Enhancing Access to ADR for Unrepresented Litigants

Federal Court Programs Provide Models for Helping Pro Se Parties — and the Justice System

By Jerome B. Simandle
Twenty-five years ago the federal courts, responding to the Civil Justice Reform Act of 1990, made deliberate efforts to expand various ADR programs through experimentation with arbitration, mediation, early neutral evaluation, summary jury trials, and other tools. But few of those efforts have reached people whose cases have become huge challenges throughout the court system at both the federal and state levels: unrepresented litigants.

In recent years, however, a variety of initiatives have sprung up in federal courts across the country, all aimed at improving pro se litigants’ access to justice. Through help desks, limited-scope pro bono appointments, and revitalized mediation programs, attorneys and bar associations from New York to Northern California are helping unrepresented defendants understand the laws affecting their cases and discuss options for meaningful resolution. These inexpensive, efficient, imaginative projects should offer us all hope.

A Clear and Consistent Challenge

The processing and resolution of pro se cases remains a major challenge. The number of pro se cases filed in federal courts is significant: of the 279,036 civil cases filed in US District Courts in 2015, 73,745, or more than one-fourth, were filed pro se. This number includes a large number of prisoners. More than 90% of the prisoner cases filed in federal court (most of which involve questions of confinement and civil rights) were pro se. Of the cases not involving prisoners, slightly more than 10% were filed pro se; these may typically allege employment discrimination, police misconduct, Social Security benefits, or a variety of contract or tort claims arising under state law.

In federal courts, all complaints by plaintiffs who have been granted leave to file in forma pauperis are subject to early screening by the assigned judge and may be dismissed sua sponte if the court lacks jurisdiction or if the complaint is legally frivolous, fails to state a claim, or seeks monetary relief from a defendant who is legally immune from suit. Similarly, for prisoner cases, all such claims are subject to screening if they seek redress from a governmental entity or if they challenge conditions of confinement. Such pre-screening for a large segment of the court’s docket, which includes trying to discern the essence of an unrepresented party’s claim, whether the claim is brought in the right court, and whether deficiencies might be cured by an opportunity to amend, can be difficult and time-consuming. The unrepresented party’s lack of knowledge of legal rights and process typically compounds the difficulty for the court, the litigant, and the opponent.

Federal courts have made significant progress in furnishing useful forms and manuals for pro se parties on court web sites and at clerks’ offices, and many courts now have dedicated pro se law clerks to assist judges in addressing such cases. In most clerks’ offices, staff have been trained to answer questions about processes or procedures from unrepresented litigants courteously and respectfully — but without giving legal advice. Perhaps most important, courts have established panels of attorneys willing to accept pro bono appointments in appropriate cases, although enthusiasm for such efforts seems to vary from place to place.

Despite these historical gains in educating, welcoming, and representing pro se litigants, this significant part of the federal civil docket still presents difficulties for case management and resolution. In 2011, the Federal Judicial Center, the education and research agency of the federal judiciary, published a comprehensive report on assistance to pro se litigants in US District Courts. The authors inquired into measures undertaken by the 94 district courts to assist pro se litigants. Chief Judges identified the top three common challenges of non-prisoner pro se cases as: litigants who make unreasonable demands of the court; problems discerning substantive issues; and procedural deficiencies (such as filing on time and conducting discovery). For prisoner pro se cases, Chief Judges mentioned these same concerns, along with logistical problems due to incarceration as well as frivolous filings. The judges identified the principal...
concerns in addressing the legal aspects of the pro se docket as poor quality of pleadings due to lack of knowledge and skills, frivolousness or repetitiveness of some cases, and difficulty in recruiting and appointing pro bono counsel.7

Because most of these identified difficulties (other than perhaps frivolous or malicious filings) are related to lack of knowledge, skill, or understanding of court processes or inability to attend in court, it was not surprising that at least three-fourths of the Chief Judges identified the appointment of pro bono counsel as a “great need” or “moderate need” at the phases of litigation pertaining to discovery, participation in settlement negotiations, and trial.8 Appointment of pro bono counsel was also seen as a great or moderate need in preparation of initial pleadings, participation in Rule 16 or other conferences, and participation in hearings.

The judicial settlement conference, of course, has long been the staple of amicable resolution without adjudication in ordinary civil cases where all parties have counsel. Pro se litigants have not been readily included, perhaps because some judges, not wanting to be perceived as placing undue pressure on the unrepresented party, are reluctant to engage with unrepresented parties, since any negotiated settlement must be accepted voluntarily by the parties who are relinquishing rights, often including a jury trial. Judges who customarily preside at negotiations with shuttle diplomacy between the parties, including ex parte discussions consented to by all involved, may be reluctant to have such ex parte discussion with an unrepresented party who may distort or misremember what was discussed. In practice, judges may choose to conduct settlement conferences with unrepresented litigants on the record to avoid future misunderstandings, while recognizing that on-the-record negotiations are often fatal to candor and compromise.

Court-annexed mediation processes, though probably less intimidating than the judicial settlement conference, present their own obstacles. Mediators are generally paid by the parties, but most pro se litigants are not able to afford such services. Also, mediators need additional training to effectively handle cases with unrepresented parties who may be suspicious, angry, or simply ill-informed.

But many in the federal court system have found ways to help pro se litigants understand and benefit from mediation and judicial settlement conferences. Two notable examples are help desks, sometimes called legal clinics, and new approaches to mediation.

**Pro Se Legal Clinics**

Let’s first explore a sampling of federal district courts that have partnered with bar associations or other nonprofit legal organizations in setting up a free clinic, staffed by one or more attorneys, to advise and assist unrepresented litigants. These clinics are intended to provide confidential advice to pro se parties and those considering filing a civil complaint, advising the parties about the court’s processes, and generally serving as a sounding board to answer questions and give guidance about pleadings, deadlines, hearings, discovery, settlement processes, and information resources, including the court’s PACER system, which allows users to obtain case and docket information online.

In the Federal Judicial Center report, 45% of the Chief Judges sought more information about implementing bar programs to assist pro se litigants, and 64% wanted information about funding for such programs.10 Happily, for courts interested in establishing a clinic, a federal court is permitted to issue a grant from its Attorney Admission Fund to a legal services organization to operate a pro se legal clinic assisting federal civil litigants.11 Such a grant benefits bench and bar by helping litigants identify and present their claims in an appropriate way, have a realistic idea of federal court processes, and get to the merits much sooner.

Federal courts addressing special needs of pro se cases can look to a number of success stories.
For example, in the Northern District of Illinois, the Courthouse Help Desk opened in Chicago in 2006, operating under a grant from the Chicago Bar Foundation to the Legal Assistance Foundation of Metropolitan Chicago, which selects and trains the lawyers who maintain the desk. Volunteer attorneys on the desk, which operates by appointment only, assist pro se litigants by reviewing pleadings, explaining the legal process through the various stages of litigation, and discussing strategies for how people can best represent themselves. This program, the oldest of its type, has already helped several thousand pro se litigants. According to Chief Judge Ruben Castillo, the Help Desk enables the non-prisoner cases to move more quickly to resolution on the merits, and litigants are expressing satisfaction at getting their day in court.

The Eastern District of New York’s Federal Pro Se Legal Assistance Project in Brooklyn has operated for one year, completing 290 consultations. The court granted funds to the City Bar Justice Center, which selected and trained the pro se attorney who opens the project’s courthouse office four days a week. The court publicizes the service through fliers, and both judges and court staff can refer pro se litigants to the clinic. According to US Magistrate Judge Lois Bloom, the judges are already seeing a difference in the quantity of pro se practice and in the ability to get to the merits of the dispute with less time expended on preliminary, formalistic matters. The project’s staff attorney is assisted by pro bono attorneys from major law firms who volunteer one day per week.

The Northern District of California partners with the Federal Pro Bono Project run by the San Francisco Bar Association. As in New York’s Eastern District, the California Help Center’s director assists litigants by explaining the law, reviewing paperwork requirements, and giving guidance at each stage of litigation. With such help, unrepresented parties are able to better prepare for the settlement opportunities presented by the court’s various ADR programs.

In Syracuse, the Pro Se Clinic of the Northern District of New York is maintained by the Federal Bar Association through a court grant. One unusual feature of this program is its ability to provide telephone help for litigants who may live far from the courthouse. In operation for about seven years, the clinic has been very helpful in preparing pro se cases such as employment discrimination and other civil rights cases for resolution. The staff attorney may also refer parties to the county bar attorney referral service.
Overall, these courts report that their pro se clinics have improved access to justice, have met with acceptance and appreciation by the unrepresented parties, and have been a gratifying experience for their staff attorneys and pro bono volunteers, all while preserving the neutrality of the court in these disputes.

**Limited Appointment of Pro Bono Counsel**

Some cases benefit from more specific attention from an attorney. Most federal district courts maintain rosters or lists of counsel who may be willing to accept an appointment to represent an indigent pro se party under 28 U.S.C. § 1915(e)(1), which says that an attorney may be requested — but not mandated — to represent an indigent civil litigant. Attracting voluntary pro bono counsel, however, can be difficult, especially when a case promises to be time-consuming and possibly unwinnable and the client is a difficult one.

The concept of a limited appointment, for purposes of a settlement process only, for example, can overcome an attorney’s reluctance and help resolve the case. When the event — such as mediation — concludes, so does the appointment. Counsel at the negotiation stages have proven to be beneficial in explaining the process, making a realistic appraisal of the strengths or weaknesses of the case, and arriving at a realistic view of the value of the case.

Once again, success stories abound. The District of Rhode Island recently requested volunteers for limited appointments from its pro bono panelists, and a program is underway. Likewise, the Eastern District of Missouri will make limited appointments in non-prisoner cases. In the Northern District of New York, the limited appointments in non-prisoner cases are made through the Civilian Pro Se Program, which is run by the Federal Bar Association. The Southern District of New York’s Pro Se Litigation Office will make limited appointments for purposes of early mediation, especially in employment cases, and reports a settlement rate of nearly 70% in 2015, placing about 60 cases per year in pro bono mediation; the attorneys include a law school clinic’s faculty who supervise clinic students, and the numbers of cases are growing each year. (See the article on page 13 of this issue by Rebecca Price on the Southern District of New York’s program).

Similarly, upon referral through the Northern District of Illinois’ Clerk’s Office, the Chicago Lawyers Committee for Civil Rights Under Law selects pro bono counsel for limited service, especially in employment cases, in the Settlement Assistance Program. The pro bono attorneys appear in judicial settlement conferences, which can also be an attractive opportunity for newer attorneys seeking such experience.

In one of the few programs so far targeting pro se prisoner cases, the Northern District of California’s Pro Se Prisoner Early Settlement Program will include volunteer counsel appointed on a temporary basis for mediation before a Magistrate Judge, usually conducted at a state prison facility, after a trial date has been set. The Federal Pro Bono Project’s Legal Help Center places both full- and limited-purpose counsel. Similarly, in the Southern District of New York, counsel are recruited for discovery or mediation aspects of prisoner cases through the Limited Scope Discovery Program, maintained by the Federal Court Council’s Public Service Committee. To date, this program has placed 48 such cases with limited-scope counsel.

**Mediation Efforts in Pro Se Litigation involving Prisoners**

As mediators know very well, a respectful, patient, and versatile mediator can provide a meaningful opportunity for the pro se litigant to tell his or her story and seek resolution of a dispute. Numerous District Courts have mediation programs at various stages of litigation for pro se prisoners in cases that survive the early screening process.

For example, the Northern District of New York reports success in its revitalized prisoner mediation
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program, which is conducted principally by two US Magistrate Judges. These sessions, which take place in the courtroom, have resulted in approximately 70 settlements out of 125 cases so far. In the Northern District of Illinois, the Magistrate Judge is the mediator in the Settlement Assistance Program for prisoner and non-prisoner cases; the non-prisoner mediations are held at the courthouse, while the prisoner mediations are conducted by video conference to the prison. The overall settlement rate for both kinds of cases is 75%.

In Rhode Island, on the other hand, after reviewing the parties’ mediation statements, the District’s ADR Director sets up mediations for prisoners at the prisons, where success depends upon a level of trust among the mediator, prison staff, and unrepresented prisoners. Likewise, the ADR Director for the Central District of California will also serve as a staff mediator in cases in which no panel mediator is appointed; such mediation duties are usually performed, however, from a panel of more than 200 trained mediators.

Perhaps we see judges and court staff serving as mediators in pro se cases because of cost. Ordinarily, court-annexed mediation programs permit the mediator to charge an hourly fee, set or limited by court rule. While some courts request
limited pro bono service by panel mediators, the funding of mediation before a private neutral is another impediment to enhancing access to justice for the unrepresented litigant.

Conclusion

As more of our 94 district courts look to enhance ADR opportunities for unrepresented litigants in prisoner and non-prisoner cases, we have an increasing number of successful models in courts of all sizes. The common denominators include judges and court professionals who are willing to attempt new solutions.

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Endnotes

1 Out of 52,531 prisoner cases filed, 48,628 (92.6%) were filed pro se.
6 Id.
7 Id. at 35-36.
8 Id. at 26.
9 Id. at 26.
10 Id. at 37.