IV.

REPORT OF
THE COMMITTEE ON *PRO SE*[1] PARTIES AND CIVIL JUSTICE REFORM

A. BACKGROUND

Pro se parties – persons proceeding in the civil justice system without their own attorneys - have become increasingly common in Colorado courts. Statistics from the State Court Administrator's Office[2] for *pro se* filings in Colorado district courts show an increase in the percentage of domestic relations cases filed as *pro se* from 52.2 percent in 1997 to 55.7 percent in 1999.[3] Similarly, the percentage of civil cases (excluding domestic relations cases) filed as *pro se* grew from 30.3 percent in 1997 to 32.3 percent in 1999.[4] These percentage increases are greater than the percentage increase in total number of cases filed.[5] According to one account at the national level, the actual number of *pro se* plaintiffs doubled during the period 1991 to 1994.[6]

Litigants who choose to represent themselves usually do so because they are unable or unwilling to pay an attorney. In both cases, the growth in legal self-help products and services attests to the growing popularity of *pro se* litigation, especially in less complex cases.[7]

Given these unmistakable trends, the Committee concludes that *pro se* litigation in relatively non-complex cases, such as divorce, is a fact of life, and one that is likely to continue its upward trend in the future. While some litigation involves matters of such complexity that parties should have legal counsel no matter what their economic means,[8] others may indeed be able to secure justice without professional representation and without imposing undue burdens on the judicial system. For *pro se* litigants who need only minimal assistance from judges and staff, there are some changes to the judicial system which, if made, might enable them to assert their legal positions more effectively and with less adverse impact on the judiciary.

This Committee does not intend to encourage more litigation by acknowledging the presence of *pro se* parties and proposing changes to accommodate them. At the same time, however, the Committee does not believe the courts should intentionally or unintentionally maintain obstacles to effective use of the courts by unrepresented parties. It is the Committee's position that enabling *pro se* parties is wiser and more appropriate than trying to thwart their presence in the judicial system. This approach may, in fact, be the only one available: attempts to force *pro se* litigants to obtain counsel in some cases would likely fail and might be unconstitutional as well.

Whether the unrepresented party cannot afford counsel or simply chooses not to retain a lawyer, that party has a responsibility to pursue or defend his or her legal rights with reasonable efficiency. Presently, unprepared and unassisted *pro se* litigants drain court time and tax the patience of judges and court staff. These parties clog the legal system due to inexperience and lack of training; therefore, increased information to, and reasonable assistance for, *pro se* litigants should serve to mitigate the drain on valuable judicial resources.

The Committee's recommendations are intended to enhance the efficiency and effectiveness of the judicial process for *pro se* litigants once they have walked through the courthouse doors. This includes people there voluntarily as plaintiffs and those named as defendants in litigation. The Committee believes much can be done to ease the burden unrepresented parties impose on the court in non-complex cases, while at the same time facilitating the effective and efficient use of the court by providing reasonable assistance to the *pro se* party in such cases. The Committee also believes the proposed changes will, in the long run, result in *fiscal* efficiencies by reducing the need for new judges and staff. At the same time, the Committee recognizes that the courts must not unwittingly encourage *pro se* litigation, especially in complex cases that may unfairly burden judicial resources to the detriment of the civil justice system and the people using it.

B. Threshold Question: More Litigation Resulting from Assistance to *Pro Se* Parties?

The threshold question for the Committee was whether making *pro se* representation easier, or the courts more user-friendly, would cause a *bigger* problem by increasing the number of *pro se* litigants and swelling the caseloads of already overburdened courts.

The Committee concludes that the number of *pro se* litigants in non-complex cases is likely to continue increasing regardless of whether changes are made in the judicial system to accommodate the phenomenon.[9] Furthermore, the Committee finds that in non-complex cases *pro se* litigants presently create bottlenecks in the courts. Lack of familiarity with the rules, procedures, and traditions of the judicial process and improperly prepared forms and pleadings consume a great deal of judge and staff time.[10] Given that the number of *pro se* parties will likely increase in non-complex cases regardless of whether the courts are made more user-friendly, making the courts work better for *pro se* parties will relieve the bottleneck caused by ill-prepared and uninformed *pro se* litigants.

Additionally, the Committee recognizes the "information highway" has prompted many potential litigants to feel capable of representing themselves. Prospective litigants often believe – however incorrectly – that the Internet provides all the legal information necessary for effective self-representation. This has no doubt added to the number of people who choose to appear *pro se*.

C. Groundless and Frivolous Litigation

Notwithstanding its general conclusion that accommodation of the *pro se* litigant in non-complex cases can be a net gain to the efficiency and effectiveness of the judiciary, the Committee also concludes that groundless and frivolous litigation poses a serious threat to the system. Significantly, there may be more groundless and frivolous litigation and/or groundless and frivolous motions filed by *pro se* parties than by attorneys. There also appears to be an understanding among lawyers (at least) that judges generally do not sufficiently use their power to award attorney fees to a prevailing party in groundless and frivolous litigation.[11] Therefore, many believe judges should be encouraged to use this power to dissuade unwarranted claims by *pro se* litigants as well as licensed counsel.[12]

D. IMPACT OF *PRO SE* PARTIES ON THE COURTS[13]

As discussed earlier in this report, the volume of litigation by unrepresented parties is high in Colorado and steadily increasing. Interviews with a number of judges indicate they generally recognize *pro se* litigation has increased from just a few years ago. Two charts are included with this Report showing the percentages of district court filings in 1997, 1998, and 1999 in which one or both of the parties were unrepresented. The charts show, respectively, domestic relations cases (EXHIBIT 4) and civil, non-domestic cases (EXHIBIT 5). It should be noted that, while *pro se* litigation has risen statewide, there are some counties in which it has gone down; these are primarily small counties with few filings.[14]

Judges report unrepresented litigants often create problems for the court and other litigants because they do not understand the legal process. Unfamiliar with the rules of procedure and evidence, *pro se* litigants ask many questions that consume the court's time, questions that would not be asked by qualified legal counsel. Judges also report *pro se* parties are occasionally disruptive. Moreover, delays occur when *pro se* parties are given time to prepare for court or obtain counsel. Accordingly, judges are often in a quandary when unrepresented litigants appear in their courtrooms: Do they "help" the *pro se* party, and possibly disadvantage the represented party, or do they hold the *pro se* litigant's feet to the fire and require him or her to follow the same rules and procedures required of represented parties? (This question of balance is less problematic when both parties are unrepresented, because the judge can give the same level of assistance to both sides. Of course, delay and other problems of *pro se* litigation may be compounded when both sides are unrepresented.)

The impact of unrepresented parties appears to differ between district and county courts. In general, most parties appear *pro se* in the county courts, in both criminal and civil matters, and it appears that, historically, unrepresented parties have been the norm in county court. In contrast, district court judges and staff are not as accustomed to dealing with *pro se* litigants, and issues in district court are generally more complex. Furthermore, the stakes usually are higher in district court than in county court.

E. EXISTING *PRO SE* ASSISTANCE RESOURCES

1. Pro Se *Resource Centers*

State-funded *pro se* resource centers exist in the First,[15] Second,[16] Fourth,[17] Fourteenth,[18] Seventeenth,[19] Eighteenth,[20] Twentieth,[21] and Twenty-First[22] Judicial Districts. All staff positions at the centers are funded by the State, except those in the Second and Fourth Judicial Districts, which are funded locally.

These centers generally provide in-person assistance to *pro se* parties in domestic relations cases. While functions and staffing vary slightly from district to district, in general, *pro se* center staff explain court procedures and provide an overview of what the parties can expect from the court. The *pro se* staff will answer questions about procedure, supply forms and assist litigants with completion of the forms. They also review paperwork prior to filing, and make referrals for legal and/or community assistance, when needed. An additional responsibility in many districts is the coordination of *pro se* divorce clinics in which one or more local attorneys will provide an overview of divorce procedure and answer questions.

These clinics are held in the courthouse, and usually during the lunch hour in order to facilitate attendance.

It should be noted that, in many locations, the resource centers are staffed on a limited basis. For example, in Douglas County, the *Pro Se* Resource Center is staffed only one day per week, Monday. The assistant who works in Douglas County also works in Arapahoe County, where the center is staffed three days per week.

Members of the Committee spoke with staff and judges in several judicial districts currently funding *pro se* resource centers. In all cases, it strongly appeared that the centers were providing valuable assistance to unrepresented parties, and helping to reduce the docket clogging that is a problem in many Colorado judicial districts.[23]

2. *Bar Association Programs*

In some judicial districts, local bar associations have programs for providing free assistance to *pro se* litigants. In Arapahoe County (Eighteenth Judicial District), for example, the Arapahoe County Bar Association offers a monthly free clinic for parties who wish to file motions, or whose former spouses have filed motions, in post-dissolution-of-marriage proceedings.[24]

3. *Case Managers*

Another resource, which at present exists as a pilot program in only three counties statewide, is the use of domestic relations case managers.[25] Much of the work of case managers relates to unrepresented parties. A domestic relations case manager is generally responsible for reviewing files prior to permanent orders to ensure that all requirements have been met. Additionally, the case manager may meet with parties to identify and/or narrow the issues in a case. A summary of the issues and the parties' wishes is compiled and, upon their approval, included in their file for use by the judge.

The current average salary for a case manager is $38,464 annually. The salaries range from $27,600 to $48,079, including part-time and full-time case managers. The total cost at present is $275,374 annually.[26]

An evaluation of the case manager positions began in February 2000. A final report, to be ready later this year, will identify the specific practices within each district and their effectiveness in reducing in-court time and the overall length of cases. In addition, the case manager's effect on the outcome of litigation will be considered as well as court, bar, and public satisfaction with the position.

Colorado Supreme Court Justice Rebecca Love Kourlis, a member of the Committee, reported that the case manager approach has been quite successful in other states.[27] With the assistance of a manager, cases move more quickly through the courts. This advances the goal of effective and efficient use of court resources.

4. *Simplified Divorce Pilot Project*

Another resource for both represented and unrepresented litigants in domestic relations cases is the Simplified Divorce Pilot Project, also known as the Family Friendly Pilot Project, which began in January 2000 and is scheduled to last for one year. This pilot project of the Colorado State Judicial System is operating in the Denver District Court (500 cases), El Paso District Court (200 cases), and Arapahoe County District Court (100 cases).

Some of the principles of the "family friendly" project are—

a. One judge/one case, which means one judge handles the entire case, from start to resolution. In contrast, at present, there may be two or more different judicial officers handling a dissolution of marriage case.

b. Cases will be managed aggressively, and there will be a case manager on every case in the project.

c. Discovery will be limited.

d. The judge will serve more as a "coach," helping parties through the process, than as a traditional judge. There will be regular meetings of the parties and counsel starting thirty days after the case is filed.

e. The Colorado Rules of Evidence can be relaxed, so that the proceeding is less adversarial.

f. Cases will be expected to move through the system in approximately six months.

At the end of the year, an evaluation will be done to determine whether the pilot project is meeting its goals. For comparison, there are control cases equal in number to the pilot project cases. Variables to be measured will include: the amount of time necessary to obtain final orders for the divorce; the number of hearings; the number of pleadings; the amount of court time utilized; the number of issues the judge had to resolve; the amount of outside resources utilized; and the number of post-decree motions filed.

F. COMMITTEE'S RECOMMENDATIONS

The Committee makes the following recommendations:[28]

1. *Monitor Simplified Divorce Pilot Project*

The Governor and General Assembly should closely monitor the results of the Simplified Divorce Pilot Project to ascertain whether any of the innovations being tested should be implemented throughout the State.

2. *Establish* Pro Se *Resource Centers*

One *pro se* resource center should be established in each judicial district and, if the caseload so requires, in each major county. The centers should be limited to civil matters but exclude prisoner civil litigation, class actions, products liability cases, and medical and legal malpractice cases. These centers should contain information regarding various types of cases and court procedures. For example, pamphlets should be made available informing litigants they can be held responsible for attorney fees and costs if their cases are found to be groundless or frivolous.

These centers should be designed to serve litigants in both county and district courts. Computers should be available in these centers for use by the public. Litigants should be charged reasonable and realistic user fees for computer time, forms, books, and other materials.[29]

Staffing of these centers should be designed to fit the particular needs of the district. In some counties, for example, a staff person might be needed only once a month. In other counties, the center might be staffed on a daily basis by more than one person.[30] It is possible that, in some counties, the resource centers would not be staffed at all; in those counties, if a litigant wanted to talk to a resource staff person, the litigant would have to travel to another county.

It is important civil *pro se* centers do not undertake to assist in specialized or complicated cases (including, as mentioned above, class actions, civil prisoner litigation, products liability cases, and medical and legal malpractice proceedings).

The Committee recommends these centers be established as part of the judicial system, rather than maintained by private parties, in order to maintain quality and control and avoid the unauthorized practice of law.[31]

These centers should be carefully structured and limited to minimize their expense, avoid becoming law firm or legal aid substitutes, and avoid promoting litigation. For instance, *pro se* litigants should be advised of the legal consequences of filing frivolous or groundless claims, as well as the cost that such misconduct can impose on the civil justice system and their fellow litigants. This might be accomplished in part by insisting that all resource center users first sign a "statement of responsibilities" outlining their responsibilities as *pro se* litigants and the consequences of filing frivolous and groundless claims. By signing this form, users would attest that they understand how their actions might adversely affect others and what the penalties might be for abusing the system. Similarly, would-be *pro se* litigants would be advised through this statement of the importance of seeking legal counsel for complex matters of the types noted above.

The Committee recommends funding be made available to develop such low-cost resources as video and audio tapes and pamphlets (available in both English and Spanish) which explain the court process and types of civil actions, as well as the repercussions to pro se litigants who file frivolous and groundless claims.

Additionally, the Committee recommends that *pro se* resource centers *not* be established by statute or constitutional amendment, but rather administratively established through the Judicial Department. The centers should not be an entitlement, but part of the efficient administration of Colorado courts.

3. *Provide for Case Managers*

The Governor and General Assembly should closely monitor the case manager pilot program and consider establishing a system statewide. Case manager duties should include the screening of cases and motions to determine whether they may be groundless and frivolous.[32]

4. *Enhance Judicial Rejection of Groundless and Frivolous Cases*

Colorado judges should have intensive, on-going training in dealing with groundless and frivolous litigation and the awarding of attorney fees in such cases. Judges should be encouraged to use all the tools presently available to prevent and discourage groundless and frivolous litigation, whether brought by *pro se* or represented parties. Additionally, the Governor and General Assembly should support legislation or rulemaking to provide greater encouragement to Colorado judges to award attorney fees and costs as sanctions against groundless and frivolous litigation or groundless and frivolous motions.

G. CONCLUSION

The continuing growth of *pro se* litigation threatens to undermine the quality of civil justice in Colorado unless our State undertakes two concomitant reforms. First, Colorado should expand judicial resources available to *pro se* parties in non-complex cases to help mitigate the impact that such litigants are already having on our court system. At the same time, *pro se* litigants should be reminded of their obligation to use the courts responsibly, and those who abuse the system should face tougher sanctions, including being ordered to pay attorney's fees and costs for filing frivolous and groundless claims.

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[1]Latin for "for himself," "in his own behalf," "in person." BLACK'S LAW DICTIONARY, 1364 (4th ed. 1957).

[2]For which statistics the Committee thanks Ms. Veronica Shotts and Chris Ryan of the Division of Planning & Analysis, Colorado State Court Administrator's Office.

[3]There were 16,683 domestic relations *pro se* filings (out of a total of 31,977) in 1997. There were 17,767 domestic relations *pro se* filings (out of a total of 31,898) in 1999.

[4]There were 10,154 civil, non-domestic *pro se* filings (out of a total of 33,552) in 1997. There were 12,527 civil, non-domestic *pro se* filings (out of a total of 38,835) in 1999. It should be noted that parties who are unrepresented at the start of a case may retain counsel later in the proceedings.

[5]It should be noted, although there has been an increase of *pro se* litigants as measured at the instigation of a case, there are no statistics for the continuation of *pro se* status throughout the pendency of a case. Judges report cases in which parties commence a case *pro se* but retain a lawyer as the case progresses. Conversely, parties represented at commencement may, for various reasons, become unrepresented at some time during the process. Reasons for this could include running out of money, becoming dissatisfied with counsel and firing the attorney prior to hiring the new lawyer, and having one's attorney withdraw from reputation due to a difference in approach to the case. Rule

1.16(b) of the Colorado Rules of Professional Conduct permit an attorney to withdraw from a representation, among other circumstances, because—

> (1) the client
>
> (A) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.
>
> . . .
>
> (E) insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited by these rules; or
>
> . . .
>
> (2) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal . . . .

[6]"Feeling Aggrieved, Many Seek Day in Court, Minus Lawyer," *Boston Globe*, April 19, 1994. *See also* A. Stevens, Self-Representation Can Save Money But Often at the Cost of Success, *Wall Street Journal*, June 3, 1991, at B1 (*pro se* litigation has increased by perhaps twenty percent since 1988 in some jurisdictions).

[7]*See* Goldschmidt, Mahoney, Solomon, and Green, *Meeting the Challenge of Pro Se Litigation* (Chicago: American Judicature Society, 1998) p. 10.

[8]For example, in such highly technical cases as products liability litigation or medical malpractice cases.

[9]Empirical data appears to support this conclusion. A study of *pro se* litigation conducted for the American Bar Association in a Phoenix domestic relations court reports:

> Of all divorce cases in 1990, at least one of the parties was self-represented in over 88 percent of the cases. In 52 percent of the cases both parties were self-represented. When compared with the data in a previous study of the same court – which reported that 24 percent in 1980, and 47 percent in 1985, of all divorce cases involved at least one self-represented party – the increase in pro se litigation over time is apparent.

Goldschmidt, Mahoney, Solomon, and Green, *Meeting the Challenge of Pro Se Litigation* (Chicago: American Judicature Society, 1998) pp. 8-9.

[10]These findings represent the collected observations of the justices, attorneys, and legislators who served on the *Pro Se* Committee.

[11]Rule 11, Colorado Rules of Civil Procedure, provides in part as follows:

> (a) Obligations of Parties and Attorneys
>
> . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, *it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee . . .

[Emphasis added.] Note that Rule 11 sanctions, with the exception of striking a pleading in the absence of a signature, do not apply to *pro se* parties.

However, statutory relief against "frivolous, groundless, or vexatious litigation" is offered by Part 1 of Article 17 of Title 13, Colorado Revised Statutes, first enacted in 1977, which includes the following provisions:

§ 13-17-101. Legislative declaration

The general assembly recognizes that courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice. In response to this problem, the general assembly hereby sets forth provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof (including any claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or substantially vexatious. All courts shall liberally construe the provisions of this article to effectuate substantial justice and comply with the intent set forth in this section.

§ 13-17-102. Attorney fees

(1) Subject to the provisions of this section, in any civil action of any nature commenced or appealed in any court of record in this state, the court may award, except as this article otherwise provides, as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees.

(2) Subject to the limitations set forth elsewhere in this article, in any civil action of any nature commenced or appealed in any court of record in this state, the court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification.

. . . .

(4) The court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under section 13-21-111.5(3) that lacked substantial justification. As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

. . . .

(6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious; except that this subsection (6) shall not apply to situations in which an attorney licensed to practice law in this state is appearing without an attorney, in which case, he shall be held to the standards established for attorneys elsewhere in this article.

. . . .

[12] It should be noted that the same problem related to groundless and frivolous litigation was recognized and addressed by a committee of Governor Bill Owens' Transition Team.
[13] A special subset of *pro se* litigation is civil litigation by prisoners, who may sue the State prison system or prison officials for perceived wrongs. The Committee was privileged to have as a member John Suthers, who is the Executive Director of the Department of Corrections for the State of Colorado. Mr. Suthers provided a memorandum on civil litigation by prisoners, which is attached to this Report as Exhibit 3. The Committee believes Mr. Suthers' report adequately addresses this matter at this time, and therefore it does not make any recommendations regarding prisoner civil litigation.
[14]For example, in Summit County, the percentage of civil, non-domestic cases filed as *pro se* went from 23.3 percent in 1997 to 18.6 percent in 1999. The sampling is small, however, as the number of *pro se* filings decreased only by two, from 65 in 1997 to 63 in 1999.
[15]Gilpin and Jefferson Counties.
[16]The City and County of Denver.
[17]El Paso and Teller Counties.
[18]Grand, Moffat, and Routt Counties.
[19]Adams County.
[20]Arapahoe, Douglas, Elbert, and Lincoln Counties.
[21]Boulder County.
[22]Mesa County.
[23]The clogging is a problem both for litigants and for the judicial system. It often results in delays that are extremely frustrating to the parties involved in litigation.
[24]These are most often motions to modify either child support or parenting time.
[25]There are some counties where local funding is being utilized to pay for case managers. In Arapahoe County, for example, a case manager is being utilized in juvenile cases. Case managers also are utilized in El Paso County.
[26]As part of the efforts to standardize these positions across the State, a single salary level has been assigned for all future allocations. Case manager salaries are now set at a Grade 96, Step 1, or $40,656 annually for full-time positions. If this salary level were applied to current positions, the net statewide cost of these positions would increase by $5,000 annually.
[27] The Committee acknowledges Justice Rebecca Love Kourlis' leadership in this area.
[28]It should be noted that neither Supreme Court Justice Rebecca Love Kourlis nor Arapahoe County Court Judge Stephen Ruddick, who are members of the Committee, took positions in regard to the recommendations concerning training for judges and court staff.
[29]User fees would be waived for litigants who were permitted to proceed without paying fees.
[30]As is currently the case in El Paso County.
[31] The Committee also recommends, when new courthouses are built in Colorado, space be included for *pro se* resource centers, if possible.
[32] More generally, the Committee recommends the Judicial Department be encouraged to train court staff in dealing with *pro se* litigants