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DEVELOPING COURT GUIDELINES FOR ASSISTING SELF-REPRESENTED LITIGANTS IN NEW YORK

The inquiries of a growing number of self-represented litigants confront the courts of New York and other states with the dilemma of facilitating access to the courts, which is desired as a matter of public policy, without giving legal advice, which is prohibited as a protection for the public. Prior to the year 2000, little information had been collected to learn the nature or extent of the impact of self-represented litigants using the New York courts. Also, no attempt had been made to determine what information such litigants were seeking or receiving, and what guidelines were being, or should be used, to facilitate court access without giving legal advice. This project makes those determinations for the courts in New York's Sixth Judicial District.

Using information from the Sixth District's trial courts and existing literature exploring the issues involved in assisting self-represented litigants, this project's primary goal is to develop guidelines to aid the courts in providing meaningful assistance while avoiding the unauthorized practice of law. Secondary goals are to ascertain the extent to which self-represented litigants utilize those courts, learn what types of cases involve the greater numbers of such litigants, and examine the courts' perceptions of, and responses to, the challenges posed by such litigants. Specific objectives include collecting reports by chief clerks of the numbers of cases involving self-represented litigants, the proportion of court staff time devoted to responding to their inquiries, the types of assistance currently provided, what directives are used by staff in determining how to answer litigant's questions, how often the court clerk's response is that legal advice cannot be provided, and what are the most difficult aspects of dealing with those litigants. Two other

important objectives are to collect significant numbers of typical questions asked by litigants and typical answers given by staff in the District's courts, and to solicit suggestions on how to improve the courts' responses to litigants.

The primary methodology used for this project was to survey the chief clerks of the 37 trial-level courts in the New York's Sixth District and assess their responses to two questionnaires. The first questionnaire, which was prepared the Office of Court Administration and disseminated statewide during the summer of 2000, sought information about existing programs for self-represented litigants and the impacts such litigants were having on the courts. The second questionnaire was developed for this research project and disseminated to all trial courts in the District during the fall of 2000. To supplement the first questionnaire, the second asked how many cases involve self-represented litigants, how much staff time is devoted to assisting them, what types of cases predominate, what types of assistance are being provided, what directives are used to guide court staff, and how often assistance is denied because legal advice cannot be given. It also requested samples of questions asked by self-represented litigants, inquired about the most difficult aspects in dealing with such litigants and solicited suggestions to improve the courts' interaction with them. The results of both surveys are summarized in this paper, and the responses of each court are recounted in the appendices. The resulting data are analyzed by both court type and location, and reported caseloads are compared with demographic features of the District's 10 counties. In addition, questionnaire responses, existing literature considering how guidelines for assisting self-represented litigants should be constructed, and written directives used in the courts of other states are utilized in deriving practical guidelines for New York that have a sound theoretical basis and use multiple approaches to assist court staff.

The information gathered from the questionnaires provides a robust picture of the nature and extent of the demands placed on the District's courts by self-represented litigants as well as the

courts' reactions to those demands. Generally, the project's objectives were achieved. The courts' responses indicated that the average monthly numbers of cases involving self-represented litigants for the four types of courts surveyed--Supreme & County Courts, Surrogate's Courts, City Courts and Family Courts--were 12, 19, 207 and 223, that those counts represented averages of 19%, 30%, 47% and 46%, respectively, of those courts' total monthly caseloads, and that the average percentages of time devoted to self-represented litigants were 27%, 28%, 44% and 43%, respectively. Dominate case types included matrimonial actions, decedents' small estates and guardianships, small claims and landlord/tenant disputes, and child support, custody and visitation proceedings. Since extensive expenditure of staff time as well as the lack of understanding and emotional upset of litigants were reported as dominant difficulties, such litigants' inquiries clearly present a major challenge. The survey data also reveal that a strong majority of courts guide staff in offering assistance only by directing that "procedural information" may be given and that "legal advice" may not, without defining those terms. Most court clerks stated that they need additional guidance, particularly in determining what constitutes legal advice. Just as important are the typical questions and answers reported by the courts. As well as capsuling the types of information being sought, they provide a practical basis for deducing guidelines that can be applied depending on the nature of the inquiry.

The data elicited by the court questionnaires lead to many conclusions concerning the challenges presented by self-represented litigants, how the District's courts are handling them, and the needs for additional resources to facilitate public access. Court responses demonstrate that cases involving self-represented litigants constitute a substantial share of caseloads, sometimes exceeding 90%, and require large amounts of the time of court staff, sometimes exceeding 70%. Other difficult impacts are litigants' lack of understanding of court procedures, emotionally upset litigants, litigants unwilling or unable to prepare their own paperwork, and their unrealistic

expectations of the assistance courts can provide. The concerns and suggestions of court clerks lead to recommendations for additional and simpler forms, increased data collection on the extent and nature of self-represented litigation, and the provision of someone to whom litigants can be referred when legal advice is necessary. Another important conclusion is that courts need guidelines to assist them in responding to self-represented litigants. After analyzing various approaches to such guidelines, this project offers specific guidance through definitions of legal information which can be given and legal advice which cannot, principles to guide court staff, and a table of categories used to quickly ascertain what information can be provided for each type of inquiry. Although the term “legal advice” may have no inherent meaning, certain recurring characteristics of inquiries that clerks feel they cannot answer nonetheless permit the construction of a working definition of “legal advice” and other guidelines that can help staff assist self-represented litigants. The central proposal in this regard is the following working definition of "legal advice":

A written or oral statement by a court employee that A) interprets the law or recommends a specific course of conduct to a litigant in an actual or potential legal proceeding, B) applies the law to the individual litigant's specific factual circumstances, C) requires the court employee to have knowledge of the law and legal principles beyond familiarity with court requirements and procedures, and D) is likely to substantially affect the legal outcomes that may result for the litigant being assisted.

While there are more than a dozen recommendations overall, the most important are the fashioning of multi-faceted guidelines for staff and training in their use, the development of additional written forms and instructions, and the availability of a source of legal advice when self-represented litigants

need such assistance and existing staff cannot provide it.

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