Impact of Order Preparation: Alameda County (2005)

ACCESS TO JUSTICE:

DELIVERING EFFECTIVE SERVICE TO PRO SE LITIGANTS

By Hon. Evelio M. Grillo
Alameda County Superior Court

The image invoked by the term "self- represented litigant" is of a defendant representing him or herself in a criminal case. The reality, however, bears little resemblance to this conventional stereotype. Quite plainly, statistically the typical pro se litigant is a party to a Family Law case, a landlord-tenant or small claims action, or a probate proceeding. Unlike pro se criminal defendants, who often are self-represented because they seek to vindicate a principle and not because they lack access to counsel, the pro se litigant in a civil court is usually self- represented because of his or her economic circumstances, and case law that universally holds there in no right to publicly funded counsel for the indigent or working poor during civil proceedings, even where the right involved is fundamental, such as the right to dissolve a marriage.

Large numbers of self-represented litigants in California's civil courts are limiting timely access to our civil courts. The sheer (and increasing) numbers of self-represented litigants, the litigants' unfamiliarity with court processes, and multiple and/or defective filings by large numbers of pro se litigants has filled court calendars as self-represented litigants, a significant number of whom are uneducated or marginally literate, seek justice in our civil courts. The potential for the creation of judicial gridlock brought on by the a large number of self-represented litigants seeking court resolution of a civil dispute without the

assistance of counsel is apparent from the statistical profiles of the typical civil calendar in a California court. In Alameda County (the author's jurisdiction) at least one or both parties in the following types of civil cases are self-represented: 73% in Family Law cases, 42% in probate guardianship proceedings, and 87% in limited jurisdiction landlord-tenant cases. Alameda County's statistical profile is consistent with the statistical profile of other jurisdictions: Statewide, at least one of the litigants is self-represented during all or part of a typical family law matter in upwards of 70% of the cases.

The sheer (and increasing) numbers of self-represented civil litigants do not suggest of a simple solution to the problem. But what if the numbers alone do not tell the whole story. More to the point, through changes in the courtroom dynamic --specifically, how courtroom services are delivered to self-represented litigants—is it possible to increase access to justice for all litigants, or is gridlock and calendar congestion is an inevitable consequence of the large increases in the number of self-represented litigants statewide? Based on the experience of a pilot program in Alameda County, the answer is yes to the first question, and no to the second.

THE DAY OF COURT PROJECT

During 2005, Alameda County Family Law Division established the Day-Of-Court Assistance Project. The Project was established in response to extreme congestion in the court's Family Law calendars brought on by changes in the law and increased numbers of pro se filings in the Family Courts. Litigants, self-represented and otherwise, were having to wait weeks and sometimes even

months to obtain a hearing for routine Family Law matters such as custody, support and visitation, and Family Law trials often were conducted piecemeal. As the calendars grew more and more congested, the Family Law bar began to complain about the lack of access to the courts and the length and duration of the Family Law calendars. During 2004 the local bar, the Family Law Facilitator, Family Court Services and judicial officers formed a working group to address the bar's concerns. During these discussions, anecdotal evidence from the participants suggested that pro se litigants who received durable court orders on the day of their court hearing –*i.e.,* a written order that clearly laid out the court's decision-- during subsequent months appeared in court less frequently and filed fewer motions seeking the same or similar relief than pro se litigants who left court with an oral ruling, or who were asked to prepare a court order from the clerk's minutes. Based on these observations and the anecdotal evidence, the working group formalized its relationship with the court and the Day-Of-Court Assistance Project was born. Using volunteers from the local bar and local law schools, and working in conjunction with the Family Law Facilitator's office, the goal of the project was to have each and every pro se litigant leave the court after a hearing with a clear, valid and enforceable court order, irrespective of whether this issue decided was custody, visitation, child or spousal support, or property division. If the judge made a ruling on any of these issues during a Family Law hearing, the ruling was to be reduced to a written order by the volunteers, and an endorsed filed copy of the order was to be provided to the

litigants before the litigant left court, or at a minimum, was to be mailed to the litigant within 24 to 48 hours.

THE EVALUATION

After the project was up and running, the reports and anecdotal evidence seemed to suggest that the project was meeting its stated goal of increasing the durability of Family Law orders and decreasing the number of multiple filings arising from the lack of a clear and durable order after hearing. In order to confirm what judicial officers, family law facilitators, and volunteer attorneys were perceiving, the court's Self-represented Litigants Subcommittee requested an evaluation of the data by the court's Planning and Research Bureau (PRB). During the fall of 2007, the PRB conducted a study in which it examined the relationship between the preparation of durable court orders in court on the day of the hearing, and the probability that an Order to Show Cause covering the same subject matter would be filed in subsequent months. The sample period was the first two weeks of March 2005. The two populations examined form the sample period were as follows:

1. Pro se litigants who were asked to prepare an order after hearing; and
2. Pro se litigants who were provided with a court order prepared in court by the judge, a courtroom clerk, the Family Law Facilitator, or a volunteer.

The study excluded from the data cases in which an attorney represented one of the parties and the attorney was asked to prepare the order after hearing, hearings where the parties (even if both were pro se) came to court with a

stipulated court order, and hearings during which no orders were made. These three sub-groups were excluded from the sample in order to make sure the data was not skewed by including in the sample population cases in which a represented party prepared an order, there was prior agreement to an order, or the court made no order.

The study period for the sample population (March 2005) was 2.5 years. During October 2007, each case in the March 2005 sample population was examined to determine whether a new OSC was filed in the two and one-half years since the March 2005 hearing. The study also controlled for differences between subject areas, *i.e.*, if the March 2005 order covered child visitation only, a subsequent OSC filed for child support or spousal support would not be counted as a subsequent order covering the same subject area.

The results of the study are nothing short of groundbreaking. In short, the study confirms that pro se litigants who are provided with a written court order at the time the court makes a ruling or issues an order, return to court seeking relief on the same issue at half of the rate of pro se litigants who are asked to prepare their own court orders. Stated another way, pro se litigants who are provided with a timely court order use 50% less courtroom services than pro se litigants who are left to fend for themselves. In terms of the raw proportions, 41% of pro se litigants who were not provided with a court order filed an OSC covering the same topic area within 30 months; and only 20% of pro se litigants who left court with a court order re-filed an OSC covering the same topic area within the same

time period. The probability of these findings being the result of random chance is low[1].

These findings have several significant implications for the courts and for pro se litigants, particularly in areas such as Family Law. The most obvious lesson to be learned is that how courts deliver services can and does impact access to the courts. Or stated another way, providing services to pro se litigants does not increase the use of court services by pro se litigants and actually increases access to the courts for all litigants. These findings also suggest it is time to rethink the paradigm used to deliver justice to pro se litigants by some courts and judicial officers. Expecting or requiring pro se litigants to function at the same level as trained attorneys –though arguably sound in principle—may be self- defeating if the end result is repeated filings, calendar congestion, and diminished access to the courts for everyone. Finally, by utilizing non-profit and court funded self-help centers and community resources, such as domestic violence or children's advocacy centers, to provide day of court assistance, courts can and do significantly impact access to justice for all litigants, the represented and the self-represented alike.

[1] [1] The p-value for these findings is .06. This means that if order preparation does not affect order durability, the probability of observing a difference of this magnitude (41% vs. 20%) with the sample sizes used in this study (27 litigants not provided with a court order, 40 litigants provided with a court order) is only 6 percent.