

**Report on the Survey of Judges  
on the Impact of the Economic Downturn  
on Representation in the Courts**

**(Preliminary)**

**ABA Coalition for Justice**

**Linda Klein, Chair**

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## **I. Executive Summary**

In late 2009, the American Bar Association Coalition for Justice undertook a study of judges throughout the United States to determine the effect of the economic downturn. The study focused on three important questions. First, have the judges seen a change in the number of filings in their courts? If so, have they increased or decreased and if they have increased, what types of cases have seen the most growth? Second, are judges seeing a change in the number of people being represented by attorneys in cases before them? Third, what is the impact of being self represented on cases and how does it impact both the parties and the courts?

With regard to the number of cases, a majority (53%) said that the number of cases increased in 2009. Twenty percent (20%) said that cases have stayed the same. Eighteen percent (18%) of the judges answered that they have seen the number of cases actually decrease. The judges who answered that cases had increased were asked a follow up question about the types of cases that have increased. The most common increase was in the area of foreclosures (61%). Second, was an increase in domestic relations cases (49%). There has long been an acknowledged link between the economy and divorce rates, as economic issues tend to put the greatest amount of pressure on a marriage. The third most common area of increase was consumer issues (49%), and the fourth was housing matters other than foreclosures (26%). All four of these categories are certainly related to the economic conditions of the parties and therefore likely to the slow down in the economy as a whole. The fact that not all judges have experienced the same impact was anticipated.

The economic downturn does not affect all communities equally and therefore you would expect to see that the majority of the courts saw increases, some saw decreases and other segments saw no change at all.

The judges were asked if they had seen a change in representation in their courts in 2009 civil matters. Sixty percent (60%) of the judges stated that fewer parties were being represented. Thirty-seven percent (37%) said that they had not seen any change in the level of representation. Only 3% said that representation had increased. The judges were asked how the lack of representation impacts the parties. While 37% said there was no impact, and 3% said that outcomes were better, 62% of all judges said that outcomes are worse. This finding is important mainly based on the perspective from which it is offered. A number of studies have been done that try to measure the impact of self representation on a case. They have been difficult. For example, what is success in a dissolution of marriage? A divorce is rarely denied by a court. What measure should be used? A recent study in Wisconsin used the length of the case and the amount of family support, but these are only indicators and are closely correlated with the complexity of the case. This study is unique in its perspective. We are seeing the issue from the point of view of the judge, the person who often is the finder of fact and who will ultimately determine an appropriate judgment. This is a direct measure on the impact to the case. Here, 62% of judges say that not having an attorney hurts parties.

Those judges who said that parties were negatively impacted were asked how parties were negatively impacted.

Ninety-four percent (94%) of those responding stated that the failure to present necessary evidence was the most common problem. Eighty-nine percent (89%) said that parties were impacted by procedural errors. Ineffective witness examination (85%) and failure to properly object to evidence (81%) were both cited by more than four fifths of the judges as issues. Seventy-seven percent (77%) of the judges cited ineffective arguments. Several judges noted that even when a party won at hearing, they were not able to proffer an enforceable order or judgment to the court.

Most state budgets are being cut due to the slow down in the economy affecting state revenues. This in turn has resulted in cuts to courts and their staffs. Courts have no choice but to become more efficient. However, the growth in self represented litigants has the opposite affect on the courts. While only 62% of judges said there was a negative impact on the party's case when he/she was self represented, 78% of the judges said that the court is negatively impacted by parties not well represented. Ninety percent (90%) of the judges who stated courts were negatively impacted said that the court procedures were slowed. Judges believe that having both parties represented allows the court to operate more efficiently. Seventy-one percent (71%) of the judges said that pro se litigants use more staff time to assist them. More than half the judges (56%) stated that the court is negatively impacted by the lack of fair presentation of relevant facts. Forty-two percent (42%) of the judges recognized that the impartiality of the court may be compromised to avoid injustice in the cases. This means that the judge may have to act in place of an attorney to make certain that justice is done. Compromising the integrity of the court is a high price to pay.

The growth of self representation does not just affect the poor, although as studies have clearly shown they are impacted. But, 46% of the judges found that the number of people who were self represented and did not qualify for court appointed attorneys had increased.

## **II. Methodology**

The survey instrument was distributed to state trial judges through a snowball sampling technique. The ABA Judicial Division has a conference of State Trial Judges with about 900 members. About half of the members of the Conference allow the receipt of items from the ABA. An email was sent to those judges from ABA President Carolyn Lamm asking that they take the survey and forward it to their colleagues who are not ABA members. In addition, state court administrators and judicial educators were contacted directly and were asked to distribute the survey within their states. Leaders of state judicial organizations were also asked to distribute the survey to their members. Snowball sampling was utilized because there is not at present an available national sampling frame for state court judges. There is no list of judges from which to draw a probability based sample. According to the National Center for State Court's most recent work load study, it is estimated that there are approximately 9,461 state court judges of general jurisdiction nationwide. There are 5,592 judges of limited jurisdiction and 3,077 judges of specialized jurisdiction (e.g. family, juvenile, probate etc.). In addition, there are 2,283 magistrates associated with these courts. This makes the potential pool of judges about 20, 368. In all, 1,176 judges took the survey; 986 completed it.

For a population in excess of 20,000, a sample of 784 would be necessary to be 95% certain that the findings were within  $\pm 3.5\%$ . This sample is 20% larger, although the sample was not drawn based on a probability based method; the sample appears to be representative of the nation's state judiciary. There is still a strong likelihood that it reflects the views of judges in the United States.

The survey was accessed by respondents online; no written version was made available. Not all questions were presented to all respondents. Certain internal logic within the survey moved respondents to separate follow-up questions based on their answers to prior questions. Questions eight through twenty provide the substance of the report. The questions were focused on the court's dockets in 2009. Question eight asked whether the number of cases has increased, decreased or stayed the same. Those who answer question eight that cases have increased, were taken to question nine to indentify the types of cases that have increased. All judges who handle civil matters were then asked question ten, the impact of the economic downturn on representation. Question eleven asks the impact of not being represented on litigants. Those who state that there was a positive impact were taken to question twelve to explain how they were better, those that thought parties were negatively impacted were taken to question thirteen to explain the negative impact.

Question fourteen asks how the court is impacted by self represented parties, and question fifteen asks those who state that the court is negatively impacted, to explain the impact. Question sixteen asks the court to identify the types of cases in which self represented litigants cause the most problems. Question seventeen asks the judges if requests for obtaining counsel have increased, decreased or stayed the same. Question eighteen asks if the number of people who are not represented but did not qualify for a court appointed attorney has increased, decreased or stayed the same. Question nineteen asks the judge what the court would need to operate more efficiently. Question twenty asks what the potential solution to these issues might be.

The survey was designed to be relatively brief so that the imposition of time being requested would be reasonable. The Committee believed that this would enhance the response rate. Data was collected from the middle of February to the end of June 2010.

### **III. Results**

Respondents came from throughout the country. Thirty-seven states, Puerto Rico and one Native American Court were included in the study. Out of the sample, 293 of the 1175 respondents refrained from answering the question that identified their state. Nine states had significant participation, in order of magnitude they were: Georgia (124), Florida (108), Texas (91), Louisiana (83), New York (74), Minnesota (59), Washington (48), and Tennessee (37). Eighty-three percent of respondents (966) stated that their title was “judge.” Ten percent (10%) were either associate judges or magistrates.

Two thirds of the respondents were from courts of general jurisdiction; 26% from courts of limited jurisdiction and 7% from courts of special jurisdiction. Thirty percent (30%) of the judges identified their courts as rural, 28% suburban and 41% urban. Together these responses help reflect that the sample is representative of the state judiciary within the United States as a whole. Nationwide, 57% of trial courts are courts of general jurisdiction, 27% are of limited jurisdiction and 15% are of specialized jurisdiction. Our sample slightly over-represents general jurisdiction courts, matches limited jurisdiction courts and under-represents specialized courts, but is generally distributed within proportions similar to the distribution of judges. According to census data, the national population is about 21% rural and 79% metropolitan. The respondents track this distribution fairly closely, with 30% of judges coming from rural communities and 69% from metropolitan areas. Although the distribution does not match the population exactly, it is similar and reflects the trend that there are more judges per population in rural areas than compared to urban.

Responses to the question with regard to the types of cases that are heard show that most of the respondents hear multiple types of cases. One hundred and seventy one answered that they only hear criminal cases. These judges were asked a follow-up question, “Has the number of individuals who are not represented by counsel increased, decreased or stayed the same?” Twelve percent (12%) saw decrease, 59% said it has stayed the same, but 29% said that it has increased.

Because of the constitutional right to an attorney, it is not surprising that the vast majority of criminal judges have seen no change but, it is surprising that a substantial portion have seen an increase in self represented defendants in the context of criminal matters.

The next area of inquiry was with regard to the caseload of the courts as a result of the recession. A majority of judges (53%) who hear civil matters said that the number of cases filed in 2009 has increased. Twenty-nine percent (29%) have seen decreases and 18% have seen no changes. This variation is not surprising as the economic impact has not been equal across all communities. Some states have seen a huge impact on jobs, and some have only seen a little.

The judges who also saw increases were asked to identify the types of cases that have increased. The table below shows that there were increases in a wide variety of matters but that the most common have been foreclosures, domestic relations, consumer law and housing matters other than foreclosures.

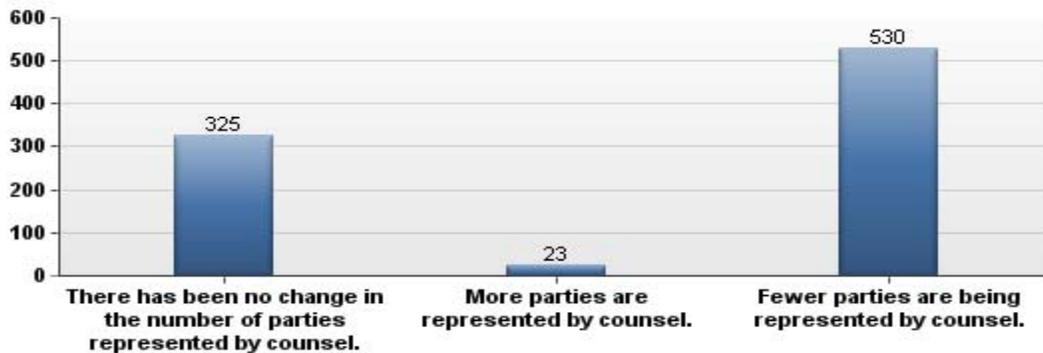
There have been a number of studies in the past that have shown a strong correlation between the divorce rate and the economy. As stated earlier, economic issues put the greatest amount of pressure on a marriage. These four leading cases are all clearly in relation to the economic situation.

Table 1.  
 What type of cases have increased? (please mark all that apply)



The primary area of inquiry was with regard to representation. The table shows that 60% of judges say that fewer people were being represented by counsel. The trend in self representation has been growing in most courts over the past decade. Judges are saying that they saw continued growth in 2009.

Table 2.  
 In 2009, what was the impact of the economic downturn on representation in your court?



The most important issue with regard to self representation is what is its effect. The table below shows that while 37% of the judges say that it is not problematic, 62% say that individuals are negatively impacted. Only a very few say that there is a positive impact.

Table 3.  
How are parties impacted by not being represented?

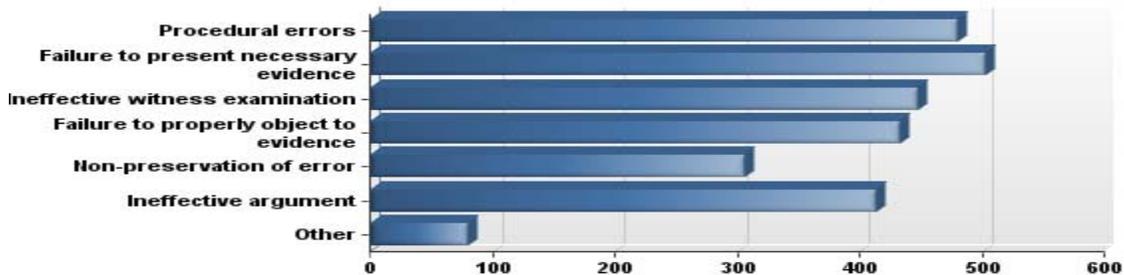


These findings are important when the standpoint of the judge is considered. A number of other studies have tried to measure the impact of self representation on cases. How should it be measured, how do you determine the effect? These studies have tried to establish certain indicators or proxies for impact that range from the amount of recovery, to the length of the proceeding. Here, we are dealing with the trier of fact in many cases, but even in the case of a jury trial the judge is the person ultimately charged with entering the judgment or one order. This perspective is both unique and powerful. If those who are making the ultimate decision in a case are saying that parties are being negatively impacted, no indicator or proxies is required.

Those judges who answered that self represented parties were negatively impacted were asked the follow-up question of how they were negatively impacted. The table below shows that there is a strong consensus that parties are hurt by failure to present necessary evidence, suffer from procedural errors, are ineffective when examining witnesses, and fail to properly object to evidence.

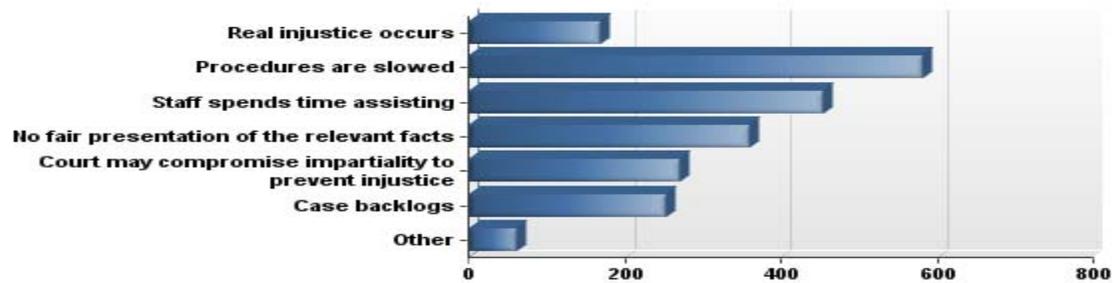
Additional comments by the judges indicate that pro se litigants do not provide legal research or support for their positions; they fail to prepare judgments and orders, or prepare orders that are improper or unenforceable.

*Table 4.  
How are the parties negatively impacted? (please mark all that apply)*



While 62% of judges said that their parties are negatively impacted when they are not represented, 78% said that the court is negatively impacted. Only 21% said that court is not affected. Those judges who answered that the court was negatively impacted were asked how the court was impacted. The table below shows that there is a strong consensus that self represented litigants slow court procedures. Seventy-one percent (71%) of the judges are concerned by the time staff must use to assist self represented parties.

Table 5.  
 How is the court negatively impacted? (please mark all that apply)

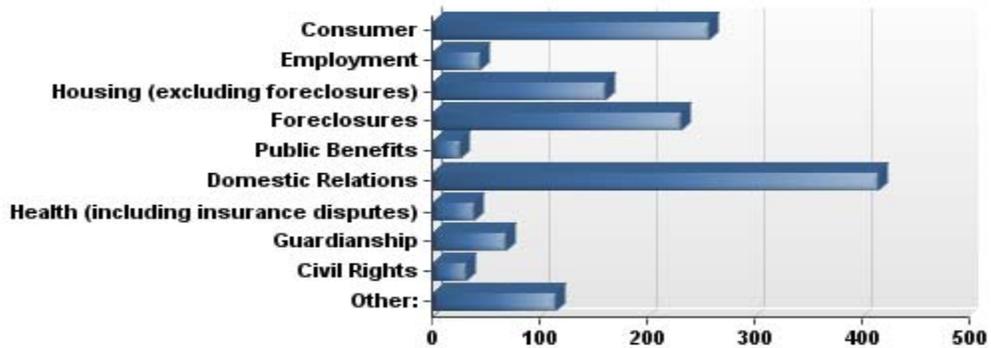


Fifty-six percent (56%) of the judges think that the court is negatively impacted when there is not a fair representation of the facts. This is a fairly sophisticated analysis that the court suffers if it cannot properly do its job. Likewise, 42% of judges are concerned that they compromise the impartiality of the court in order to prevent injustice. This may explain why only 62% of the judges say that parties are negatively impacted if the court is trying to prevent such negative impact; however the court suffers in doing so. Also troubling to 26% of the justices is that the court allows an injustice to occur when one of the parties is not able to properly present the valid claims or defense that they might have.

The top four areas of growth in cases are also the top cases in which self representation is most problematic. Table six shows that the most common type of case is domestic relations followed by common law issues, foreclosures and housing.

Table 6.

*Parties not being represented has created the most problems in the area of: (please mark all that apply)*



The courts are seeing an increase in requests for obtaining counsel, 56% of those responding said that they have seen an increase. Forty-three percent (43%) said the level has remained constant. The growth in self representation cannot be attributed solely to the growth in the number of people who would qualify with claims for legal aid or other court appointed lawyers. That said, this is definitely a cause, along with the chronic underfunding of legal services. However, 46% of all judges saw an increase self representation among individuals who did not qualify for a court appointed attorney. This may represent a growing trend toward self representation of the middle class.

The courts were asked how they could operate more effectively. The overwhelming consensus at 86% is that the courts would be more efficient if both parties were represented. Contrary to the popular belief that lawyers slow the wheels of justice, the court views advocates as an efficiency within an adversarial system.

Sixty-four percent (64%) of the judges agreed that the courts would operate more efficiently if the parties better understood the system.

When asked what is the possible solution to more representation within the courts, 73% responded that legal services funding should be increased. Almost as high, 68% were in favor of more pro bono attorneys. The next highest suggestion at 44% was pro se training for parties, and 36% identified online self completing forms. The unbundling of legal services had the lowest support at 19%.

#### **IV. Conclusion**

Our system of justice is based on an adversarial model. It also has a sophisticated set of rules and procedures that allow it to operate. For it to operate most efficiently, each party should be represented by counsel. When parties are not represented, we now have direct evidence that those who are not represented actually hurt their cause by doing so. However, they are not always damaged because the judge will often work to prevent an injustice from happening in many cases. The judge recognizes that in doing so they may appear to compromise the impartiality of the court. Such an appearance can have a long term negative impact on the court.

When parties are represented, the system is more just and more efficient. Judges think that the best solution is to find ways to get more people representation when they appear in court.