Addressing the Pro Se Litigant Challenge in Kansas State Courts

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I. Introduction

In early 2007, Kansas Supreme Court Justice Robert E. Davis, now Chief Justice, met with members of the Judicial Council Family Law Committee to express his and the Court’s growing concern about the increased number of self-represented litigants appearing in the state’s courts. In particular, Chief Justice Davis noted that district court clerk’s offices and judges were encountering a high number of pro se litigants in many areas, including family law, landlord-tenant, and other civil matters. The Court wanted to resolve pro se litigant issues, for the benefit of the courts, the public, and the practicing bar.

For those of us attending the Family Law Advisory Committee meeting that day, Chief Justice Davis’ acknowledgement of the pro se litigant challenge was welcome. As most family law practitioners know, anymore it is usually the exception rather than the rule for a lawyer in a domestic relations case to work with an attorney on the other side. Further, it is now a daily occurrence for the clerks’ offices and courts to deal with self-represented litigants, and it has become common for many types of lawyers to work with pro se parties sometime in their practice.

There are different opinions about why there has been a proliferation of self-represented parties in our courts in recent years, but we can all probably agree that something needs to be done to address the challenges that the courts, clerks’ offices, and attorneys face in this regard. So what, exactly, has been done to address the pro se litigant challenge in our state courts?

In June 2007, the Kansas Supreme Court convened the Pro Se Committee (Committee) and appointed its inaugural members. The Committee’s general mandate was to study and provide recommendations to the Kansas Supreme Court on how to resolve the issues relating to the challenges that self-represented individuals present to the state’s legal system. Chief District Judge Ed Bouker, of Hays, is chair of the committee whose original membership included judges, attorneys, court administrators, and district court clerks from all over the state who have volunteered their time. Over time, additional attorneys from throughout the state have been added to give more insight and weight to the concerns of the private bar. The committee’s name has changed since its inception and it is now known as the Self-Represented Study Committee. But its charge has remained the same. As the chief justice reported in his 2009 State of the Judiciary Address, “the intent of this committee’s work is not to marginalize or do away with the need for attorneys, but to make better use of limited resources for everyone involved in the system.”

Once the committee was convened, it began its work with a broad-based discussion to decide what its specific purpose or mission should be. The committee reviewed and considered goals and objectives, as well as mission and purpose statements from other states, ultimately adopting a revised version of the North Carolina Bar Association Pro Se Committee’s purpose statement. The purpose statement of our state’s committee is:

(1) Study the prevalence of self-representation in the Kansas District Courts.

(2) In collaboration with national and statewide entities, including the Kansas Bar Association, study and report on self-representation programs from across the nation and how these programs might improve public access to Kansas courts.

(3) Study methods designed to assist self-represented litigants and the resources (including, time, money, and materials) necessary to implement those methods.

(4) Develop recommendations to encourage self-representing litigants to consult with and use the services of attorneys to the level to which they can afford such services.

(5) Develop recommendations and solicit feedback on those recommendations from the public, Kansas attorneys, and entities interested in access to the Kansas courts.

(6) Report to the Kansas Supreme Court no less than annually on the committee’s progress and recommendations.

With this specific purpose structure in mind, the committee set out to study and address how to make the state courts more accessible to the public. It also planned to address how lawyers could provide affordable, quality legal services to individuals who represent themselves, but who are in dire need of legal representation. In this article, I will highlight what the committee has accomplished since it was convened almost two years ago. I will also discuss what the committee is currently working on. The organization of this review will be in two sections. In the first part, I will discuss objectives one and two — the collaborative study of the pro se litigant challenge, both nationally and in Kansas. In Part II, I will review objectives three, four, five, and six, all of which relate to the ideas shared and discussions that have been had to address the pro se litigant challenge in Kansas. As you will see, some of these ideas have resulted in proposals, projects, and recommendations for the Kansas Supreme Court to consider. Much has been ac-

(Continued on next page)
Part I: The collaborative study of the pro se litigant challenge, both nationally and in Kansas

The increase of pro se litigants is a growing national concern, with individual states approaching the issues differently depending on the nature of their pro se litigant issues, the public’s access to their respective courts, and most of all, financial resources. In Kansas, although our Supreme Court had identified the issues and embraced the challenge, the Self-Represented Study Committee began from ground zero, starting only with the premise that there was a statewide burden on our courts, the practicing bar, and clerks’ offices because of the increased time spent on the issues that self-represented parties pose. In order to quantify the extent of the problem in Kansas, the committee conducted a survey of district judges across the state, which found that 68 percent of the judges who responded encounter a self-represented litigant at least once a week or more. More than 25 percent of judges see self-represented litigants daily. A statewide survey of the clerks’ offices found that, on average, clerks spend at least 15 percent of their time working with pro se litigants. During one of the committee meetings, the law librarian from the Wichita Bar Association estimated that up to one-third of law library patrons are pro se litigants seeking legal advice and assistance.

In an effort to explore how the issues directly affect certain constituencies within the legal system, the committee created three subcommittees: (1) one comprised of its judges, (2) another comprised of its attorneys, and (3) a third comprised of its court administrators and clerks. In addition to attending full committee meetings, these subcommittees have met separately for the past year and so far have made significant progress in identifying specific challenges each unique group faces in handling pro se litigants. Moreover, each of these subcommittees has done extensive work in developing ideas and proposals that should greatly assist in addressing pro se litigant issues. Discussion of the subcommittees’ work is in Part II of this article, which follows below.

Importantly, along with statewide representatives from the judiciary, the practicing bar, and the clerks’ offices, the Self-Represented Study Committee also includes representatives from Kansas Legal Services (KLS), the Kansas Coalition Against Sexual and Domestic Violence, the Judicial Council Family Law Advisory Committee, and the Kansas Bar Association (KBA). The many viewpoints and interests represented on the committee ensure a comprehensive, fair, and sometimes lively discussion on how best to accomplish the committee’s goals and objectives.

In order to help guide and direct the committee’s efforts both before the committee was convened and after, former Chief Justice Kay McFarland appointed a small team of representatives to attend two national conferences in which the delegates learned how states throughout the country are handling the myriad of issues relating to the self-represented litigant. Additionally, the committee has studied and continues to explore best practices that other states have developed, including reviewing materials from the National Center for State Courts.

Collaborative efforts with the KBA are ongoing, with members of the committee having agreed to be a part of a three-hour CLE program at the Joint Judicial Conference and KBA’s Annual Meeting in June 2009 that will address the pro se litigant issue, as well as discuss new opportunities that may be possible for lawyers in this regard. A working relationship with the Judicial Council Family Law Advisory Committee has helped with the development of simple divorce forms, a project that will be discussed below. Finally, the committee has discussed the possibility of providing public education regarding its proposals and soliciting of public comment through the use of town meetings and caucuses, which may be scheduled throughout the state sometime in the future.

Part II: Proposals that should greatly assist in addressing the state’s pro se litigant challenge

There are three significant proposals or projects that the Self-Represented Study Committee has worked on to make Kansas courts more accessible to the public with the overarching goal of involving lawyers to the greatest extent possible. They are:

- Creation of a pilot project for limited scope legal services,
- Proposed judicial guidelines applicable to civil hearings involving self-represented litigants, and
- A proposed pilot project in clerks’ offices in which resource packets are given to self-represented litigants.

Another important project, the development of simple divorce forms for statewide use, has been undertaken by the Judicial Council Family Law Advisory Committee and also will be discussed below.

(1) Limited Scope Legal Services (Unbundling)

An important area that the committee has devoted time and effort to exploring is one that benefits both attorneys and litigants — limited scope representation. Many self-represented parties do not appreciate, nor fully understand the complexities of the legal issues in which they may find themselves involved. Thus, one of the main objectives of the

5. See www.divorceinfo.com/azfaqssp.html for Arizona’s Web site, which provides information to self-represented parties who seek a divorce; see also www.wicourts.gov/forms/1/circuit.htm for standard, statewide forms required by all Wisconsin courts for civil, criminal, family, juvenile, mental commitment, probate, and small claims cases; and finally see www.self-represent.mo.gov/page.asp?id=5240 for Missouri’s “Representing Yourself in Missouri Courts, Access to Family Court” comprehensive Web site.

6. The conferences were – the American Judicature Society’s Midwest Regional Conference on Pro Se Litigation in Des Moines, Iowa, in September 2006 and the National Judicial Conference on Leadership, Education, and Courtroom Best Practices in Self-Represented Litigant Cases, which was held Nov. 3-1, 2007, at the Harvard Law School.
Committee is to find ways of encouraging self-represented litigants to seek as much professional advice and legal assistance from attorneys as they can possibly afford.

In 2007, the Kansas Supreme Court approved a change to Kansas Rules of Professional Conduct, Rule 1.2, Client-Lawyer Relationship: Scope of Representation. This change presumably allows attorneys to provide limited legal services, otherwise known as unbundling. Subsection (c) of Rule 1.2 now reads as follows:

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

Given the change in the rule, the committee solicited the views and advice of Stan Hazlett, disciplinary administrator, and Sheila Reynolds, a Washburn Law professor and an expert in professional responsibility. Both attended a committee meeting in which the discussion focused on whether limited scope representation would be ethically permissible under the rule change. In particular, the committee was curious about limited scope representation in the family law context. Interestingly, in child support cases filed by the Department of Social and Rehabilitation Services, attorneys filing those cases only represent the payee parent with regard to the child support matter, but do not represent that parent on any other issues related to the child, like custody disputes. Courts find this practice acceptable. As well, insurance companies may limit the scope of representation they are obligated to provide. This practice appears to be acceptable with some courts too. Currently, however, judges differ greatly on when or if they will allow a lawyer to withdraw from a domestic relations case once the attorney has entered an appearance and has done significant work on the case.

Ultimately, the committee’s discussion centered around whether limited scope representation could be accomplished without jeopardizing quality representation of a client’s interests. This discussion was particularly interesting with regard to divorce cases, especially the ones with never-ending post-divorce issues. Family law practitioners know that you can be sucked into a divorce case for years when, for example, the parties fight about their kids. And when a party is not paying for your services and the court will not allow you to withdraw, there becomes a disincentive to take on these types of cases in the future. Limited scope representation would allow a lawyer to assist a client with drafting, for example, a property settlement agreement for a certain fee without having to represent the client in issues related to the children. Or in another hypothetical, the attorney could limit the scope of representation to the divorce itself, but be clear that she is not representing the client in any post-divorce matters unless otherwise agreed to.

Other states, such as New Hampshire and Maine, allow limited scope representation. Representatives from their states claim at national conferences that their lawyers have improved their legal practices financially because they only have to focus on legal work and not on any nonlegal matters that result from the litigation. They also report fewer fee collection problems, because the client usually pays for the agreed upon legal services upfront. Lastly, limited scope representation allows the attorney to advise clients on how to proceed in small hearings or dockets, thereby saving the attorney valuable time at lengthy court dockets.

As you can see, the benefits of limited scope representation are numerous for all involved in the legal system, especially lawyers. Besides the anecdotes shared above, there are at least three other compelling and related arguments for limited scope representation. First, there is reassurance for the lawyer that their commitment to the client is limited and that they will not be drawn into protracted litigation for which the client cannot pay and from which the attorney cannot withdraw. Second, this type of arrangement will be attractive to a wider client base, who can afford to pay for some, but maybe not all, of their legal services. This argument also supports the idea that there will be greater public access to lawyers. Lastly, lawyers can represent a client on more complex and professionally interesting aspects of a legal matter and simply advise the client on how to proceed with simpler matters that may not necessarily require an attorney’s involvement.

Thus, with all of this research and leg work completed, the Self-Represented Study Committee will propose that the Kansas Supreme Court approve three pilot projects in which limited scope representation will be allowed, tested, and evaluated in domestic relations cases. Under consideration for the pilot project are the 3rd (Shawnee County), 10th (Johnson County), and 23rd (around Hays) judicial districts. The attorney subcommittee has developed forms, as well as best practices and procedures, for limited scope representation in domestic relations cases, which will allow a client to contract with an attorney only for those services they can afford. The main purpose of the forms is for the litigant to be informed about the scope of the representation that he and the lawyer have agreed to. The forms also ensure that the court will allow the attorney to withdraw from the case after the agreed upon legal work is completed. Subject to the Court’s approval, the proposed pilot projects will occur over a year’s time and local attorneys who participate will be involved in evaluating the results.

(2) Judicial guidelines applicable to self-represented litigants

The committee decided that guidelines were necessary to assist the courts in their administration of justice when a pro se party is involved. With this in mind, the subcommittee of judges drafted proposed judicial guidelines applicable to self-represented litigants, which at this time are to be used for educational and informational purposes only. These guidelines also include helpful commentary to assist judges in applying them. With recognition that the issues and challenges presented by self-represented litigants may differ in courts throughout the state, judges are encouraged to use the guidelines in a manner that best suits their individual court and the litigants ap-

7. See proposed Judicial Guidelines Applicable to Civil Hearings Involving Self-Represented Litigants Including Commentary (prepared by Self-Represented Study Committee Judicial Subcommittee). In October 2008, Chief Judge Edward E. Bouker, 23rd Judicial Dist. Div. 1 presented the proposed judicial guidelines to judges at their annual judicial conference in Overland Park.
pearing before them. The guidelines are specifically tailored for court interactions with self-represented litigants in civil cases in which there is no right to counsel. And they are advisory in nature. To the extent there is any conflict between the Guidelines and the Judicial Code of Conduct, the Code governs.

The guidelines are comprised of four sections: general practices, prehearing interaction, conducting hearings, and post-hearing interaction. All four sections have specific delineated guidelines with commentary following each guideline. Importantly, as a whole, the guidelines make clear that judges should never favor or penalize a self-represented litigant. But they also strongly suggest that judges should encourage self-represented litigants to seek legal counsel. For example, while acknowledging that a party has a right to represent himself, the commentary to Guideline 1.3, Legal Representation, stresses that “judges should make self-represented litigants aware of the consequences of proceeding without an attorney. Judges should explain that self-represented litigants have no right to a relaxation of the standards that apply to litigants who are represented by counsel.”

This commentary is in line with Mangiaracina v. Garcia, a 1986 Kansas Court of Appeals case, in which the court determined, “[a] pro se litigant in a civil case is required to follow the same rules of procedure and evidence, which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment for all litigants.”

The proposed guidelines were made available to KBA members via the KBA’s weekly eJournal on Feb. 17, 2009, in which the committee solicited comments from the bar. As already mentioned, at present, the committee has decided to submit the guidelines to the Supreme Court Education Committee for judicial educational purposes.

(3) A proposed resource packet for self-represented parties

Besides judges, clerks, and court administrators are probably most burdened with the proliferation of self-represented litigants. Increasingly, clerks are spending more time working with pro se litigants, and sometimes these patrons are aggressive and difficult. The clerk’s staff is usually the first and only contact that the public may have with the judicial system. And that impression can affect the patrons’ overall perception of the legal system.

Unfortunately, it is often the case, that self-represented litigants expect clerk staff to provide legal advice and other procedural information. Under K.S.A. 20-3133, these are expectations that clerk staff are not legally able to meet. On a daily basis, clerk staff must provide prompt, accurate, and high-quality service, all while knowing that by law they cannot dispense legal advice. A committee survey of clerk staff and court administrators found that the most frequently asked questions by pro se litigants were family law related questions. But it is also common for self-represented parties to ask clerks for advice in many other types of cases. The subcommittee of clerks and court administrators, therefore, has studied ways to ameliorate or reduce the burden they currently face with pro se litigants, keeping in mind their obligation to provide quality public access to the courts. The subcommittee is currently developing a proposal for a pilot project in which clerks’ offices, in test jurisdictions, would make a resource packet available to self-represented litigants. The resource packet would include:

- Administrative Order No. 232 – In Re: Services by Court Clerks and Staff to the Self-Represented Litigant, which directs clerks to conspicuously post a notice that clearly states that they are prohibited from providing legal advice or assistance.

Chief Justice Robert E. Davis signed this administrative order in January 2009. The notice also includes a detailed list of the services that a clerk’s office does provide, such as giving docketing information, sharing general information about the local court operations and facilities, and encouraging litigants to seek the advice of an attorney.

In addition, the resource packet would include the following:

- A “Self Assessment” tool, which would test a litigant’s ability to represent himself in court;
- A glossary of commonly used legal terms;
- Local court rules;
- A disclaimer stating (again) that the clerk’s office cannot give any legal advice and advising the self-represented litigant to seek advice of an attorney;
- A list of legal resources, including a list of local attorneys who will do low fee or no fee work; and
- A list of Web sites and online resources for forms for all types of cases.

A specific time frame for the pilot project has not been determined. Nor has the full committee yet submitted the pilot project to the Supreme Court for its approval. In the meantime, during the upcoming months, the court staff subcommittee will conduct presentations to district and municipal court clerks to educate them on Administrative Order No. 232 and the proposed resource packet pilot projects.

(4) Simple divorce forms developed by the Judicial Council Family Law Advisory Committee

The proliferation of non-Kansas specific domestic relations forms imposes burdens on the courts and the clerks’ offices. You probably know that you can find generic divorce

8. Id.
9. 11 Kan. App. 2d 594, 595-96; 703 P.2d 1109, 1111 (1986); see also Jackson v. State, 1 Kan. App. 744, 573 P.2d 637 (1977), rev. denied, 225 Kan. 844 (1978) (wherein the Court of Appeals determined that pro se pleadings are to be liberally construed so that relief can be granted if the facts warrant it); but see In re Estate of Broderick, 34 Kan. App. 2d 695, 701, 125 P.3d 564 (2005) (in which the court stated that the liberal construction rule does not mean that statutory requirements may be ignored.)
10. This statute states, in relevant part: “It shall be unlawful for clerks of the district court or any of their deputies to ... perform any services as an attorney or counselor of law in any case.”
11. The Judicial Council Family Law Advisory Committee has a subcommittee, which is reviewing and revising the Protection for Abuse and Protection from Stalking forms. These revisions are not yet complete.
forms on the Internet. But did you know that you can buy a divorce kit at Wal-Mart? These generic forms are often poorly or incorrectly drafted. To make matters worse, the self-represented party fails to complete these forms fully or accurately. Research I conducted almost two years ago shows that many, though not all, of the state’s judicial districts have developed divorce forms for use by both pro se litigants and attorneys. Most of these forms are posted on judicial district Web sites and clerks’ offices have paper copies of the forms available for pro se litigants. Yet, the forms are not uniform across the state and there are some judicial districts that do not have standard forms posted online, including one of the largest judicial districts, the 29th Judicial District, which is Wyandotte County.

So around the time the Self-Represented Study Committee was convened in 2007, the Judicial Council Family Law Advisory Committee created two subcommittees to draft simple forms. One of the subcommittees was charged with drafting simple divorce forms, with comprehensive packets both for a divorce with children and a divorce without children. The other subcommittee was charged with revising the Protection from Abuse and Stalking forms. The Judicial Council Family Law Advisory Committee, though working independently on this project, has worked closely with the Self-Represented Study Committee to ensure that the newly drafted divorce forms are consistent with the committee’s core objectives.

The divorce forms subcommittee completed the development of divorce forms in late 2008, both for cases involving children and cases without children. Both forms packets include the petition, a responsive pleading, a Domestic Relations Affidavit, a notice of hearing, and decree. If there are children involved, a Uniform Child Custody Jurisdiction and Enforcement Act form and parenting plan are included. Both sets of forms also include instructions for completing the forms, instructions for filing and forms for serving the action, and information on how to prepare and what to expect at the final divorce hearing. Most importantly, the instructions strongly recommend to pro se litigants that they seek the professional advice of a licensed attorney. The divorce forms subcommittee considered drafting uniform temporary order forms for the packet, but decided that variations in local practice concerning the issuance of such orders made it too difficult to do so. At present, the Self-Represented Study Committee recommends a link on the Judicial Council Web site to the various judicial districts so that a pro se litigant or an attorney may easily find local rules or procedures relating to the issuance of temporary orders.

The divorce forms, as drafted, were recently approved by the full Family Law Advisory Committee, the Judicial Council, and the Self-Represented Study Committee. In mid-December 2008, they were submitted to the Supreme Court for approval. Currently, the Kansas Supreme Court is seeking comment on the proposed divorce forms from the practicing bar and has set a deadline of July 1, 2009, for such comments. You can use the Internet to access the forms and comment on them by going to www.kansasjudicialcouncil.org.

Hopefully, once the Court is satisfied that there has been sufficient input by all relevant and appropriate constituencies, the Court will formally adopt or approve these forms for their statewide use. Then, it is anticipated that the approved forms will be posted on the Judicial Council Web site. KLS has a licensed “Hot Docs” program, which is a document preparation software that allows a party to respond to a series of questions, which will result in a printed pleading. Through the use of questions prompted by the “Hot Docs” software, the litigant is educated or informed about areas of law or procedure in which an attorney’s professional advice or expertise is needed. The Self-Represented Study Committee supports the idea of uploading the divorce forms into this KLS program for use by low-income litigants.

II. Conclusion

You are now up-to-date on many of the key collaborative efforts that have been made to address the pro se litigant challenge in Kansas state courts. The Self-Represented Study Committee remains committed to addressing these issues for the benefit of all constituencies involved, especially attorneys. As mentioned before, there remains a lot of work to be done. The committee invites your comments and suggestions. These can be sent to Art Thompson, who can be contacted at thompsona@kscourts.org or at (785) 291-3748.

About the Author

Prior to joining the KU Law faculty in 1999, Suzanne Valdez was an attorney with Kansas Legal Services in Kansas City, Kan. As a legal aid lawyer in Wyandotte County and with the Law School’s Douglas County Legal Aid Society, Valdez worked with pro se litigants on a daily basis. Valdez currently serves on the Kansas Self-Represented Study Committee, the Judicial Council Family Law Advisory Committee, as well as the subcommittee that is responsible for drafting simple divorce forms for statewide use by pro se litigants. At the Law School, Valdez directs the Criminal Prosecution Clinic and Externship Clinic. She also teaches Practice in Kansas and Pretrial Advocacy. She wishes to recognize Art Thompson with the Office of Judicial Administration for his assistance with this article.


14. From the Kansas Judicial Branch at www.kscourts.org, the local court rules and forms can be accessed.

15. Marilyn Harp, executive director of Kansas Legal Services, presented the “Hot Docs” software to the Supreme Court in September 2008.