Excerpt from Richard Zorza, *The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers* (National Center for State Courts 2002), pages 17-20:

Chapter 2

The Ongoing Barriers to Effectiveness for Those Who Represent Themselves

Information Is Not Enough: Looking at Barriers to Access and the Problems in Innovation

Given the range of self-help experiments, those responsible are a highly valuable source of information on the as yet unsolved barriers to access.[1] It is the people who have attempted to solve the problems of litigants without lawyers who best know both exactly what those problems are and why existing piecemeal innovations have not more fully solved those problems.

Among the most significant ongoing barriers reported by litigants and innovators are:[2]

¶ The Analysis Barrier. Most self-help assistance programs report as the key problem that telling people the law was not enough. Litigants often need far more help than the program could give them in analyzing the implications of the law, in applying that law to the facts, and then in forging out of the law and the facts a coherent and persuasive legal argument. For example, it is one thing to tell a litigant that service of a court paper must follow certain rules. It is quite another for the litigant to be able to understand the legal meaning of what actually happened in a failed attempt at service.

¶ The Situation and Options Evaluation Barrier. Self-help litigants have difficulty in getting the perspective to decide when to settle, rather than to pursue litigation, and when to choose alternative dispute resolution, rather than insist on resolution through the court. Such evaluation typically requires a broader range of information in context than it is reasonable to expect a litigant to have. Such evaluation also may require the freedom to talk in confidence about all aspects of the situation, including those that the litigant considers to be embarrassing or dangerous to reveal publicly or to the other party.[3]

¶ The Preparation and Presentation Barrier. Most self-help litigants are not good at presenting a claim (even if they do understand it). It should take not a great feat of memory for the typical lawyer to remember how hard was that first attempt to explain something to a judge in a crowded courtroom. Often emotions—healthy emotions—get in the way of appearing "logical," and litigants are penalized by fact finders who at best find it hard to isolate the relevant facts and at worst wrongly suspect those who are emotional of being unreliable.[4] As a general matter, complicated multistep claims and defenses create proceedings that are particularly difficult for people without lawyers.

¶ The Remedy Barrier. Most self-help litigants have a lot of difficulty identifying the right and most appropriate relief. It is hard for a domestic violence victim to know what will

really make a difference—except in the most general terms— and even harder for a victim to figure out what relief is typically considered within the power of the court.

¶ The Enforcement Barrier. Most self-help litigants have the greatest difficulty actually enforcing relief, even when it is ordered. The paperwork, the use of sheriffs, and the wide variety of supplemental and enforcement proceedings are all hard to understand, let alone navigate.

¶ The Ethics and Neutrality Barriers. Practitioners widely report that perceived or actual limitations deriving from rules prohibiting unauthorized practice of law, governing how "unbundled" legal services are provided, and mandating judicial neutrality represent a major barrier to innovation generally and to the concrete help litigants need day-to-day. While commentators tend to regard such rules as providing a far greater practical disincentive either to individual help or general innovation than need be the case,[5] that analysis is not yet well known by those who deal day-to-day with people without lawyers, and much analysis and advocacy remains to be done.[6]

¶ Bar Uncertainty. Many lawyers, and particularly the organized bar, remain profoundly nervous about self-help programs of any kind. They are likely to be particularly nervous about building a court that appears to make lawyers superfluous,[7] and they need assistance in understanding that such a court would help them in their practice, both by making court a simpler place and by helping them find clients.

To summarize, practitioners report that whatever resources are put into information, in the end many litigants cannot be prepared to handle the courtroom with information alone. Regardless of all the information they have been given, these litigants' lack of realistic and effective preparation clogs up the court and renders the enforcement process dysfunctional. The challenge then becomes to change the overall process by designing an integrated environment in which a combination of help and information is enough—in other words, that the expectations upon litigants without lawyers be reasonable, rather than unreasonable.[8]

Chapter Endnotes

[1] Particular thanks must be made to the California Family Law Facilitators, who supported this work by engaging in a detailed analysis of the barriers to effective assistance; to the participants in the August 2000 National Association of Court Managers Workshop on this topic; to the faculty and participants in the May and October 2000 workshops on Pro Se Collaborations, held in collaboration by a number of organizations, including the American Judicature Society and the Judicial Management Institute and those listed above in the acknowledgments. John Greacen and Bonnie Hough have been particular contributors to this analysis.

[2] Bonnie Hough informally describes this approach as "asking what it is that lawyers actually do for people." See, generally, Deborah Rhode, "The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis," Yale Law Journal 86 (1976): 141-145 (analyzing actual activities in uncontested cases).

[3] It is here (as well as in other places) that the issue of whether there should be confidentiality of communications between self-help staff and litigants emerges. Those who believe that the majority of court preparation communications do not need to be confidential have a point, and it may be true that politically and practically it is

necessary for the current generation of court self-help staff to be clearly defined as not being in an attorney-client relationship with those they help. Nonetheless, important values are served by the availability of confidential consultations. Any complete solution to the problems of litigants without lawyers should include such a confidential component, perhaps through unbundled preparatory consultation (see, below, Chap. 11, n. 9). Without confidential counsel, litigants find it hard to know what will get them in trouble, what the risks of various paths are, and how best to handle awkward, embarrassing, and difficult (or worse) situations. Our system has made a commitment that, in the end, allowing for such help results in fairer outcomes that are more broadly acceptable to society.

[4] A court that fails to find a way to correct this inaccurate tilt in its credibility findings may be guilty of unconscious yet systemic gender bias. Given the high percentage of unrepresented litigants in family and housing courts (see above, Chap. 1, n. 5) there is every reason to believe that in many courts women form of the bulk of the unrepesented litigants.

[5] John M. Greacen, "No Legal Advice From Court Personnel: What Does That Mean," Judges Journal, Winter (1995):10–15; Richard Zorza, "Re-conceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity," Fordham Law Review 67 (1999):2659; Greacen, "Legal Information vs. Legal Advice: Developments during the Last Five Years," Judicature 84 (2001): 198.

[6] There is, for example, astonishingly little academic or judicial writing on the real day-to-day constraints imposed by judicial norms upon judicial conduct in the pro se or self-help context, yet there are repeated, informal complaints about the difficulty of handling such situations. The author suspects—and his suspicions are shared by those with whom he has consulted—that these complaints derive more from fear of the unknown than a failure, after analytic effort, to craft a safe and appropriate path. See, generally, Meeting the Challenge, pp. 52–60; Russell Engler, above, Chap. 1, n. 8, pp. 2028-2031 (urging a greater role for judges).

[7] Deborah L. Rhode, "Professionalism in Practice: Alternative Approaches to Nonlawyer Practice," New York University Review of Law and Social Change, 22 (1996), 700, 705: "Where bar organizations have actively participated in the reform process, they have almost always resisted the kind of liberalization that expert task forces and commissions have recommended. Over the last half-century, state bars repeatedly have fought publication of self-help law books; opposed introduction of standardized forms; prevented court clerks from providing routine legal assistance; shut down form preparation services; and blocked licensing systems for nonlawyer practitioners [footnotes omitted]." Meeting the Challenge, p. 50, noting that "one of the somewhat surprising findings from the (American Judicature Society/Justice Management Institute) survey [of courts] is that the organized bar seems to have been rarely involved in the development of court policies to guide the provision of assistance to the self-represented. . . . It is clear that some of the most promising programs in the area are ones that have been developed collaboratively by bar groups, court staff and judges." Debra Baker, "Is This Woman a Threat to Lawyers?" ABA Journal, 54 (June 1999):54 (describing spate of cases attempting to invigorate the enforcement of the prohibitions on the unauthorized practice of law); contrast, Perkins v. CTX Mortgage Company, 969 P.2d 93 (Wash.1999) (whether a particular nonlawyer activity is unauthorized practice of law depends, in part, on a balancing test comparing the public's need for regulated professional skill with the public interest in access to the service being provided); compare Washington Supreme Court General Rule 25, effective September 1, 2001, establishing a state practice-of-law board and authorizing the board to make recommendations to the court concerning categories of work that may be performed by nonlawyers.

[8] As John Greacen has pointed out, the lack of preparation of litigants—no matter how much information they have been given—results in pressure on the court system to provide more and more practical preparation help. Such help is expensive, and, when provided by the courts themselves, can raise ethical concerns that are often, although needlessly, paralyzing.

The assumption of this monograph is that any cost savings obtained by deciding not to provide such assistance are illusory. Every case that is adjourned because of a missing document or lack of preparation costs the system a great deal in wasted staff time. The litigants and society in general bear other costs, such as time from lost work and other disruptions. A full economic analysis of these impacts would be a useful contribution to the debate.