Supreme Court Self-Service Legal Center, found in Appendix H.

The Committee's own research indicates that at the district court level, far and away the most frequent instances of pro se litigation involve domestic relations matters, and that domestic matters overall comprise the largest share of the district court's caseload. Knowing this, early on the Committee elected to begin the drafting of a trial "packet" of forms and instructions in the "simple divorce case," i.e., no children/no property. The Committee's goal was to develop such a packet, ultimately for Court approval, along with a plan for distribution to pro se litigants seeking divorce assistance. A subcommittee headed by Professor Catherine Mahern undertook this substantial drafting project. Professor Mahern's subcommittee developed a packet of forms and instructions in time for use at the district and county judges meeting in July 2002 in Hastings, where a full day of the judges' educational program was devoted to the subject of pro se litigation which had in large part been organized by Committee members Sievers, Luther, and Walker. Additional members of the Committee were involved in presentations in Hastings. This opportunity to be involved with the trial judges provided an opportunity for invaluable feedback which is reflected in this report.

As part of the materials distributed for the judges' educational seminar, we provided the simple divorce packet and asked that the participating judges review it in advance to tell

us what it was missing, how it could be improved, and whether they saw it as a useful and helpful project. While the judges were quite uniform in the view that the materials were helpful and would be an improvement, we also learned that there were several matters we had not covered or had not dealt with in the most useful way. Therefore, since the Hastings meeting, Professor Mahern has continued to work on the simple divorce packet. Our goal is to revise the packet for submission to the Court for approval so that it can be placed on the Court's website in a downloadable format as well as being made available from the clerks of the district courts in hard copy format. In early September 2002, Professor Mahern's subcommittee sent out a modified Pro Se Simple Divorce Packet, reflecting suggestions from the Hastings experience to every district court judge and district court clerk. Also included was a questionnaire inquiring about the issues each confronted with the pro se litigant, copies of the two questionnaires are attached as Appendix J. Of the 56 packets and questionnaires sent to the district court judges, 26 were returned (49%). Of the 86 packets and questionnaires sent out to the district court clerks, 40 were returned (46%). Judges and clerks were asked to review the packet for content and to determine if it would comply with local practice.

The clerks were asked about the frequency of requests received for "forms" or pleadings for persons seeking to file for divorce without an attorney. The majority of respondents indicated that they receive such requests, generally once or twice each month. The clerks expressed frustration in dealing with requests for forms, but also expressed the desire to be helpful without giving legal advice to potential pro se litigants. The clerks were divided on what assistance they felt they could give a pro se litigant, or were willing to give. The majority of clerks felt that the pro se packet from the subcommittee contained few problems, and many clerks provided valuable suggestions on improving the forms and the instructions. Many of these suggestions have been incorporated into a pro se divorce packet revised by Professor Mahern as of October 9, 2002. The majority of the clerks responding agreed to participate in further discussion and/or review of pro se materials.

The judges were asked about the process used in their respective courts for such things covered by the packet such as the process for obtaining an order to proceed in forma pauperis, and the process for setting a case for a final hearing. Although the processes varied in some courts, the variations do not appear to represent an insurmountable obstacle to developing a state-wide pro se divorce packet. When asked what each judge was

willing or able to do to facilitate a pro se divorce petitioner at the final hearing, there was some noticeable variation in response. Two responded that they were willing to do nothing. However, the remainder indicated a willingness in uncontested matters to assist the petitioner, including asking the relevant questions, or instructing them on how to proceed. As to the sufficiency of the packet and the instructions, all judges found them to be sufficient, and three judges made specific suggestions for changes on the forms and instructions. The overwhelming majority of judges who responded indicated a willingness to review other pro se materials.

Information about divorce under Nebraska law goes hand in hand with information about domestic violence and the Committee notes that there is a clear link between the recommendation under discussion and the Nebraska Supreme Court's $53,000 grant from the Nebraska Commission on Law Enforcement and Criminal Justice under the Violence Against Women Act. The purpose of the grant was designed to improve the public's understanding of protection orders and the role of the courts in domestic violence, but will also include the development of instructions and forms available on the Court's Judicial Branch website. See Article, Nebraska Judicial News, p.10, September, 2002.

Attached as Appendix K is a simple divorce packet which the Committee recommends be distributed to the Judges' Associations for consultation and then approved by the Supreme Court.

RECOMMENDATION 3: THAT THE SUPREME COURT MAKE THE PRO SE LITIGATION COMMITTEE A PERMANENT COMMITTEE, WITH THE CONTINUING FUNCTIONS OF (1) MONITORING AND ADJUSTING THE INITIAL ASSISTIVE STEPS AUTHORIZED BY THE COURT, (2) PROPOSING ADDITIONAL RECOMMENDATIONS FOR COURT-APPROVED PRO SE ASSISTANCE AND IMPLEMENTING ANY FUTURE RECOMMENDATIONS WHICH THE COURT APPROVES. THE COMMITTEE'S MEMBERSHIP ROSTER SHOULD BE FORMALIZED TO INSURE THAT CERTAIN GROUPS, BAR COMMITTEES, AND STAKEHOLDERS ARE REPRESENTED.

The life of the Committee was set at three years by the Supreme Court and presently we are at the beginning of the second year. The report and recommendations for action to be taken are being submitted rather early in the Committee's life because the Committee believes that action can and should be taken now. In short, the Committee believes that its understanding of the nature and extent of pro se litigation, the issues and challenges it presents, as well as the potential solutions, is such that the Committee's report and recommendations should be submitted and considered by the Court at the present time. This does not mean that the work of the Committee is concluded. The Committee believes that the matter of pro se assistance is something which requires innovation, experimentation, monitoring, and further study. The Committee does not believe that the recommendations proposed herein are the only things that can or should be done to provide meaningful

assistance. But, from a practical standpoint, the proposed recommendations represent rather small and incremental steps in what should be an evolving process. The proposals herein, in the opinion of the Committee, can be presently taken with an acceptable level of additional effort and financial investment to insure that the judicial system and the organized Bar are truly committed to the proposition that "equal justice for all" is truly intertwined with meaningful access to the courts. And, in the committee's view, in any many instances, meaningful access for many of Nebraska's citizens, particularly the poor and "near poor" cannot occur without systematic pro se assistance.

The recommendation that the Committee be permanent and chaired by a Supreme Court Justice is a practical recommendation rooted in the reality that the Committee probably functions most efficiently when chaired by someone who knows the pulse of the Nebraska Supreme Court.

Additionally, the Committee feels that there are certain representatives of various stakeholders who should be formalized as Committee members to insure the most effective operation of the Committee as well as representation of the sometimes competing interests within the organized Bar. The president of the Bar and the executive director of the Bar Association should be ex officio members. The directors of institutions providing

legal services to the poor, such as Nebraska Legal Services, Creighton University Legal Clinic, and the University of Nebraska College of Law Civil Clinic should be Committee members. The Committee should include at least two district court judges, two county court judges, and an appellate judge other than the chair, plus a judge from some other court. All of the judges should be appointed by the Chief Justice. The chairs of the following bar committees should either be members of the Committee or be empowered to appoint a representative: the Committees on Practice and Procedure, Public Service, Unauthorized Practice of Law, Volunteer Legal Services, and Family Law. The chair of the House of Delegates should also be on the Committee or appoint a member of the House as a representative. At least one district court clerk and a county court clerk should also be on the Committee. The chair of the Committee should have authority to recruit and appoint such other members as are necessary to carry out the Committee's work, including lay members, all of whose appointments will be made by the Supreme Court.

RECOMMENDATION 4: GIVEN THAT THE BAR ASSOCIATION MAKES AT LEAST ONE MAILING EACH YEAR TO EVERY ACTIVE LAWYER IN THE FORM OF A DUES STATEMENT, THE COMMITTEE RECOMMENDS THAT SUCH DUES STATEMENT INCLUDE A SIMPLE ADDITIONAL FORM ASKING EACH LAWYER TO SIGNIFY THEIR WILLINGNESS TO ENGAGE IN PRO BONO REPRESENTATION,

REDUCED FEE REPRESENTATION, OR BOTH, WITHIN THEIR JUDICIAL DISTRICT AND THAT SUCH INFORMATION BE COMPILED BY THE NSBA AND MADE AVAILABLE TO APPROPRIATE ORGANIZATIONS SUCH AS THE VOLUNTEER LAWYER PROJECT.

This recommendation is consistent with the Committee's core belief that ultimately the best system is one in which everyone who needs counsel has counsel and that we should maintain a focus on that goal while at the same time recognizing the reality of the increase in pro se litigation and the obligation of the judiciary and the organized Bar to do something about it. Surveying the lawyers in this way and compiling a list of lawyers willing to help can be a good tool to promote fuller representation of the under represented.

RECOMMENDATION 5: THE COMMITTEE RECOMMENDS THAT THE EDUCATIONAL CURRICULUM FOR JUDGES PERIODICALLY INCLUDE METHODS OF MANAGING CASES INVOLVING SELF-REPRESENTED LITIGANTS WITH EMPHASIS ON ETHICAL QUESTIONS INVOLVED WITH HAVING PRO SE LITIGANTS APPEAR IN COURT.

As discussed earlier, people have a right to represent themselves in court, but it has been suggested that the result is "the client having a fool for a lawyer." See Justice Blackman's dissent in *Faretta v. California*, *supra* (suggesting the right of self-representation also necessarily includes the right to be a fool). This is really not to suggest that self-represented people are ignorant or foolish, but rather is recognition that the complexity of litigation, in anything other than the simplest matters, present the self-represented litigant

with a bewildering array of procedural rules, evidentiary dictates, and local court rules and "judicial customs" unique to a particular judge or geographic area. Therefore, the question inevitably arises as to the measure of assistance which can legitimately be provided by the judge while maintaining impartiality.

Several surveys of Nebraska trial judges reveal a wide variety of philosophical attitudes which range from "I provide no assistance whatsoever" to "in a simple divorce case, I do whatever is necessary to get the divorce properly done." However, the Committee believes that fairness in the administration of justice as well as our open courts provisions require that a baseline for judges who must deal with the frequently-encountered questions and issues of pro se litigants should be developed. In this way, the litigant has an improved opportunity for "equal justice" because certain recurring problems will be handled in the same way, irrespective of the individual judge or the geographic location.

Although lacking empirical studies to confirm it, the Committee believes that most judges are not adverse to this type of assistance. The Committee believes that the litigation process can be broken down into six areas and then the recurring questions in those areas addressed:

1. Pleadings: ("You say my pleading is inadequate, what are the problems with it?")

2. Service of Process: ("How can I serve papers on a person I can't find?")

3. Trial Procedures: ("Why can't my witnesses be in the courtroom?")

4. Rules of Evidence: ("How do I get my medical bills into evidence?")

5. Enforcement of Judgment: ("Your Honor, you just gave me a judgment, what do I do now?")

6. Post-Trial Information: ("What do I do to appeal my case?")

Obviously, for some issues there is no way to develop a uniform protocol and the decision as to what information to provide or how to respond must be left to the individual judge. Nonetheless, during the continuing education programs of the trial judges, the Committee believes that uniform protocols for certain situations can be developed which will still be consistent with the judges' duty to maintain impartiality.

RECOMMENDATION 6: THE COMMITTEE RECOMMENDS THAT THE SUPREME COURT, CONSISTENT WITH ETHICAL CONSTRAINTS, AND THE NEBRASKA STATE BAR ASSOCIATION SUPPORT INCREASED FUNDING OF CIVIL LEGAL AID PROVIDERS TO THE POOR AS THE PRIMARY MEANS OF EXPANDING ACCESS TO LEGAL REPRESENTATION FOR UNDERSERVED PEOPLE.

Inherent in the above recommendation is recollection of our earlier finding that most self-represented litigants are driven

by economic circumstances, not choice, and that the judicial system and the goal of justice are best served by represented litigants. Consequently, while the Committee believes that the reality of increasing self-representation, and its challenges, cannot be ignored, the first and foremost solution ought to be increasing representation of litigants. This is not to denigrate the need to take steps to make our system more accessible by pro se litigants, but rather it is the Committee's belief that the judicial system and the organized bar must not ignore the root cause of self-representation.

CONCLUSION

The Committee believes that with difficult economic times, as are presently occurring in Nebraska, there is no reason to expect a reduction in pro se litigation, and in fact, an increase is more likely given what we know about what drives people to self representation. Therefore, the Committee believes that access to the courts requires that we within the system move forward at this time to provide some measure of assistance to people who are forced into self representation. The matters recommended above are, in our view, practical steps that can and will make a difference while enhancing access to justice without significant cost to the judicial branch or the organized Bar, although some funding is obviously needed. The Committee is available to the Court for discussion or to answer questions

which are raised by our report. As Chair, I have accumulated a substantial library of literature on the topic which is also available to the Court.

Finally, I commend the Committee for its hard work and diligence and thank each member for their effort.

Respectfully submitted,

Richard D. Sievers, Chair