



**A REPORT TO THE SUPREME COURT ADVISORY COMMITTEE
FROM THE TEXAS ACCESS TO JUSTICE COMMISSION
ON THE COURT'S UNIFORM FORMS TASK FORCE
APRIL 6, 2012**

INTRODUCTION

The Supreme Court of Texas established the Texas Access to Justice Commission (“Commission”) in 2001 to serve as the statewide umbrella organization for all efforts to expand access to justice in civil legal matters for the poor. It is the role of the Commission to assess national and statewide trends on access to justice issues facing the poor, and to develop initiatives that increase access and reduce barriers to the justice system.¹ The Commission is comprised of ten appointees of the Court, seven appointees of the State Bar of Texas, and three ex-officio public appointees.

The Commission is fortunate to have a partner in the State Bar, with its strong commitment to increasing access to justice and to assisting pro se litigants. A main component of the Bar’s mission is to “assure all citizens equal access to justice.”² Its current Strategic Plan proposes to accomplish this goal in part by working “in collaboration with key partners to increase the availability and utilization of effective high quality pro se information, education, and support materials.”³

Over the years, in recognition that it is always best to have a lawyer, the Commission has worked to increase the number of attorneys available to help the poor by augmenting funding to legal aid programs and by enlarging pro bono resources to serve the poor. The Commission, with the leadership of the Supreme Court, has been able to obtain much needed legislative funds for civil legal aid providers and has helped to increase statewide pro bono by working with firms, corporate counsel, and various sections and associations of the State Bar.

Despite these successful and continued efforts, the growth in the number of poor with civil legal assistance matters has far outpaced our ability to fund legal aid or recruit lawyers to assist on a pro bono basis. Without access to an attorney, the poor have no choice but to represent themselves.

¹ Supreme Court of Texas Misc. Docket 01-9065, Order Establishing the Texas Access to Justice Commission, April 26, 2001. See Exhibit A.

² Per the State Bar of Texas website and its Strategic Plan FY2012 & FY2013: “The mission of the State Bar of Texas is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law and promote diversity in the administration of justice and the practice of law.”

³ State Bar of Texas Strategic Plan, *supra* note 2, at page 6.

The phenomenon of increasing numbers of pro se litigants is not new, nor is it unique to Texas.⁴ Courts across the nation have experienced the same situation and have grappled with how to best go about addressing it. There have been countless conferences and journal articles within the judiciary, legal aid, and access to justice communities on this topic, including here in Texas.

In April 2010, a statewide Forum on Self-Represented Litigants was held in Dallas to discuss the issue of the burgeoning population of unrepresented litigants who cannot afford representation and who are unable to obtain representation through a legal service provider. A broad spectrum of stakeholders were invited to attend, including the private bar⁵, the judiciary, clerks, law librarians, and legal service providers. National leaders were invited to discuss various best practices⁶ and solutions that are widely accepted throughout the country. The Forum concluded with a consensus to pursue development of these best practices, including standardized forms.

Two entities were created in the wake of the Forum. The Texas Access to Justice Commission created its Self-Represented Litigants Committee in May 2010 to research and develop strategies to improve self-representation for the poor.⁷ The Supreme Court of Texas created the Uniform Forms Task Force in March 2011 to develop standardized forms.⁸

The Court made clear in its order creating the Uniform Forms Task Force that it was “concerned about the accessibility of the court system to Texans who are unable to afford representation”⁹ and believes that “developing pleadings and forms for statewide use would increase access to justice and decrease the strain on courts posed by pro se litigants.”¹⁰ Accordingly, it asked the Task Force to “develop proposed models of uniform pleading and order forms to be evaluated and approved by the Court for statewide use.”¹¹

To ensure broad representation of varying interests, the Court chose a diverse group of people as members of the Task Force, including two judges who regularly preside over family law matters, a district clerk, a county attorney, a court administrator, a local bar director, a legal aid family law lawyer, a law librarian of a large self-help center, a technology person, and three private board-certified family law lawyers.

At the initial meeting of the Task Force, the group spent time discussing its mission and priorities. Members agreed that the Task Force was to develop easy-to-use yet legally sound

⁴ *Documenting the Justice Gap in America, Current Unmet Civil Legal Needs of Low-Income Americans: An Updated Report of the Legal Services Corporation*, Legal Services Corporation, 2009, page 25.

⁵ State Bar Sections encompassing substantive legal areas that interface with poverty law were invited to attend the forum, including the following sections: ADR, Bankruptcy, Consumer and Commercial Law, Family Law, Hispanic Issues, Immigration, Individual Rights and Responsibilities, Justice of the Peace, Labor and Employment, Litigation, Appellate, Asian-Pacific Islander, and Administrative and Public Law. State Bar Committees were also invited, including the Unauthorized Practice of Law Committee. The mission of the State Bar of Texas is to “...assure all citizens equal access to justice....”

⁶ *Best Practices in Court-Based Programs for the Self-Represented*, the Self-Represented Litigation Network, 2008, funded by a grant from the State Justice Institute.

⁷ Supplemental Report to the Court on the Activities of the Self-Represented Litigants Committee of the Texas Access to Justice Commission, February 6, 2012. See Exhibit B.

⁸ Supreme Court of Texas Misc. Docket 11-9046. See Exhibit C.

⁹ *Id.* at 1.

¹⁰ *Id.* at 1.

¹¹ *Id.* at 2.

forms for non-complex, uncontested matters that were targeted for use by the poor. In deciding where to start, the Task Force reviewed data from various sources on the legal needs of the poor¹² and concluded that family law, specifically divorce, was by far the greatest area of need. Based on this information, the Task Force developed a set of instructions and forms for an uncontested divorce with no children and no real property. The leadership of the State Bar Family Law Section was asked for substantive input and criticisms of the forms in July 2012 and repeatedly asked thereafter. None was given. The set of forms was sent to the Court for approval on January 11, 2012. To this day, the alleged “72 flaws” have never been shared with the Task Force or the Commission.

There are no legitimate issues about whether people will represent themselves and use forms. Over 4 out of 5 people who qualify for legal aid are unable to get help from an attorney. People purchase family law forms from Craigslist, Google searches, office supply stores, etc. When one googles a family lawyer’s name, often links to commercial forms appear in the search results. The real question is whether Court-approved standardized forms will improve access to justice and lessen the administrative burdens on the court system. Thirty-seven states have found it helps without damaging private practitioners.

THE CURRENT SITUATION IN TEXAS

More Poor, Fewer Lawyers to Help

There are over six million Texans who qualify for legal aid, yet legal aid and pro bono programs are only able to help at most twenty percent of the qualified people who seek it. Significant decreases in funding to legal aid programs from reduced Interest on Lawyer Trust Accounts (“IOLTA”) revenue and federal funding cuts,¹³ combined with one of the highest poverty rates in the nation at eighteen percent, means that there will be fewer legal aid lawyers to help the growing numbers of poor who need assistance.

Substantial Number of Pro Se Litigants

Recent data from the Office of Court Administration (“OCA”) has made clear what has been suspected anecdotally in Texas for years—people are representing themselves. OCA statistics show that 21.6% of all family law filings in Texas are filed by a pro se *petitioner*.¹⁴

¹² This data included statistics provided by legal aid, TexasLawHelp.org, the Travis County Law Library Self-Help Center, and anecdotal information from Task Force members on the demand for legal services in their local areas. Legal aid and pro bono organizations consistently report that family law comprises over thirty percent of their case load. TexasLawHelp, an online resource for legal information and forms, shows that family law information and forms are the most frequently accessed on their website. The four most popular TexasLawHelp forms are family law forms, with 115,981 hits for just these four forms in comparison to 596,555 hits for the entire website. The Travis County Law Library, the largest self-help center in the state, states that family law forms are requested more than any other practice area.

¹³ This year alone, Texas experienced a \$6.2 million loss in federal funds to the three largest legal aid providers in the state due to federal funding cuts to the Legal Services Corporation. In just five years, funds generated from IOLTA have decreased over 75% from \$20 million in 2007 to \$4.4 million in 2011.

¹⁴ Data collected by the Office of Court Administration from District and County Courts during September 1, 2010, through August 31, 2011. The statistic under-represents the number of pro se litigants in court. It does not include pro se litigants who are respondents, who become pro se after hiring an attorney, or who secure an attorney after filing pro se. The statistics also do not include Title IV child support cases filed by the Office of the Attorney General, nor do they include post-judgment filings. Finally, several counties failed to report data, so their filings are not captured. See Exhibit D for a summary of pro se statistics. See Exhibit F for a breakdown of pro se litigants by county.

Based on information from counties who collect statistics on the number of pro se filings for specific case types, we believe that the numbers are much higher for divorce. Specifically, Bell County reports a 52% pro se filing rate for divorce in 2011, up from 40% in 2010.¹⁵ Lubbock County states that 44% of divorces filed over the past two years involved at least one pro se party.¹⁶ In Travis County, 78% of divorces without children and 56% of divorces involving children were filed pro se.¹⁷

Statistics from the Office of the Attorney General show that 461,147 parents represented themselves in Title IV-D family law cases during 2011.¹⁸ Title IV-D cases involve child custody, visitation, child support, and paternity issues. Approximately 50% of these cases involve the establishment of original orders, while the remainder involves modification or enforcement of those orders.¹⁹

Great Majority Pro Se by Necessity not Choice

Although OCA does not track the income levels of pro se filers in district and county courts, we do have information on user income levels of TexasLawHelp, the largest online self-help source for free legal information and free forms in Texas.²⁰ User income levels are extremely low. When viewing income levels with household size, approximately 81% of users qualify for food stamps.²¹ Even excluding household size, users are clearly poor, with 24% earning less than \$9,570 annually and 62% earning less than \$29,000 annually.²² Because all information and forms on the website are available at no cost, there is no incentive for users to lie about their income or household size.

We also have information on the income levels of unrepresented parents involved in Title IV-D cases. The Office of Attorney General reports that the great majority of unrepresented parents in Title IV-D cases are very low-income. Of the 1.3 million parents involved in currently open Title IV-D cases, approximately 750,000 are current or recent recipients of TANF (Temporary Aid for Needy Families) or Medicaid benefits.²³

¹⁵ “Divorce-by-Form Riles Texas Bar,” *The Wall Street Journal*, Nathan Koppel, February 24, 2012. Interview with Sheila Norman, Bell County District Clerk, and Judge Rick Morris, 146th Judicial District Court, Bell County, on January 10, 2012. Interview with Sheila Norman on March 27, 2012 confirms that the increase cannot be attributable to returning soldiers as it is her understanding, and Judge Morris’ understanding, that soldiers are returning in units of 200-300 troops at a time, rather than a mass return as had previously been expected.

¹⁶ “Divorce-by-Form Riles Texas Bar,” *Id.* Interview with David Slayton, Director of Court Administration in Lubbock County, and Judge Judy Parker, County Court at Law Number Three, Lubbock County, on January 10, 2012.

¹⁷ “Divorce-by-Form Riles Texas Bar,” *Id.*

¹⁸ Interview with Michael Hayes, Deputy for Family Initiatives, Office of the Attorney General, January 19, 2012.

¹⁹ *Id.*

²⁰ In 2011, the site had 596,555 visits, averaging 1,634 visits per day. Interview with Colton Lawrence, Website and Special Projects Coordinator, Texas Legal Services Center, January 6, 2012.

²¹ Graphic of TexasLawHelp user income and household size survey results from Feb 1, 2012 through March 6, 2012. See Exhibit F.

²² *Id.*

²³ Interview with Michael Hayes, Deputy for Family Initiatives, Office of the Attorney General, February 8, 2012.

Increased Pro Bono Will Not Meet Need

Legal aid and pro bono programs closed over 120,000 cases last year.²⁴ Of those, the three large legal aid programs and the three largest pro bono programs closed 17,531 cases through the generosity of 7,022 pro bono attorneys.²⁵

There are over 90,000 attorneys licensed by the State Bar of Texas. It has been suggested that increasing pro bono is the solution to the current situation. While laudable, the fact is that even if every lawyer were required to represent at least one pro bono client, we would still only be able to serve less than 40% of the poor who seek help from legal aid. A major additional barrier is that we do not currently have the infrastructure in place to coordinate urban pro bono lawyers with rural clients.

Forms are not an alternative to pro bono. Good Court-approved forms make it easier, not harder, to get more lawyers to handle family law cases on a pro bono basis. Pro bono attorneys who do not regularly practice poverty law are more willing to handle a pro bono matter when they have good forms to use to resolve it.

Improving Self-Representation for Poor is Vital to Increase Access to Courts

The stark reality is that there will never be enough legal aid and pro bono lawyers to help those who need it, and pro se litigants are here to stay.

While we must continue to strive towards the goal of providing attorneys to the poor, improving self-representation is one of the few avenues available to increase access to justice for the poor.

How can we realistically do so?

²⁴ Interview with Jonathan Vickery, Associate Director and Director of Grants, Texas Access to Justice Foundation, February 22, 2012.

²⁵ *Id.*

PART ONE

COURT-APPROVED FORMS

FORMS: A FUNDAMENTAL NECESSITY

Use of Forms Across the Nation

Many states have explored ways to improve self-representation and have started with standardized forms. Forms are not a radical or even new idea. They are simply a fundamental necessity without which a pro se litigant has little hope of redress.

Only Two States Do Not Have Court-Approved Forms

Research shows that 48 states have Court-approved family law forms and one state has forms approved by their state bar.²⁶ Family law forms are the most widely available, with 37 states having divorce forms and 30 states having divorce with real property forms. States have not shied away from dealing with more sensitive child custody and support issues, with 31 states having divorce with children forms, 33 states having child custody forms, and 39 states having child support forms. Additionally, 37 states require that their courts accept the standardized form when a pro se litigant chooses to use it. No state attempts to restrict use of the forms to low-income litigants.

Forms Effective at Increasing Access to Court with No Harm to Litigants or Lawyer Incomes

Forms are *the* most basic and common tool on the continuum of legal assistance²⁷ used by the many states faced with growing numbers of pro se litigants. States affirm that forms are effective at increasing access to the courts for the poor while not causing harm to the litigants or the livelihood of attorneys.²⁸

Forms Effective at Improving Judicial Efficiency and Economy

States also report that forms improve judicial efficiency and economy by having a better prepared litigant with accurate forms that comport with state law.²⁹ Judges report that they spend less time reviewing the form for legal accuracy. Clerks and courtroom personnel are able to process pro se litigants and pro se cases more quickly and with less frustration and time.³⁰

²⁶ Research on uniform forms in the 50 states plus the District of Columbia was conducted by the Commission via personal interviews of those involved in promulgation of forms, surveys, and online research. See State Form Research Chart in Exhibit G. Alabama has Bar-approved forms.

²⁷ The continuum of legal assistance is based on the concept that legal matters present varying degrees of difficulty. While some cases require full representation by a lawyer, others may need only partial representation, and yet others may need little to no assistance. See Exhibit H for graphic of the Continuum of Legal Assistance.

²⁸ Research on uniform forms in the 50 states plus the District of Columbia was conducted by the Commission via personal interviews of those involved in promulgation of forms, surveys, and online research. See State Responses on Statewide Forms in Exhibit I.

²⁹ State Responses on Statewide Forms, *supra* note 26, and National Center for State Courts survey on forms, Exhibit J.

³⁰ *Id.*

Use of Forms in Texas

Forms Already Exist

In Texas, the issue is not whether or not to have forms. Forms already exist and have for years.

Even the Family Law Section sells do-it-yourself forms. Its Texas Family Law Practice Manual has almost every form one would need. The manual is available for sale to anyone who wishes to purchase it for \$645 plus tax.³¹ These forms are also available for free in law libraries across the state. Additionally, the Family Law Section's website provides a link to LawGuru, where forms for a variety of situations, including divorce and complex matters such as premarital agreements, can be purchased at a lower cost than the Texas Family Law Practice Manual.³²

The Texas Young Lawyer's Association *Pro Se Handbook* has forms and is available on the State Bar of Texas website at no cost.³³ Forms are available for sale at retail stores like Office Depot or by vendors like LegalZoom. A quick search of the internet reveals multiple sources for forms, such as on websites like Craigslist and Google, including those with promises of assistance by attorneys who are no longer licensed to practice by the State Bar of Texas.³⁴

Available Forms Often Inadequate

Unfortunately, the forms currently available are often inadequate for use by pro se litigants. Many forms do not comport with Texas law. Others are incorrect or outdated. Both cause litigants to arrive at the courthouse with improper pleadings that must be redone, and require judges to review the form itself for accuracy. Still others are simply too complex for use by the average pro se litigant. While no one would deny that the Texas Family Law Practice Manual has as accurate and complete a set of forms as one could need at no cost to those who have access to it through a local law library, it is highly unlikely that a pro se litigant could navigate the six volume set to determine which forms to use, much less understand the technical legal language in which the forms are written or the daunting 123 page Final Decree of Divorce form.

Available Forms Not Accepted by Some Courts

The situation is complicated by the fact that although there are some adequate forms available though TexasLawHelp.org at no cost, not all Texas courts will accept them. Some courts prohibit the use of pleadings with fill-in-the blanks or check-boxes, or otherwise make it difficult for pro se litigants to proceed in court.

Court-Approved Protective Order Forms Have Existed Since 2005 with Success

In 2005, the Supreme Court of Texas approved a Protective Order Kit so that pro se litigants could obtain a protective order against an abusive partner. Since these forms

³¹ See Exhibit K.

³² See Exhibit L.

³³ See Exhibit M.

³⁴ See Exhibit N.

were approved for use, they have benefitted countless victims of domestic violence. They have helped many people navigate the court system in the midst of a serious situation, yet are simple, accessible, effective, and enforceable. The kit has also had the added benefit of increasing the number of pro bono attorneys willing to handle domestic violence cases.

It is important to note that there was no disagreement over these forms, even though the circumstances were similar to those today. Everyone agreed that it was better for a victim of domestic violence to have an attorney. There were not enough legal aid and pro bono attorneys to meet the need, especially in rural areas. Barriers to relief existed as they do now, in that some courts would not allow women to use other available forms to pursue protective orders on their own, and some district and county attorney offices would not pursue protective orders. However, protective orders are typically handled by local legal aid attorneys and county or district attorney offices rather than the private bar, which could account for the lack of controversy over this kit.

WHY COURT-APPROVED FORMS ARE NEEDED

Benefits to the Public

Access to Judicial System

1. Provision of Means to Comply with Legislative Requirements

In Texas, we require the public to resolve certain legal matters, such as divorce, in court. For the poor who cannot afford an attorney, it is imperative that the Court, as the entity entrusted with ensuring access to justice, provides a sound means for them to comply with this requirement. Failing to do so effectively bars the poor from the judicial system, a result that is incompatible with the notion of justice for all upon which our country was founded.

Some have argued that access to justice embraces more than access to the courts and can only be ensured by access to a lawyer, even if that lawyer is only able to provide advice. We agree that access to justice is a broad concept and that it is always better to have a lawyer, yet there can be no access to justice without access to the courts. Access to the courts starts with access to forms. Advice from a lawyer is unquestionably helpful, if one can obtain it, but advice cannot be filed in court. Only a form can be filed in court. No case can be filed without one. No case can be completed without one.

2. Provision of Safe Harbor

Although Rule 7 of the Texas Rules of Civil Procedure makes it clear that a party is allowed to represent himself³⁵, the unrepresented poor face many hurdles in getting heard in court. Current practices in various counties and courts put unnecessary constraints on pro se litigants, such as refusing to accept fill-in-the blank forms or requiring pro se litigants to retype any pre-printed form. As with the 2005 Protective Order kit and its subsequent revisions, courts would be required to accept forms

³⁵ “Any party to a suit may and prosecute or defend his rights therein, either in person or by an attorney of the court.”
TCRP 7

approved by the Supreme Court when presented by a litigant, thus providing a safe harbor against such barriers to access by the poor.

Additionally, the Supreme Court imprimatur on forms will give the poor confidence in the legal sufficiency of the forms and help abate the predatory form sale and advice practices that are currently occurring in Texas. A review of Craigslist ads from February 1, 2012, through February 14, 2012, revealed that there are paralegals, “notarios,” and lawyers no longer licensed to practice law offering their services to help people with forms or selling forms that are available at no cost online. Ironically, during the time that this paragraph has been written, we were notified of two separate people attempting to file a divorce in the same county who had been sold outdated forms from two separate sources that were once available at no cost online.³⁶

3. Increase of Pro Bono Attorneys Willing to Handle Divorce Cases

We have every reason to believe that Court-approved forms will increase the number of pro bono attorneys who are willing to handle a divorce case. We have anecdotal evidence from attorneys who state that they would not have handled a protective order case without the Court-approved Protective Order kit forms as well as reports from judges who have had pro bono lawyers using the forms in their courts. National research supports this conclusion, in that states report an increase in pro bono lawyers who use the forms, as well as lawyers who use the forms for their paying clients.³⁷

Efficient Use of Available Attorney Resources

The three largest legal aid programs are required to conduct a needs assessment study to determine how to best allocate their resources amongst the various needs of the poor. Based on the results of the study, they develop program priorities in terms of who is helped before others. In family law, the legal aid program priority is victims of domestic violence.

At a time when it is clear that there are not enough legal aid attorneys to meet the needs of the poor, it is important to look at the most efficacious use of available pro bono attorney resources. While we recognize that Court-approved forms make it easier to recruit pro bono attorneys to handle a divorce, we must also state that as matter of public policy, it does not make sense to use scarce pro bono attorney resources to handle simple, uncontested divorce matters. It makes more sense to improve pro se representation by the poor by providing easy-to-use, legally sound Court-approved forms and reserve limited pro bono attorney resources for the more complex and contested matters so that they can bring their considerable knowledge of the law to bear in a situation that no poor pro se litigant could handle.

Issues of Harm to the Poor

The Texas Family Law Foundation (“TFLF”), the lobbying arm of the State Bar of Texas Family Law Section, states that Court-approved forms are a trap for the unwary and will ultimately harm the public. This argument ignores our current use of a plethora of

³⁶ Interview with Paula Pierce, Texas Legal Services Center, March 7, 2012.

³⁷ State Responses on Statewide Forms, *supra* note 26.

commercial forms in Texas and the harm that comes from failing to provide simple, sound forms.

1. Good Forms Will Clearly Improve the Status Quo

TFLF states that Court-approved forms will cause more harm than good. It is true that inaccurate or otherwise bad forms can cause harm to those who use them. This happens on a regular basis with the forms currently available in Texas. It is a fundamental reason that good, easy-to-use and legally sound Court-approved forms are needed.

2. Most People Use Forms Correctly

TFLF further suggests that the quality of the form ultimately does not matter because people will either intentionally or inadvertently use the forms incorrectly to their disadvantage. Certainly, we all hear the horror stories—both by those who have been harmed by using forms incorrectly and by those who have been harmed by attorneys who have mishandled their case. We hear the anecdotal evidence of the case about the woman who lost her rights to her husband's retirement or the man who spent thousands of dollars trying to correct mistakes made by doing his own divorce. We also hear the anecdotal evidence about the woman who paid thousands of dollars to an attorney who failed to get her share of the equity in the house or who took no action on her case at all. We hear these stories because they are not the norm. They are the outliers that make great stories for the press and for our friends at cocktail parties but are not representative of the majority of pro se litigants who use legally-sound forms correctly, or those who have good experiences with their family law attorney.

3. Court-Approved Forms Minimize Risk of Harm

Those who use forms incorrectly often do so because the forms lack instructions for completion, or they are so poorly written that it would be hard for anyone to fill them out. Instead of banning Court-approved forms, which would effectively bar thousands of poor from resolving their legal matter, it makes more sense to create good forms with detailed instructions on accurate use to minimize the risk of harm. Court-approved forms would be standardized, making it easier for a judge to catch mistakes.

Clearly, the provision of Court-approved forms will not *add* to the level of harm that is presently happening from forms currently available for use. While it is true that more people are likely to use Court-approved forms than others, better forms will improve the situation, not worsen it.

4. Proposed Forms Narrowly Drawn to Minimize Risk of Harm

The forms developed by the Uniform Forms Task Force have been narrowly tailored to apply to extremely limited situations. The express purpose of creating forms tailored to such narrow situations is to create as little risk of harm as possible.

The forms and instructions for the Divorce with No Minor Children and No Real Property clearly state the appropriate use of the forms and provide warnings

against using them for other situations. They also admonish people to get a lawyer, if they can, and provide statewide hotline numbers for legal advice referrals to legal representation.

5. Lack of Court-Approved Forms Harms the Poor

A lack of Court-approved forms causes great harm to the growing numbers of poor who have no access to an attorney. The inability of the poor to resolve their legal matters in a timely fashion can cause significant problems in later years. It can also be costly to the litigants and burdensome on the courts.

With respect to divorce, even when the divorce is amicable and uncontested, it is much more complicated for a couple to get divorced ten years after they have separated and gone their own ways, than it is for them to get divorced when needed. They may have acquired assets that are presumed to be community property even though they have not lived together for years. More commonly, they may have had children with another partner. These children are presumed to be children of the marriage because they were born during the marriage. A divorce with children born during the marriage but not of the marriage involves at least two respondents, or more, depending on the number of fathers of children born during the marriage. There may need to be additional legal action to determine paternity, which is burdensome to the court and costly to the parties. Another common issue is the inability of one spouse to locate the other spouse. Instead of simple service, the cost of which is covered under an Affidavit of Inability to Pay Costs for those who qualify for it, the party may be required to issue citation by publication at significant cost. Ultimately, what may have been able to be handled through the provision of Court-approved forms, may no longer be appropriate for such relief at a later date.

Aside from the many complicating factors that can occur from simply living life, failing to provide Court-approved forms continues the status quo of harm discussed herein where people are accessing forms from a wide variety of inferior sources, are being taken advantage of by unscrupulous people purporting to help, and are even prevented from using forms in certain courts

Benefits to Judicial System

The poor and pro se litigants will always be with us and their numbers are growing. In Texas, 21.6% of family law filings are pro se. Based on data from various counties, we believe that more than 40% of divorce filings are pro se. The overriding benefit of Court-approved forms to the court system, as indicated by national research, is increased judicial economy and efficiency.³⁸

For Judges

Currently, judges are presented with forms from multiple sources with varying degrees of quality. Court-approved forms provide judges with a reliable, standard form that is legally sound and comports with Texas law. Judges become familiar with the forms and no longer have to spend time reviewing the forms to ensure that they meet Texas law and can simply focus on reviewing the documents for completeness. Judges also report

³⁸ State Responses on Statewide Forms, *supra* note 26; National Center for State Courts survey, *supra* note 27.

that pro se litigants are better prepared when they come to court, which reduces the amount of time that the judge spends on the bench handling their case.³⁹

For Clerks and Courtroom Personnel

Anecdotal evidence suggests that clerks and courtroom personnel presently spend three times longer servicing pro se litigants than those familiar with the legal process. They are often the first people that interface with a pro se litigant and deal with the multiple questions that pro se litigants have about resolving their case.

Court-approved forms reduce time spent by court personnel with pro se litigants in a variety of ways. They have a place to refer pro se litigants for good, accurate forms, reducing the stress from upset litigants frustrated with a system not set up for public use.⁴⁰ Pro se litigants tend to be better informed on how to proceed, with the result that they reduce the number of trips to the courthouse with incorrect forms.⁴¹ Court personnel also become familiar with Court-approved forms and know where to look for key information in the pleadings, such as is needed for service of process.⁴²

For the Public

Court-approved forms improve the public's perception that the judicial system is truly open to all. Public faith in the accessibility of our judicial system helps in the acceptance of unfavorable rulings as fair, rather than concluding that the system is corrupt.

Benefit to Bar

The TFLF has suggested that Court-approved forms will harm the bar by changing the practice of law as lawyers currently know it. They worry that allowing forms for uncontested matters will quickly lead to forms for contested matters. The TFLF is also concerned that forms will negatively impact the ability of an attorney to earn a living, especially the "bread and butter" lawyers who rely on uncontested divorces to maintain their practices.

Many of the TFLF concerns about statewide forms were shared by attorneys in the numerous states that have them.⁴³ No state has reported that these concerns have materialized.⁴⁴ In fact, many states have seen lawyers benefit by assisting pro se litigants on a limited scope basis with completion of the forms, or by providing advice on their particular situation.⁴⁵ Typically, these clients represent new business to attorneys because they are not those who could have afforded the lawyer to handle their entire case.

Aside from a potential financial benefit to lawyers, states report that Court-approved forms makes it easier for pro bono attorneys to handle a case. Pro bono attorneys may be unfamiliar with practice areas that often affect the poor and are more willing to help when they are provided with good forms.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

PART TWO

**COLLATERAL ISSUES RAISED BY
THE STATE BAR OF TEXAS FAMILY LAW SECTION
AND THE STATE BAR OF TEXAS SOLUTIONS 2012 TASK FORCE**

AUTHORITY OF SUPREME COURT OF TEXAS TO PROMULGATE FORMS

The TFLF has raised the question whether the Court has the authority to promulgate forms for use by pro se litigants in court. The Commission has prepared a brief to address this issue, which has been filed with the Court and included in the materials sent by the Commission to the Supreme Court Advisory Committee. The brief concludes that the Court clearly has the authority to promulgate pleading forms under the Texas Constitution, statutory law, and common law.

Of note in the brief is the review of other forms created by the Court. Specifically, in 2009, the Court promulgated a form petition for tenants to use when filing suit to require a landlord to repair a condition materially affecting the health or safety of a tenant.⁴⁶ The form petition was promulgated along with an amendment to Texas Rule of Civil Procedure 737. While the Legislature had instructed the Court to promulgate the amendment to Rule 737, it had not instructed the Court to promulgate the accompanying form.⁴⁷

The Court has also promulgated numerous forms for use in the legislatively created “judicial bypass” procedure by which a court may authorize a pregnant minor to obtain an abortion absent parental notification.⁴⁸ The Court-approved documentation includes a set of detailed, plain language instructions regarding the judicial-bypass procedure, an application for the litigant to complete and file in court, a form for the litigant to use to request a continuance of a court hearing, and numerous other forms. Unlike the protective order and landlord-tenant forms, the judicial-bypass forms were promulgated at the Texas Legislature’s direction.⁴⁹ In doing so, the Legislature implicitly recognized the Court’s constitutional authority to promulgate such forms.

The Texas Rules of Civil Procedure contain numerous forms that litigants can use in judicial processes. Texas Rule of Civil Procedure 592b contains a template form that a litigant may use in submitting an attachment bond.⁵⁰ Rule 736(2) sets forth a form that a litigant may use to give notice of a suit to foreclose on certain liens.⁵¹ Rule 750 contains a form for litigants to use in filing an appeal bond in a forcible entry and detainer case.⁵² And Rule 117a sets forth a fill-in-the-blank form for citing by publication or personal service in suits for delinquent ad valorem taxes.⁵³

FORMS MAINTENANCE AND COST

The TFLF is concerned that a new bureaucracy will need to be created, at significant cost, to maintain any forms created. This fear does not comport with the seven years of experience we

⁴⁶ Brief of the Texas Access to Justice Commission on the Supreme Court’s Authority to Promulgate Forms filed on April 6, 2012 at page 9 and Exhibit K of the Brief. The Brief and its exhibits are available on the Supreme Court Advisory Committee website and in the packet of materials for the April 13, 2012 meeting.

⁴⁷ *Id.* at page 9 and Exhibit L of the Brief.

⁴⁸ *Id.* at page 9 and Exhibits M, N, and O of the Brief.

⁴⁹ *Id.* at page 9 and Exhibit M of the Brief.

⁵⁰ *Id.* at page 10 and Exhibit P of the Brief.

⁵¹ *Id.* at page 10 and Exhibit Q of the Brief.

⁵² *Id.* at page 10 and Exhibit R of the Brief.

⁵³ *Id.* at page 10 and Exhibit S of the Brief.

have with the Protective Order Kit. That Kit is maintained by the Court's Protective Order Task Force, a small group of volunteers who drafted the original forms and who regularly update the Kit as needed. Likewise, the Uniform Forms Task Force, a standing group that meets monthly, will be responsible for the maintenance of the forms it creates.

The TFLF suggests that maintenance of Court-approved forms will be similar to its experience with the six-volume Family Law Practice Manual in which it expended \$240,716 in print and travel costs to revise. However, to date, the Uniform Forms Task Force has *produced* the entire instructions and forms for an uncontested divorce with no children and no real property at a cost of less than \$10,000. To compare the two sets of forms is baseless. There is a vast difference in the complexity of these two sets of forms. For example, there are only 29 pages to the entire Uncontested Divorce with No Children and No Real Property kit including instructions, whereas the Family Law Practice Manual's divorce decree alone is 123 pages.

MEANS-TESTING USE OF FORMS

The TFLF has suggested that the forms be restricted for use by the poor. While the forms have been designed for use by the poor, the Commission does not recommend it.

No Other State Restricts Form Use to Poor

Of the 48 states plus the District of Columbia, none attempt to restrict their statewide forms to low-income people. Such an attempted restriction would make Texas the only state to do so. Texans have a right to self-representation under Texas Rule of Civil Procedure 7. What legitimate basis could there be for depriving citizens of the right to use the forms?

Several Problems Associated with Means-Testing Court-Approved Forms

Difficult to Means-Test Forms Available Online

If the forms were to be means-tested, who would conduct the means-testing? A human means-test would lead to creating the exact bureaucracy and expense that the TFLF fears would happen with form maintenance.

Correlating Forms with Pauper's Oath Potentially Bars Poor from Use

It has been suggested that the forms be restricted only to those who file an affidavit of inability to pay costs at the same time they file the forms. There are millions who qualify for legal aid who may be able to afford court costs but not the far greater cost of hiring a lawyer. There are multiple other problems associated with this approach. Currently, there are several large counties in Texas that automatically contest every pauper's oath filed. The likelihood of default for a low-income pro se litigant is extremely high, with the unintended consequence that the poor, for whom these forms were designed, would be barred from using them.

Additionally, Texas Rule of Civil Procedure 145 provides a safeguard to the poor's ability to access the court system while being mindful of each county's need to fund their courts. It does not make sense to combine Rule 145 with Court-approved forms. These forms are about increased access to, and efficient administration of, the justice system, not about generating additional revenue.

The TFLF has stated that their objection to forms is not financial, so it is unclear what purpose they think a Court-imposed restriction on their use would serve in the administration of justice. Decency calls for a judicial system where the poor can access the courts. The small minority of people who could afford a lawyer but choose not to retain one, as is their right, can use forms now, choosing from the array of forms that are widely available.

No Uniform Definition of Poor Across Counties and Courts

Additionally, there is no uniform definition of poor throughout the 254 counties in Texas. A person may qualify as poor in one county but not in another. In fact, there are multiple definitions of poor operating within our state and nation. To qualify for legal aid at a Texas Access to Justice Foundation (“TAJF”) funded organization, a person’s income must be at or below 125% of the federal poverty guideline. To qualify for food stamps, or for legal aid at a Legal Service Corporation (“LSC”) funded provider, a person’s income must be at or below 200% of the federal poverty guideline. However, both TAJF and LSC allow victims of crime to have income levels of up to 187.5% of the federal poverty guideline. Finally, to qualify for public housing, the project-based Section 8 program, and the Section 8 voucher program, a person’s income may not exceed 80% of the median income for the area in which he lives, as determined by the United States Department of Housing and Urban Development.⁵⁴ Statewide housing guidelines are approximately 300% of the federal poverty guideline for smaller families and less than 200% of the federal poverty guidelines for larger families. However, each county has specific guidelines that may be more or less than the statewide guidelines.

Due Process and Other Public Policy Concerns

Finally, there may be due process concerns with the Court promulgating a form and restricting its use to only one category of people. Additionally, it is unclear how restricting use of the forms to the poor is rationally related to a legitimate government interest. Protecting the earning capacity of the private bar would not qualify as a legitimate government interest. However, it is in everyone’s interest to ensure access to the judicial system.

ALLEGATION OF MISSION DRIFT

The TFLF is purportedly concerned that the Commission has strayed from its mission to increase access to justice for low-income people by pursuing efforts to improve self-representation that may have a consequence of benefitting those who could afford a lawyer but choose to represent themselves.⁵⁵ National leaders in access to justice matters and the Commission respectfully disagree. Those who can afford a lawyer, but unwisely choose not to, have ready access to forms now, including those sold on line by the Family Law Section.

⁵⁴ See 24 C.F.R. §982.201 (2011) (Section8housing voucher program); 24 C.F.R. § 960.201 (2011) (public housing); 24 C.F.R. § 5.653 (2011) (project-based section 8).

⁵⁵ *Why It Won't Work: The Access to Justice Seven-Point Plan for Pro Se Litigants*, the Texas Family Law Foundation, January 18, 2012. Exhibit O.

Majority of ATJ Commissions Work to Improve Self-Representation

Developing strategies to improve self-representation falls squarely within the mission of anyone dedicated to seeking justice for the poor. Three-quarters of the Access to Justice Commissions across the nation, with the same mission of increasing legal services to the poor, are actively developing initiatives to improve self-representation, *regardless* of income level.⁵⁶ *No other* Access to Justice Commission has been challenged by their bar, or any other outside entity, for working on these efforts.⁵⁷

Access to Justice Commissions are working on pro se litigant issues without regard to income because, as previously discussed, the vast majority of pro se litigants are poor. In Texas, we know that 81% of TexasLawHelp users qualify for food stamps. TexasLawHelp is the primary online resource for pro se litigants in Texas to access free legal information and free forms.

The Commission simply must pursue all efforts that lead to increasing access to justice. The small number of people who do not meet legal aid income levels and choose not to hire a lawyer can do so under the status quo. None of the 48 states with officially approved forms has found that such forms adversely affect the business of private practitioners.

The State Bar of Texas Agrees with the Commission

The State Bar of Texas has a strong commitment to increasing access to justice and to assisting pro se litigants, as indicated in its current Strategic Plan, which proposes to help pro se litigants by working “in collaboration with key partners to increase the availability and utilization of effective high quality pro se information, education, and support materials.”⁵⁸ This commitment is visible in the report of State Bar’s Solutions 2012 Task Force (“Solutions 2012”) which identified many of the same pro se solutions currently being pursued by the Commission’s Self-Represented Litigants Committee and its six subcommittees.⁵⁹ By identifying these same solutions, the State Bar affirms the Commission’s work to improve self-representation and agrees that this work falls within the Commission’s mission. Conversely, it appears that the State Bar disagrees with the TFLF’s assertion that these solutions will not work.⁶⁰

The Commission’s Self-Represented Litigant Committee and its six subcommittees are currently working on the following areas that were identified by the Commission in 2010 and were recommended by Solutions 2012. As is clear from this list, forms are fundamental basis for many of these efforts.

⁵⁶ Interview with Robert Echols, State Support Consultant at ABA Resource Center for Access to Justice Initiatives, March 22, 2012.

⁵⁷ *Id.*

⁵⁸ State Bar of Texas Strategic Plan, *supra* note 2, at page 6.

⁵⁹ Indigent Pro Se Litigant Subcommittee Workgroup Report contained in Appendix 1 of the State Bar of Texas Solutions 2012 Task Force Report.

⁶⁰ *Supra* note 55.

Assisted Pro Se Efforts

Solutions 2012 recommends expanding assisted pro se clinics that use volunteer attorneys to help low-income people with their uncontested legal matters. Most pro bono programs and legal aid providers have assisted pro se clinics. Almost all are assisted pro se divorce clinics. Forms are a basic need for these clinics because the litigants cannot file their case without one. Solutions 2012 also suggests using online chat or video conferencing to assist pro se individuals in need.⁶¹

The Commission's Assisted Pro Se Subcommittee has been working to develop best practices for providing assisted pro se help, and acts as a resource to counties and legal aid programs wishing to develop, expand, or improve their current assisted pro se services.⁶² The Commission's Technology Committee is also looking at ways to connect rural clients with urban pro bono attorneys via video conferencing or other less expensive technology. Additionally, the Commission educates the public and the legal community about other available resources, such as the online chat program offered on the TexasLawHelp website.

Education

Solutions 2012 suggests developing judicial and court personnel education regarding pro se litigants, including discussing the difference between advice and information.⁶³ The Commission has already developed this training and has given it several times to resounding review.⁶⁴ In fact, the presentation is in such demand that Commission has a wait list for those wishing to receive the training.

Self-Help Centers

Solutions 2012 advises establishing self-help centers throughout the state for indigent unrepresented litigants.⁶⁵ Whether the self-help center is a kiosk, a court-based full-service center, or a mobile self-help center, access to information and forms are typically the base level services provided.

The Commission's Self-Help Center Subcommittee has collected information on the various models of self-help centers across Texas and the nation, and serves as a resource to counties who seek its help in establishing self-help centers within their own communities.⁶⁶ Recognizing that each community has different needs and different resources, the Commission does not purport to know what is best for any given community. The Commission leaves it to the local community leaders to determine what type of self-help center to establish and who it wishes to serve. Some

⁶¹ Indigent Pro Se Litigant Workgroup Report of Solutions 2012 Report, *supra* note 59 at page 2.

⁶² Supplemental Report to the Supreme Court of Texas on the Activities of the Texas Access to Justice Commission's Self-Represented Litigant Committee and its Subcommittee, *supra* note 7.

⁶³ Indigent Pro Se Litigant Subcommittee of Solutions 2012 Report, *supra* note 59 at page 3.

⁶⁴ Supplemental Report on Commission SRL Activities, *supra* note 7 at pages 2-4.

⁶⁵ Indigent Pro Se Litigant Subcommittee of Solutions 2012 Report, *supra* note 59 at page 5.

⁶⁶ Supplemental Report on Commission SRL Activities, *supra* note 7 at page 7.

communities prefer to restrict services to low-income pro se litigants, while other communities choose to serve any pro se litigant regardless of income.

Limited Scope Representation

Solutions 2012 proposes using volunteer lawyers or self-help center lawyers to staff a mobile self-help center on visits to communities within a specific county.⁶⁷ The example provided is the Mobile Self-Help Legal Access Center from Ventura County Superior Court, which is equipped with computers, video stations, books, pamphlets, self-help instruction manuals and packets of Court-approved forms.⁶⁸ The Mobile Center also maintains a list of lawyers who are willing to provide legal services on a task-by-task basis, also known as a “limited scope” or “unbundled” basis.

In recognition that it is always best to have the help of an attorney, the Commission’s Limited Scope Representation Subcommittee has been working on several limited scope representation presentations. The Commission is interested in limited scope representation because it increases access to justice for low-income people by allowing those who cannot afford full representation to get the help they need from a lawyer in more affordable way.⁶⁹ While the poor may not be able to afford a retainer fee, they might be able to pay an attorney for a discrete task. The Subcommittee has found that there is much confusion and fear around limited scope representation. To address these issues, the Subcommittee has been working on presentations to educate lawyers, judges, and the public about its benefits and drawbacks, as well as when it is appropriate or inappropriate for use.⁷⁰

Rules or Legislative Changes

Solutions 2012 suggests developing a rule to let judges know that it is not a violation of the Code of Judicial Conduct to assist pro se litigants through the court system.⁷¹ The Commission’s Rules Subcommittee discussed whether revisions were needed to the current provision regarding self-represented litigants in the Code of Judicial Conduct but determined that a rule was not needed at this time, preferring to rely on education.⁷²

Solutions 2012 also suggests offering reduced liability coverage to attorneys who handle decrees for uncontested cases, stating that it might require a legislative or other disciplinary rule. While the Commission did not investigate this exact issue, it did investigate the possibility of providing malpractice coverage for attorneys who were willing to handle matters on a limited scope basis through the current State Bar program that pays a portion of the malpractice coverage for approved legal service providers in Texas. It learned that discounted malpractice coverage cannot be provided to an individual attorney unless the attorney is associated with a 501(c)(3) organization. In essence, the attorney must volunteer, or take cases on a reduced-fee basis, through a

⁶⁷ Indigent Pro Se Litigant Subcommittee of Solutions 2012 Report, *supra* note 59 at page 6.

⁶⁸ Ventura County Superior Court’s Mobile Self-Help Center Overview, Exhibit Q, page 5.

⁶⁹ Supplemental Report on Commission SRL Activities, *supra* note 7 at page 5.

⁷⁰ Supplemental Report on Commission SRL Activities, *supra* note 7 at pages 5-7.

⁷¹ Indigent Pro Se Litigant Subcommittee of Solutions 2012 Report, *supra* note 58 at page 2.

⁷² Supplemental Report on Commission SRL Activities, *supra* note 7 at page 8.

current legal service provider. The result is basically the same program that is in place through the State Bar of Texas.

The Commission looks forward to partnering with the State Bar on their proposed solutions and has included an updated list of the Solutions 2012 proposed solutions to give more detailed information about efforts happening within our state.⁷³

CONCLUSION

It is clear that there will never be enough lawyers to help the growing number of poor who need legal assistance. The poor are already representing themselves in court, and there is no reason to believe that they will stop. They have no choice.

The greatest civil legal need of the unrepresented poor is with family law matters. It may be their only interaction with the court system. Forms are a requirement for accessing the court system. Without forms, the poor who cannot get legal aid have no access.

Court-approved forms are broadly accepted nationwide as a tool to increase access to justice and judicial efficiency and economy. Almost all states provide family law forms, and a significant majority of states provide divorce forms.

Finally, it is important that the *Court* promulgate forms so that the poor have confidence that the forms are legally sound and will be accepted throughout the State. It is the role of the *Court* to ensure access to justice, not vendors on Craigslist or Legal Zoom.

The tens of thousands of people forced by poverty to try to use their right of self-representation desperately need improved access to justice. States have uniform forms because they improve this situation. We support and work for increased funding and increased pro bono efforts by lawyers. No one with knowledge of the facts can legitimately claim that these efforts can deal with multitudes who cannot obtain legal assistance.



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⁷³ Updated Solutions 2012 proposed solutions. See Exhibit Q.