

***PRO SE* LITIGANTS: THE CHALLENGE OF THE FUTURE**

Probate and Family Court Department *Pro Se* Committee Report

“A court which a generation ago was not overwhelmed by paternity cases, Rogers cases, property division cases, federal mandates for child support, abuse cases, thousands of pro se litigants, etc., could exist with some degree of comfort; those days are gone. . . . [I]dentify[ing] the problems . . . is only a first step on a long road to making the court what it should be; [namely], the one court in the [C]ommonwealth which exists to serve the needs of ordinary people in helping to structure a solution to the legal problems of their everyday lives.”

Report of the Massachusetts Probate and Family Court Bench/Bar Conference held April 8, 1995 at Boston College Law School authored by:
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Dear Bench/Bar Conference Attendee:

This letter is to follow-up on the results of discussions that took place at last April's "Probate and Family Court Bench/Bar Conference and to inform you of future plans for continued bench/bar activities.

As you may recall, the Flaschner Judicial Institute has sponsored two very successful bench/bar conferences. The first conference, held in 1995 at Boston College Law School, pinpointed three major problem areas – Rules, the Motion Sessions and Pre-Trial. In response, three bench/bar committees were appointed to study and make recommendations in each of these areas. Last April's conference was designed to provide both bench and bar an open forum to discuss and debate the recommendations and rules changes proposed by the three committees. We are pleased to enclose a copy of professor Charles P. Kindregan's excellent and comprehensive Report in which he summarizes those discussions.

As Professor Kindregan points out, prior to this conference, bar comment on proposed rules changes had traditionally been solicited only after the Supreme Judicial Court Rules Committee is poised to promulgate new rules or revisions. The Rules Committee customarily seeks comments immediately prior to their adoption. For the first time, last Spring's bench/bar conference allowed members of the Probate and Family Court to consider bar concerns and make reasonable changes before our court voted to refer proposed new rules to the Supreme Judicial Court's Rules Committee.. Indeed, as a result of listening to comments from the bar at last April's bench/bar conference, a number of revisions were made to the suggested new rules. Subsequently, the proposed changes were referred to the SJC Rules Committee. We are please to report that the suggested rules changes were approved by the Probate and Family Court judges and then referred to the Supreme Judicial Court's Rules Committee for review. Earlier this month the Supreme

Judicial Court adopted the suggested rules changes effective December 1, 1997.

A summary is enclosed for your information. We believe that the rules changes reflect a bench/bar consensus, which, in large part, is the result of the more open process pioneered by the Flaschner Judicial Institute's 1995 and 1997 bench/bar conferences. We hope that, as intended, they will have a positive impact on the administration of justice.

Given the success of the bench/bar conferences, we think it is important to continue the dialog as long as we can focus on specific and concrete problems. As you may recall, the last conference concluded with a discussion of what other issues should be addressed in similar fashion. One topic that was raised at the conference concerns the problems of *Pro Se* litigants and the proper role of judges. The written evaluations from the bench/bar conference also indicated that there seems to be universal concern about the so-called "*Pro Se*" problem. In response to comments at the conference and the written evaluations, a committee has been established and charged with making concrete recommendations for how the Probate and Family Court, particularly judges, should deal with *pro se* issues. When the committee's work is complete, the Probate and Family Court will once again work with the Flaschner Judicial Institute to convene a bench/bar conference to discuss the recommendations and solicit other constructive ideas.

Given the transition of leadership, we felt it important to let the bar know that bench/bar communication will continue to be a priority.

Sincerely,

HON. MARY C. FITZPATRICK
Chief Justice

HON. SEAN M. DUNPHY
Chief Justice Designate

ACKNOWLEDGMENTS

The Committee benefitted greatly from the many contributions made by judges, court personnel, attorneys, bar association representatives, social service and administrative agency representatives and other interested persons who shared their time and ideas and from the interest, assistance, and support of Chief Justice Sean M. Dunphy and his administrative staff. The Committee also extends its gratitude to retired Chief Justice Mary C. Fitzpatrick for her leadership in the formation of this Committee. The Committee deeply appreciates all of these contributions.

The Committee acknowledges with gratitude Suzanne Brown, Head Administrative Assistant to the First Justice of the Suffolk Probate and Family Court, for her extensive contributions to the research and writing of this Report.

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I. EXECUTIVE SUMMARY

The genesis of the Probate and Family Court Department's *Pro Se* Committee was the 1997 Bench/Bar Conference co-sponsored by the Probate and Family Court Administrative Office and the Flaschner Judicial Institute. The Conference debated a variety of issues related to changes in case-management policy and procedural changes in such areas as motions, pre-trial conferences and rules which were proposed by bench/bar committees appointed by the Chief Justice of the Probate and Family Court. Throughout the Conference both judges and members of the Bar expressed concerns as to how the recommended changes might be implemented given the large number of *pro se* litigants in the Probate and Family Court and made suggestions about other changes which might be considered given the increase in *pro se* litigation.

In response to these concerns then Chief Justice Mary C. Fitzpatrick joined with Chief Justice-designate, Sean M. Dunphy to establish the Probate and Family Court *Pro Se* Committee. The Committee is made up of a cross-section of judges and court personnel from across the Commonwealth. The Committee was charged with making concrete recommendations which would assist the court in meeting the challenges presented by the growing volume of *pro se* litigation facing the court today.

Recommendations of the Committee

Pro se litigation is not a temporary phenomenon in the Probate and Family Court. It must not be viewed as a “problem” but as an ongoing challenge. Indeed, it is presently the single most important challenge to the court’s ability to provide prompt and equal access to all citizens of the Commonwealth through effective case management. The challenge is particularly acute in the Probate and Family Court as there is no statutory authority or court rule which permits the appointment of attorneys for the parties or their children (except in those limited instances in which the Department of Social Service is a party). This challenge must be considered with an open mind and an understanding of the difficulties faced by all involved (the litigants, the Bar, judges and court staff) and with a willingness to make changes. Whether this court meets this challenge and how will have a lasting effect on the face of the Probate and Family Court in the future. A number of the recommendations of this Committee will require significant changes in the operation of the court and the function of the Bar. But the challenge is great and will not be met by doing things as they have always been done. We make these recommendations so that now and in the future, the court will better serve all who come before it.

The Committee’s recommendations fall into nine major categories which are as follows:

A. Magistrates

We propose the creation of a magistrate position which would play a crucial role in effectively managing the increasing volume of cases involving *pro se* litigants. The primary role of the magistrate would be that of “case manager.” There would be a mandatory case conference with the magistrate in most domestic relations and equity actions and specific probate matters. It would be the magistrate’s task to screen cases, to ensure that issues and parties are properly before the court, and to make initial orders in some cases. The magistrate would ensure that by the time matters come before a judge they are ready for the hearing. By allowing a magistrate to conduct initial case conferences, hear certain uncontested matters and make preliminary referrals for support services, judges would have more time to hear complex contested matters.

B. Simplified Domestic Relations Process

The Committee recommends the implementation of a process in the Probate and Family Court that would be similar to the “Small Claims” process in the District Court. Litigants involved in domestic relations matters (i.e., divorce or paternity) with a limited number of issues (i.e., support and visitation) could, with the approval of the judge or magistrate, elect to proceed under the Simplified Domestic Relations Process which would eliminate most formal discovery and relax the rules of evidence, two major stumbling blocks for many *pro se* litigants.

C. Unbundling Legal Representation

“Controlled unbundling” of legal representation is one way to make legal representation available to more litigants. “Controlled unbundling,” in the form recommended by this Committee, would allow the attorney to handle certain aspects of a case without requiring the attorney to participate in all hearings before the court. The attorney would be required to file an appearance in the case and the client and his/her attorney would in certain circumstances be allowed to agree when the attorney need not appear.

D. Rules and Legislation

A number of the Committee’s recommendations would require changes to rules of court, standing orders and existing legislation. For example “controlled unbundling” of legal services would require changes to both ethical rules and Massachusetts Rules of Domestic Relations Procedure regarding appearances and pleadings; the recommendation that the Register of Probate be allowed to refuse to accept certain incomplete or improper filings would require a change in Massachusetts Rules of Domestic Relations Procedure, Rule 77 and the recommendation that mandatory attendance at Parent Education Programs be completed within a certain time period would require changes to standing orders. Many of the initiatives recommended in this Report require additional funding. However, with modest additional filing fees and the ability to assess court costs, it is anticipated that a significant amount of the necessary funding could be generated.

E. Education and Information

The Committee recommends that educational/informational material be made available in a variety of forms and languages. The Committee proposes, for example, the implementation of an automated information system; the designation of a *Pro Se* Facilitator and the institution of a Court

Information Center in each Probate and Family Court; the creation of informational videos on court processes and proceedings; development of Web-site/Computer Access; expansion of the Lawyer for the Day Program; and the expansion of law student representation of indigent litigants. The Committee recommends specific training for judges and court staff to increase awareness of issues involving diversity of the population, language barriers and literacy problems. The Committee also recommends that, as part of the educational process, the importance of obtaining qualified counsel be continually emphasized.

F. **Forms Revision**

The Committee recommends that the forms most often used by unrepresented litigants be reviewed and, where appropriate, revised to include: simplified language; larger spaces for writing information; clear concise instructions; and overlay templates to address diverse language needs. Forms should be compiled in self-contained packages which include all necessary forms and instructions necessary to present the most frequently filed matters (e.g., divorce, paternity).

G. **Probation Officers**

The Committee recommends the expanded involvement of probation officers in dispute resolution through referrals by judges and magistrates, and in conducting investigations. The Committee also recommends the creation and funding of the position of associate probation officer in the Probate and Family Court to relieve the probation officers of certain duties and enable them to fulfill these expanded duties and to implement certain education policies and procedures.

H. **Court Clinic**

The Committee recommends the expansion or creation of Court Clinics either on a regional or county basis. Such clinics already exist in several counties of the Probate and Family Court, where they provide initial evaluations and assessments in custody and child welfare cases.

I. ***Pro Se* Coordinator Position**

The Committee recommends the creation of a permanent *Pro Se* Coordinator within the Probate and Family Court Administrative Office to implement the Committee's recommendations and monitor their effectiveness. The Coordinator's role will also include development of ongoing responses to the changing needs of the court and litigants .

This Committee's recommendations must be viewed in conjunction with other initiatives which impact the *pro se* litigant and the court such as those which arise out of the Supreme Judicial Court's Standing Committee on Substance Abuse, the Supreme Judicial Court's Standing Committee on Dispute Resolution, the Governor's Commission on Domestic Violence and the Governor's Commission on Responsible Fatherhood. It is expected the *Pro Se* Coordinator would also work to integrate the recommendations of these and other committees.

II. INTRODUCTION

The face of the Probate and Family Court has changed dramatically over the last twenty years. Once a court in which legal issues were presented almost exclusively by attorneys skilled in the specialized practice of probate and divorce law, recent years have seen an evolution both in who uses the court and what issues come before it. New statutes that confer vastly expanded jurisdiction, major changes in case law as well as increases in the volume and complexity of cases have combined to make this court one of the busiest Departments within the Trial Court system.

However, it is the explosion in the numbers of persons who represent themselves in court, known as *pro se* (“for yourself”) litigants, which has been the most difficult change for the court to assimilate and the attorney to adjust to. This surge in *pro se* cases, reflective of a national trend,¹ impacts all parts of the court process especially case management (from filing the complaint, to entry of the judgment and all the steps in between). It has necessitated increased staffing and services to be provided by the court. It has greatly impacted the attorney who often finds the opposing *pro se* party unfamiliar with the law, the rules of court and court process. Effectively responding to this growth in *pro se* litigation is the single most important challenge currently facing the Probate and Family Court. Whether this challenge is successfully met, and how, will determine the face and future of the Probate and Family Court as it heads into the next century.

With these considerations in mind the *Pro Se* Committee was established by then Chief Justice Mary C. Fitzpatrick in 1997, and continues as a major priority of Chief Justice Sean M. Dunphy. The Committee originated as an outgrowth of the Bench/Bar Symposium jointly sponsored by the Probate and Family Court and the Flaschner Judicial Institute. The symposium considered difficulties faced by *pro se* litigants in court and the impact of the *pro se* litigant on the court, the Bar and litigants represented by counsel including:

¹Jona Goldschmidt, “How are courts handling *pro se* litigants?”, *Judicature*, Vol. 82, No. 1, pp 13-19. The article cites a survey of judges and court administrators nationwide that indicates that 59% of all *pro se* litigant inquiries are on the domestic relations issues.

- case management;
- the difficulties attorneys face when contending with *pro se* opponents;
- the difficulties *pro se* litigants experience with rules and procedures which have been developed primarily for use by attorneys;
- the perception by attorneys that the *pro se* litigant is given an advantage and assistance by the court and staff;
- the increased costs of litigation to the party with an attorney resulting from delays occasioned by interacting with and waiting for *pro se* litigants;
- difficulties experienced by both the court and the attorney dealing with the *pro se* litigant who can afford an attorney but chooses not hire one;
- difficulties of non-English speaking *pro se* litigants and the court in meeting their needs, given the frequent unavailability of interpreter services; and
- the shortage in legal services available to indigent or lower income litigants due to government funding cuts.

All of these concerns play out against a high volume of cases which, by their very nature, often require immediate attention and the need to provide prompt and ready access to the courts for all citizens².

In 1978, landmark Court Reform legislation was enacted creating a unified Trial Court composed of seven departments, including the Probate and Family Court Department. Since that time, the caseload of the Probate and Family Court has dramatically increased due to grants of additional jurisdiction by legislation, as well as expansion in the scope of jurisdiction by appellate decisions responding to societal changes and demands. There has been a significant increase in the requirement of mandatory written findings of fact when entering orders or judgments. Generally there has been no provision of the additional resources necessary to keep abreast of these new responsibilities.

² Professor Charles P. Kindregan, Jr., "Probate and Family Court's Bench/Bar Conference" *Massachusetts Lawyers Weekly*, Vol. 26, No. 6 September 15, 1997. The Conference focused on the recommendations of committees established as a result of the first Bench/Bar Conference. The impact implementation of these recommendations would have on *pro se* litigants was a primary focus of discussion.

Illustrative of the expanded court jurisdiction created by statute is the following:

1. Review and Modification of Support Orders, every three years G.L. c. 119A, § 3B (1998);
2. Payment of guardian expenses for wards in nursing homes; *See*, 130 Code Mass. Regs. § 520 and Rudow v. Commissioner of the Division of Medical Assistance, 429 Mass. 218, 707 N.E.2d 339 (1999);
3. Distribution of Information to Non-custodial Parents of Children Enrolled in Elementary and Secondary Schools under G.L. c. 71 § 34H (1998);
4. Uniform Interstate Family Support cases under G.L. c. 209D (1995);
5. Standby Proxy Guardianships under G.L. c. 201 §§ 2A - 2H (1995);
6. Transfer of support cases from the District Court Department pursuant to G.L. c. 209C § 3 (1993);
7. Child entertainment contracts (Guardianship of Minor Entertainers) G.L. c. 231 § 85P1/2 (1991);
8. Establishment of Department of Revenue Child Support Enforcement Division G.L. c. 119A § 1 (1986) and G.L. c. 14 § 1A (1987). Department of Revenue child support cases are heard weekly before one judge in “Block Time”;
9. Children born out of wedlock (Paternity) actions under G.L. c. 209C (1986);
10. Registration of Foreign Custody Decrees under G.L. c. 209B (1983);
11. Abuse of Elderly or Disabled Persons under G.L. c. 19A (1982) and 19C (1986);
12. Abuse prevention/domestic violence cases under G.L. c. 209A (1978); and
13. Complaints for Grandparent Visitation under G.L. c. 119 § 39D (1972).

Illustrative of the expanded scope of jurisdiction defined by case law is the following:

1. Reproductive technology cases, currently pending before the Supreme Judicial Court AZ v. BZ relative to the authority of the court to enjoin parties from using pre-embryos and validity of contracts regarding their use (1999);
2. Surrogate parenting cases, *See* R.R. v. M.H., 426 Mass. 501, 689 N.E.2d 790 (1998);
3. The issue of extending visitation rights with a child for *de facto* parents, *See* Youmans v. Ramos, 429 Mass, 774, 711 N.E.2d 165 (1999) and E.N.O v. L.M.M., 429 Mass. 824, 711 N.E.2d 886 (1999);

4. Requirement that the court consider and make written findings assessing the impact of domestic violence when entering custody and visitation orders, *See Custody of Vaughn*, 422 Mass. 590, 664 N.E.2d 434 (1996);
5. Same sex Adoption cases; *See Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (1993);
6. Equity actions under G.L. c. 215 § 6 (1993) (brought by a putative father to establish a substantial relationship with the child); *See C.C. v. A. B.*, 406 Mass. 679, 550 N.E.2d 365 (1990); and
7. Medical guardianships seeking authority to assent to extraordinary medical treatment and anti-psychotic medication; *See Rogers v. Commissioner of Department of Mental Health*, 390 Mass. 489, 458 N.E.2d 308 (1983). Orders entered on cases involving anti-psychotic medication must have a termination date and also require periodic reviews of the treatment plans by the court. *See Guardianship of Weedon*, 409 Mass. 196, 565 N.E.2d 432 (1991).

Illustrative of increased requirements on judges to make written findings³:

1. G.L. c. 209A, requires written findings when a judge enters mutual restraining orders or mutual no contact orders under section 3 of the statute;
2. G.L. c. 208 §28 and c. 209C §9(c), and the Child Support Guidelines require written findings if a judge deviates from the Child Support Guidelines;
3. G.L. c. 208 §28A requires specific written findings when a judge enters temporary orders regarding care and custody of a child in a pending modification case;
4. G.L. c. 208 §31A and c. 209C §10(e) requires written findings within ninety (90) days of entering a custody order when the judge finds a pattern of or serious incidents of abuse. Such findings must reflect the effects of the abuse on the child and show such order is in the child's best interests and provides for the safety and well being of the child;
5. Mass.R. Dom. Rel. P. 6(c) requires written findings showing that an emergency exists and the nature of the emergency when the judge allows a motion for an application for *ex parte* relief from the seven (7) day notice requirement;
6. Trial Court Rule VIII, Uniform Rules of Impoundment Procedure, Rule 8 (1986) requires written findings in support of an order impounding a case;

³ Judges may require submission of proposed findings but rarely request or receive such submissions by *pro se* litigants.

7. G.L. 119 A §12 (as amended 1998) requires written findings if a judge suspends a wage assignment without agreement of the parties;
8. Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) requires written findings when ordering medical treatment for mentally incompetent patients;
9. Rice v. Rice, 372 Mass. 398, 361 N.E.2d 1305 (1977) requires written findings in making an assignment of property under G.L. c. 208 § 34 (1974). This requirement has been limited to only those cases in which an appeal is taken. *See also*, Bianco v. Bianco, 371 Mass. 420, 423 (1976), Mass. R. Dom. Rel. P. Rule 52(a);
10. Adoption of Galen, 425 Mass. 201, 680 N.E.2d 70 (1999), requires written findings when the judge denies a motion to waive the Department of Social Services home study pursuant to G.L. c. 210 §5A (1950);
11. G.L. c. 119 §39D requires written findings when ordering visitation between a grandparent and child; and
12. G.L. c. 209C §15, requires written findings if a judge learns of an outstanding warrant in the course of a request for a Domestic Relations Protective Order.

The increased volume of cases is illustrated in the Probate and Family Court Department section of the Annual Reports of the Massachusetts Trial Court System for fiscal years 1979 through 1998, which reflect the following:

1. In 1998, nearly 15,000 paternity actions were filed system-wide representing 12% of all pleadings filed in the Probate and Family Court. In some counties, more paternity actions were filed than divorces (e.g. Hampden and Suffolk);
2. More than 7,800 abuse prevention cases were filed in 1998;
3. Over the last six years, there has been a 29% increase in the total number of filings;
4. In the twenty year period since 1979, filings in the Probate and Family Court have increased 49% from 105,820 in 1979 to 158,074 in 1998. In contrast, the Superior Court reported 58,785 cases commenced in 1979 and 39,050 in 1998; and
5. There has been a steady increase in filings of petitions for Guardianship of Minor in the Probate and Family Court. In the last twenty years, filings have increased from 1,259 in 1979 to 3,755 in 1998, reflecting an increase of over 198%. In the last five years, since 1993, these filings have

increased by over 37%, from 2,777 to 3,755 in 1998. Many of these petitions are brought by or opposed by *pro se* litigants.

Enabling legislation in connection with abuse prevention cases brought pursuant to G.L. c. 209A, provided that the parties be permitted to represent themselves in connection with such actions without the assistance of counsel. In the Probate and Family Court, abuse prevention actions are often filed in connection with a related action, such as divorce or paternity, which involve child custody and visitation issues. To the extent that individuals are encouraged to proceed without legal representation in connection with abuse prevention matters, they may also feel encouraged to represent themselves in these related matters.

As defendants have become increasingly aware of the consequences of having a protective order entered against them, the number of *pro se* litigants contesting these orders and requesting evidentiary hearings has also increased. The existence of protective orders under G.L. c. 209A must be considered by the court in entering custody and visitation orders. The defendant's right to carry a weapon which may impact his/her employment is also affected by entry of such orders⁴.

In other instances, *pro se* litigation results when other aspects of the case are brought forward by agencies. Recent legislation which promotes the establishment of paternity for children born out of wedlock, in order to obtain orders of support, has resulted in the proliferation of actions instituted by the Department of Revenue. Although the Department of Revenue represents the financial interests of the moving party, who is most often the mother, the father is generally *pro se*. Once in court in connection with support issues, parties will frequently simultaneously seek to address the related issues of custody and visitation. The Department of Revenue provides representation only for child support matters. Accordingly, with respect to custody and visitation matters parties will, in most cases, not have representation. There has been recognition nationally that Federal Child Support mandates have created additional non-child support demands on the court. The Commissioner of the United States Office of Child Support Enforcement (O.C.S.E.) has established a Judicial Advisory Board to advise him on the impact of enhanced child support activities resulting from the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 on local courts.

⁴ The court also has authority to enter domestic relations protective orders [G.L. c. 208 §§ 18, 34B; G.L. c. 209C §§ 15, 20; G.L. c. 209B §32].

III. ILLUSTRATING THE *PRO SE* CHALLENGE

During the *Pro Se* Committee's review of the issues raised by *pro se* representation, judges and court personnel provided specific vignettes that demonstrate common challenges presented by the *pro se* litigant. Some examples:

- The father appears *pro se* seeking custody of four children residing with him. Two of the four children he asserts are his, but were born during the mother's marriage to another man who is therefore the legal father and from whom she is now divorced. The other two children are undisputedly the children of the former husband. The legal father has remarried and neither he nor the mother are available. This case requires a guardianship petition to be filed for the two children who are not his; and two actions under G.L. c. 215 §6 to establish a substantial relationship with the two children he alleges are his. These cases will require him to serve a summons under the Domestic Relations Rules for the case brought under G.L. c. 215 while the guardianship will require service of a citation and the scheduling of a return day.
- The mother seeks custody of two children when requesting an extension of a 209A protective order. The father objects. It appears the case has been in two courts in other states within the last six months and there are issues of whether Massachusetts has jurisdiction under the Uniform Child Custody Jurisdiction Act which the *pro se* litigants do not possess the knowledge to address.
- A maternal grandmother seeks custody of three children. Two of the children have the same father and the father of the third child is unknown. One of the two children with the same father also has a case pending in Juvenile Court. The citations will be given different return days (the return date on the citation for the unknown father will be two months). The grandmother does not know who to serve or how. An emergency appointment as temporary guardian expires and service has not been made.
- An attorney files a complaint for divorce, serves it, prepares mandatory discovery and notifies the *pro se* opponent that the attorney is ready to exchange discovery. The attorney receives no response and requests a status conference or a pre-trial conference or files a motion to compel to

get the *pro se* litigant's attention. The attorney is not in a position to settle the case at the conference. The *pro se* litigant appears and states "I want an attorney and can't afford one." This is a particular concern in the Probate and Family Court as the court has no authority to appoint counsel, at public expense, other than in those limited circumstances in which Department of Social Services is a party.

While these vignettes reflect how a case comes to the judge, the Committee sought to identify more general and uniform problems presented by the *pro se* challenge as it impacts case management. These include:

- Inability to analyze and articulate the legal issue involved in the case requiring the judge to spend substantial time to determine the procedural context in which the case is being heard;
- Unfamiliarity with court forms and inability to fill out forms completely and correctly, sometimes resulting in later discovered jurisdictional or venue problems and failure to disclose salient facts;
- Substantial time demands are placed on Registry and Probation Office staff to identify the problem and explain the forms, rules and/or process;
- Unfamiliarity with court process; the *pro se* litigant often assumes that court staff will obtain the motion date, send the notice and/or subpoena witnesses. "I didn't know" or "No one told me" are frequent comments of the *pro se* litigant;
- Inability to move case along to trial and judgment; inability to understand the need for and to present the basic information to go forward (a *prima facie* case) such as in a divorce, annulment or paternity action. The result is that the case lingers and there are multiple requests filed for temporary orders and multiple court appearances. The *pro se* litigant often believes the court will obtain the needed information on its own and assumes that it is up to the court to set the case for trial;
- Increased need to appoint guardians *ad litem* to investigate and present facts to the court (which would otherwise be developed by an attorney) to insure all relevant facts are known. All too often parties are unable to pay the guardian *ad litem* fee, and this expense is incurred by the court placing a substantial strain on the court's budget and ultimately becoming an increased expense to the taxpayer;
- Increased numbers of multiple related cases, for example one person may have a support order in a divorce, and one or more paternity cases, sometimes in different counties; cases may include a

District Court 209A complaint and a Probate and Family Court divorce or paternity with custody orders entered by both courts. Cases often involve multiple parties such as two paternity cases, a divorce, guardianship of a minor petition and a care and protection case in Juvenile or District Court. The case may involve parents, agencies and/or grandparents and the *pro se* litigant does not know how or whom to serve. The case may come before the court with improper service and improper joinder of parties, often resulting in the cases having to be rescheduled, thus wasting valuable hearing time before the judge;

- Intervention occurs far too late in the court system. Triage is done by the judge rather than a case being screened much earlier and directed to one of the many alternative methods of resolving disputes;
- Multiple filings by the *pro se* litigant who files several contempt or modifications when one pleading seeking multiple claims for relief or an amendment adding a claim would be sufficient;
- Failure to appear on time for court hearings, resulting in the case being dismissed, an arrest warrant being issued (in contempt cases) which may later be revoked and the case rescheduled, and delays in hearing other matters which frequently lengthen the court day for judges and court staff;
- Failure to understand the importance of timely filing an objection/answer thereby causing the case to move on an uncontested track until the hearing date when the defendant appears for the first time to contest;
- Insufficient availability of collateral resources at affordable cost to help the court work with the *pro se* litigant (e.g. supervised visitation centers, court clinics, interpreters and drug and alcohol treatment and screening centers);
- Unrealistic expectations of the court system by the *pro se* litigant. The *pro se* litigant expects all problems can be solved by the court. Many problems are not legal or are not properly pleaded;
- Use of prepared agreements (e.g. separation agreements for divorces) with no understanding of the consequences of the language contained therein when the court makes inquiry. Use of prepared agreements without language being tailored to particular facts of the case;
- Failure to come into court with the required forms completed, such as financial statements and child support guidelines worksheet. This requires the case to be delayed while the forms are filled out. The *pro se* litigant, however, often doesn't have the requisite information with him/her which results in significant delays in high volume sessions;

- Failure to make service of process correctly (e.g., guardianships under Rule 29B) resulting in multiple court appearances for extensions of the temporary appointment pending proper service, frequently on an *ex parte* emergency basis;
- Failure to notify other interested parties such as the Department of Social Services or Department of Revenue, resulting in the need to reschedule the case, and there by causing delays;
- Failure to follow complex court rules and complete forms in cases not otherwise requiring extensive discovery which might proceed to resolution without resorting to such rules or forms;
- Failure to have an attorney in cases in which the complexities clearly require one;
- Increased unwillingness of all parties (*pro se* or otherwise) to accept a judgment imposed after a trial or take an appeal, resulting in increased filings of post-judgment motions and modifications⁵;
- Failure of the *pro se* litigant to notify the court of the need for an interpreter or the defendant appears to contest the pleadings at an uncontested hearing and needs an interpreter. Insufficient numbers of interpreters are available to assist litigants both in and out of the courtroom. For example, a litigant may require interpreter services in order to fill out and file appropriate pleadings or during dispute intervention sessions with the Probation Office. The Committee recognizes the inherent problem in expecting a non-English speaking litigant to formally request a court interpreter;⁶
- Failure to comply with discovery (e.g. one party is represented by an attorney who initiates formal discovery, but the other party is a *pro se* litigant unfamiliar with the rules regarding discovery) resulting in repeated motions to compel discovery which stall the progress of the case;
- Absence of guidelines as to who can use volunteer court-related services such as Lawyer for the Day;
- Unfamiliarity with court protocol such as appropriate dress or not interrupting when someone else is speaking;
- Not knowing how to present documentary evidence or how to respond to an opposing party's attempt to introduce an exhibit; and

⁵ Suffolk and Middlesex Probate and Family Court have issued protocols requiring various post-judgment motions to be considered on written submission. This protocol has been adopted on a state-wide basis as directed in Standing Order 2-99 Procedure for Submission and Disposition of Certain Motions, which became effective October 1, 1999. In Suffolk 81 such motions were filed in a six month period.

⁶The staff in the Suffolk Probate and Family Court now identifies litigants who are in need of interpreter services; the case file is stamped "Interpreter" and the language is written below the stamp.

- Not knowing how to object or respond to an objection.

The single biggest factor in each case involving *pro se* litigants is the time required by the court to define the problem, determine the proper parties and appropriate pleadings and elicit evidence. Too much time is spent at the judicial level in educating *pro se* litigants, and in determining the procedural status of the case.

These problem areas result in serious delays in the case, repeated court appearances, and substantial time demands placed on the judges, registers, clerical and other support staff and probation officers, as well as significant expense for the litigant represented by an attorney and frustration for the *pro se* litigant.

IV. APPROACH TO THE *PRO SE* CHALLENGE

The *Pro Se* Committee sought, as its first goal, to identify the nature and scope of the *pro se* challenge. Recognition of the magnitude of the *pro se* challenge and its impact on the court system-wide is perhaps best demonstrated by the number of recent studies dealing with the issue. The Boston Bar Association issued its Report of the Task Force on Unrepresented Litigants on August 18, 1998, which examined this issue in the various court departments statewide and made certain recommendations. The Supreme Judicial Court's Committee recently submitted its report on *Pro Bono* Legal Services that discussed how to encourage and support *pro bono publico* (meaning for the good of the public) efforts by attorneys on behalf of low-income citizens of the Commonwealth. In August, 1999, the Massachusetts Bar Association completed an extensive survey on the use of courts by *pro se* litigants. Other states have also examined the *pro se* challenge and its impact on the courts. A National Conference on *Pro Se* Litigation, sponsored by the American Judicature Society, will be held in Arizona in November, 1999 to bring together administrators from courts nationwide to discuss the impact of *pro se* litigants on the court and methods of meeting the challenges that the increase in *pro se* litigation presents.

Since its creation, the Committee has met in ongoing sessions to examine the many facets of the *pro se* challenge. As a preliminary step, the Committee defined three broad categories of "*pro se* litigants":

1. The indigent *pro se* litigant who cannot afford an attorney but who does not qualify for *pro bono* legal assistance. This group was perceived to be the most numerous;
2. The *pro se* litigant who can afford an attorney but for various reasons, elects not to hire an attorney; and
3. The *pro se* litigant who uses *pro se* status as a mechanism for advancing an agenda or for harassing the other party, through unnecessary multiple filings of pleadings and motions. Litigants falling into this last category are relatively few in number and were viewed by the Committee as posing a management issue for the individual judge, and not a concern to be addressed in this report. Many of the recommendations will assist the court in dealing with the *pro se* litigant who falls into this category.

In an effort to obtain maximum input of the Bar and to provide opportunity for wide and varied viewpoints the Committee convened several focus group meetings with representatives of the Bar (See Appendix A).

The Committee created several sub-committees to better focus its efforts. These are:

- Management/Administration;
- Education/Resources;
- Rules/Legislation;
- Forms; and
- Probation Department (formerly known as Family Service).

COLLECTING DATA

In the Probate and Family Court, as in other courts within Massachusetts and indeed nationwide, there is a paucity of accurate data on the numbers of *pro se* litigants, the kinds of cases in which individuals seek to represent themselves, the problems they face and the effect, if any, on the outcome of the litigation⁷.

While eighty-four percent of court managers surveyed nationally by the American Judicature Society believe the number of *pro se* litigants has increased, only twenty-three percent currently collect data on the number of *pro se* litigants⁸. Judges, Registers, Chief Probation Officers and practitioners in Massachusetts were uniform in their perception that the numbers had increased (See Appendix C). The Committee, in conjunction with Chief Justice Dunphy's office, generated a questionnaire and collected data from twelve of the fourteen Divisions in the Probate and Family Court during December, 1997 regarding the numbers of individuals appearing *pro se* (See Appendix D). In addition, the Committee prepared a survey which was conducted by Probate and Family Court law clerks who elicited information from *pro se* litigants regarding the reasons why individuals represent themselves and their experience using the court system (See Appendix E).

The primary reason cited for appearing *pro se* was the inability to afford an attorney (See Appendix F). However, a strong secondary reason was dissatisfaction with attorneys and the perception that attorneys are not always helpful. Responses to the survey suggest that the Bar must work to improve its image and spread the message concerning the importance of having representation by a qualified attorney.

The appearance of inevitability in the outcome of a case (in support cases, for example, which are governed by child support guidelines) also leads some parties to appear *pro se*.

⁷ In order to generate, for the first time, reliable statistical data regarding the prevalence of *pro se* representation in the Probate and Family Court, Chief Justice Sean M. Dunphy has instituted a tracking system which identifies the number of cases in which plaintiffs/petitioners represent themselves at the outset of litigation. This mechanism for data collection, which went into effect on July 1, 1998, has generated results that are included in the Fiscal Year 1999 Annual Report (See Appendix B). Maintaining such data in a manner which accurately reflects the total *pro se* picture can be difficult as parties may initiate a case with an attorney who later withdraws and the litigant continues *pro se* or, conversely, a party may initially appear *pro se* and then hire an attorney during the pendency of the case.

Additionally, the Massachusetts Bar Association has recently completed a comprehensive survey entitled *Pro se User of the Court Survey*, published August, 1999.

⁸ Jona Goldschmidt, "How are courts handling *pro se* litigants?", *Judicature*, Vol. 82, No. 1, p. 20.

After evaluating the survey data and the information obtained through focus groups, the Committee sought to formulate concrete proposals that would assist the litigant, attorney and the court in managing cases from filing to entry of judgment.

V. RECOMMENDATIONS

The Committee recommends:

A. Magistrates

The creation of a magistrate position which would play a crucial role in effectively dealing with the ever increasing volume of cases involving *pro se* litigants. The primary role of magistrate is envisioned to be that of “case manager.” It would be the magistrate’s task to screen cases and make initial orders in some cases. The magistrate would ensure that by the time matters come before a judge they are ready for the hearing. By allowing a magistrate to conduct initial case conferences, hear certain uncontested matters, issue certain orders, make preliminary referrals and issue orders in specified circumstances, judges would have more time to hear complex contested matters.

B. Simplified Domestic Relations Process

The Committee recommends the implementation of a process in the Probate and Family Court that would be similar to the “Small Claims” process in the District Court. Litigants involved in domestic relations matters (i.e., divorce or paternity) with a limited number of issues (i.e., support and visitation) could elect with the approval of the judge or magistrate to proceed under the Simplified Domestic Relations Process which would eliminate most formal discovery and relax the rules of evidence, two major stumbling blocks for many *pro se* litigants. This process would also be available to represented litigants.

C. Unbundling Legal Representation

“Controlled unbundling” of legal representation is one way to make legal representation available to more litigants. “Controlled unbundling,” in the form recommended by this Committee would allow the attorney to provide representation in certain aspects of a case without requiring the attorney to appear at every court hearing. The attorney would be required to file an appearance in the case and the client and his/her attorney would in certain circumstances be allowed to agree when the attorney need not appear at a hearing and when the client could appear him/herself.

D. Rules and Legislation

A number of the Committee's recommendations would require changes to rules of court, standing orders and existing legislation. For example, "controlled unbundling" of legal services would require changes to both ethical rules and Massachusetts Rules of Domestic Relations procedure regarding appearances and pleadings; the recommendation that the Register of Probate be allowed to refuse to accept certain incomplete or improper filings would require a change in Massachusetts Rules of Domestic Relations Procedure, Rule 77; the recommendation that mandatory attendance at Parent Education Programs be completed within a certain time period require changes to standing orders. Many of the initiatives recommended in this Report require additional funding. We propose that a significant amount of the necessary funding be generated through the imposition of additional filing fees and assessing court costs.

E. Education and Information

The Committee recommends that educational/informational material be made available in a variety of forms and languages. For example, the Committee proposes the implementation of an automated information system; the designation of a *pro se* facilitator and the institution of a court information center in each Probate and Family Court; the creation of informational videos on court processes and proceedings; development of web-site/computer access; expansion of the Lawyer for the Day Program; and the expansion of law student representation of indigent litigants. The Committee recommends specific training for judges and court staff to increase awareness of issues involving diversity of the population, language barriers and literacy problems.

F. Forms Revision

The Committee recommends that forms that are most often used by unrepresented litigants be reviewed and where appropriate, revised to include: simplified language; larger spaces for writing information; clear concise instructions; and overlay templates to address diverse language needs. Forms should be compiled in self-contained packages which include all forms and instructions necessary to present the most frequent filed matters (e.g., divorce, paternity, guardianship).

G. Probation Officers

The Committee recommends the expanded involvement of probation officers in dispute resolution referrals by judges and magistrates and in conducting investigations. The Committee also

recommends the creation and funding of the position of associate probation officers in the Probate and Family Court to allow the probation officers to undertake these expanded duties and to implement certain education policies and procedures.

H. **Court Clinic**

The Committee recommends the expansion or creation of Court Clinics either on a regional or county basis. Such clinics already exist in several counties of the Probate and Family Court and perform initial evaluations and assessments particularly in custody and child welfare cases.

I. ***Pro Se* Coordinator Position**

The Committee recommends the creation of a permanent *Pro Se* Coordinator within the Probate and Family Court Administrative Office to institute the Committee's recommendations, oversee their implementation and monitor their effectiveness. The Coordinator's role will also include development of ongoing responses to the changing needs of the court and litigant .

This Committee's recommendations must be viewed in conjunction with other initiatives which impact the *pro se* litigant and the court such as: the Supreme Judicial Court's Standing Committee on Substance Abuse, the Supreme Judicial Court's Standing Committee on Dispute Resolution, the Governor's Commission on Domestic Violence and the Governor's Commission on Responsible Fatherhood and Family Support. It is expected the *Pro Se* Coordinator would also work to integrate the recommendations of these and other committees.

The Committee concludes that the *pro se* challenge can **only** be effectively met by fundamental changes in both case management philosophy and court administrative structure. The court must assume the role of case manager in addition to its traditional adjudicatory responsibilities. Once a case is filed, the court and not the litigant or attorney, must manage the case to ensure its timely progress. The court and the bar should be reminded of the statutory authority relative to requesting and granting attorney's fees and be encouraged when appropriate to do so thereby assisting in reducing the number of *pro se* litigants. There must be a recognition that, notwithstanding what programs may be put in place to assist litigants to obtain an attorney, *pro se* litigants will be a permanent feature of probate and family law practice. Institutional attitudes and approaches with respect to the assistance which it is appropriate to provide *pro se* litigants must be re-examined and adapted to this reality.

Unlike the Superior Court which has strict time standards, the Probate and Family Court has historically not embraced the concept of time standards for case management due to public policy⁹. Given that this court's work at that time most often involved dissolution of marriages, it was considered inappropriate to put a case on a time track for judicial resolution when parties themselves might not be ready to go forward. It was thought that parties and their attorneys could best decide when the time was right to mark the case for hearing so as to maximize opportunities for reconciliation or settlement. The court did not want to enact standards which would accelerate dissolution of the family. Accordingly, the court focused solely on the time it took for a case to be tried after a trial request was filed. Since then, however, the number of cases before the court involving family dissolutions has remained relatively constant while the total number of filings of all matters has increased approximately twenty percent.¹⁰ Many more petitions to establish paternity, guardianships, and other non-divorce actions are being filed. That fact as well as the sheer overall number of cases being filed, and the increasing complexity of issues involved in many cases, make it appropriate to reconsider this philosophical approach. The recommendations herein provide for affirmative management and scheduling by the court while maintaining flexibility to adjust case progress given the needs of individual litigants, and provide for evaluation of the suitability of each case for resolution by means other than a trial. There remains an opportunity for litigants to "opt out" of the case management schedule for good cause for a period of time if such request is approved by a judge. The Committee recognizes that "absolute" time standards from filing to judgment do not as readily lend themselves to family law cases as to other proceedings. At the same time we believe that when a litigant applies for relief from the court, the court must have the ability to manage that case in consideration of its overall case load and case flow.

Similar reconsideration of existing court management structure is required. At present, the first substantive intervention in the case occurs when it comes before a judge, often on the day of hearing after it has been pending for many months.

It was the intent of the Committee to examine the *pro se* issue, less in a theoretical context, and instead in a practical context with primary emphasis on determining where the case "bogged down" in the system, why, and

⁹ The time standards adopted by this court in 1988 (Standing Order 1-88), were adopted by order of the Supreme Judicial Court which specifically states "The time standards apply only on request by any party, in order not to precipitate the finality of trial confrontation (as in divorce or separation) when no party seeks it."

¹⁰ In 1989 the total number of original filings were 125,124, of which 23,888 filings involved dissolution of a marriage; in 1998 the total number of original filings were 158,074, of which 23,102 involved the dissolution of a marriage.

what can be done to improve the court's response. The Committee focused on practical solutions to problems, such as how a *pro se* litigant goes from filing the complaint to entry of judgment; what options, other than litigation, are available to that party during pendency of the case; and how does a case get on track for trial and stay on track.

Many of the proposed recommendations can be accomplished through administrative changes and rule changes. Others will require legislative changes and appropriate funding.

Issues involved in probate and family law cases are serious, with critical decisions being made that impact the daily lives of the litigants and their children as well as society at large. Therefore, every effort should be made to assist litigants in obtaining an attorney. None of the recommendations herein are offered as a substitute for an attorney who can, after consideration of the particular facts and needs of a given case, provide high quality legal advice¹¹. The court and the bar must work cooperatively to develop programs which encourage the hiring of, and enable litigants to have access to, qualified attorneys. Nonetheless, it is recognized that many people may simply be unable to afford an attorney, or for other reasons may refuse to hire one, and the court must be prepared for this ongoing challenge.

¹¹ It should be noted that two recent Supreme Judicial Court Decisions, Solimine v. Davidson 422 Mass. 1002, 661 N.E.2d 934 (1996) and Jordan v. Register of Probate for Hampden County 426 Mass. 1020, 690 N.E.2d 434 (1998) found that litigants appearing *pro se* were to be held to the same standards to which litigants with counsel were held.

A. MAGISTRATE POSITIONS

The creation and use of a full-time magistrate position, as recommended in this Report, plays an integral and essential role in effectively dealing with the high volume of *pro se* cases and in responding to many other aspects of the court's expanded jurisdiction occasioned by federal and state legislative mandates as well as to the increasing complexity of cases. The importance of the magistrate position cannot be overstated. Many of the recommendations of the *Pro Se* Committee Report cannot be effectively implemented without the creation of a magistrate position.

The need for magistrates is clear when one looks at the current process of managing cases. Trial time is limited. The judge often sees files for the first time the day of the hearing. All too often, the judge finds it necessary to direct litigants and attorneys to amend pleadings, to properly prepare paperwork or make referrals for investigation or evaluation which ought to have occurred long before the case goes before a judge. This results in significant delays or continuances which could have been avoided. A magistrate, acting as a case manager screening pleadings and cases and making preliminary orders and referrals, will not only free the judge to hear trials and other evidentiary matters, but will also provide needed service to members of the bar and litigants by expediting uncontested cases and preliminary matters in contested cases. The magistrate would ensure that by the time a case reaches a judge the file is in order. Preliminary referrals will afford the parties access to clinicians, guardians *ad litem* for investigation or evaluation, consultation with domestic violence advocates, attorneys for the minor child(ren) in cases in which the Department of Social Services is involved, dispute intervention by a Probation Officer and/or other forms of Alternative Dispute Resolution (ADR).

It is intended that full-time magistrates will assist the court in the following broadly defined functions of the Probate and Family Court Department:

1. Managing cases; conducting conferences with authority to enter certain orders including discovery orders and to make referrals for appropriate investigation, mediation or support services, in both contested and uncontested cases;
2. Hearing specified uncontested motions and modification judgments;
3. Hearing and deciding certain child support matters;

4. Hearing matters specified in the legislation creating the Uniform Probate Code currently being considered; and
5. Such other matters, contested and uncontested, as may be designated by the Chief Justice of the Probate and Family Court.

The creation of a magistrate position, is essential to efficiently moving cases while maintaining equal access to justice. There must be a fundamental change in the philosophy of case management. The court must serve as case manager, ensuring that cases move expeditiously through the system and do not grow stagnant. While these proposals were drafted with the primary aim of assisting *pro se* litigants, and to overcome some of the obstacles that their unfamiliarity with the court system presents, many proposals will also be of assistance in cases where the parties are represented by attorneys. It should be noted, however, that although the court's role as case manager is to ensure cases move through the court in as timely manner as possible, a party may by motion, for good reason, request permission of the court, to "opt out" or not go forward with his/her case for a given period of time.

Case Management Duties to be Performed by the Magistrate

Magistrate's Conference

The magistrate conference is the keystone to effective case flow management. It is the opportunity to triage the case at the outset and provide necessary direction, depending on the issues, circumstances and the nature of the assets involved. In this respect it is patterned closely on Federal Court procedure¹².

All contested domestic relations cases (except contempt hearings involving the possibility of incarceration, Department of Revenue/Child Support Enforcement (D.O.R./C.S.E.) complaints, 209A abuse complaints and other matters as may be identified by the Chief Justice of the Probate and Family Court); guardian of minor petitions, equity actions and probate proceedings involving will contests,

¹²The *Expense and Delay Reduction Plan* adopted November 18, 1998, Article I. Pretrial Differential Case Management, Rule 1:03, provides for a Case Management Conference to be conducted by a Judicial Officer (Judge or Magistrate) for the purpose of: exploring the possibility of settlement; identifying issues in contention; preparing a discovery plan; establishing deadlines; providing for a "staged resolution"; and exploring other matters that are appropriate for the fair management of the case.

objections to accounts, appointment and removal of fiduciary, must be conferenced by the magistrate before being heard by a judge (except as the judge otherwise orders).

All uncontested domestic relations matters (except 209A abuse complaints) must first be screened by the magistrate to ensure readiness for trial (see section 3 infra).

For the magistrate to be effective and the conference to be of value to the litigants, the magistrate must have authority to enter temporary orders, discovery orders and to impose discovery deadlines, sanctions and to make substantive referrals at preliminary stages of the case, such as to the Probation Office, Alternative Dispute Resolution and court clinic or to order immediate referral of the case to the judge. The magistrate must be able to identify the need for and, in conjunction with the justices of the court, arrange for appointments of guardians *ad litem* and attorneys for the child(ren) when applicable.

Since all discovery motions would be heard in the first instance by the magistrate, the magistrate would assess the issues of each case, determine the necessary scope of discovery, explain to the *pro se* litigant what documents must be produced and interrogatories answered and monitor compliance. An order would enter after the Magistrate's Conference setting forth the issues and any other action being ordered (e.g., referral for alternative dispute resolution, assignment for a pre-trial conference or scheduling of a trial).

As it is intended that the magistrate would serve as case manager to expedite hearings, there would be a limited right to appeal to a judge from a magistrate's order, applying a standard of "abuse of discretion". Such an appeal would be required to be in the form of a written submission unless the judge otherwise orders¹³.

The following Standing Order is proposed to provide for a magistrate's Conference in contested matters in the early stages of a case and to authorize the magistrate to make a number of specified referrals or orders to enhance case flow.

Standing Order Regarding Magistrate's Conferences

¹³This would be similar to Standing Order 2-99 Procedure for Submission and Disposition of Certain Motions that was issued by Chief Justice Dunphy (See Appendix G) and became effective October 1, 1999.

2. *This Standing Order applies to the following contested matters: domestic relations actions except contempts involving the possibility of incarceration, D.O.R./C.S.E. complaints, and G.L. c. 209A complaints; all guardianship of minor petitions; all equity actions; and in probate proceedings, all objections to accounts, petitions to appoint or remove a fiduciary, and will contests.*
3. *A Magistrate's Conference shall be scheduled by the magistrate or Trial Assignment Department not sooner than forty-five (45) days after filing of the complaint or petition; in the case of contested probate matters, not sooner than forty-five (45) days after the return date and as soon thereafter as the matter may be scheduled. The summons shall state the date, time and place of the Magistrate's Conference. Service of process shall be made not less than twenty (20) days prior to the assigned date of the Magistrate's Conference. In the event of an earlier emergency hearing and if all parties appear and agree, the Magistrate's Conference may be conducted that day at the discretion of the judge or the magistrate. In the event that service has not been made as required, the plaintiff may so notify the Registry by returning the summons with a notation of NO SERVICE, specifying the attempts which have been made and requesting the issuance of a new summons with a new date for the Magistrate's Conference. Subject to the provisions contained herein and/or subsequent to the Magistrate's Conference, judges shall continue to hear contested motions. All discovery motions must be heard by a magistrate in the first instance.*
4. *The Magistrate's Conference shall be conducted by a magistrate who shall have the following authority:*
 - i. *To make referrals to or for:*
 - (1) *alternative dispute resolution (ADR);*
 - (2) *probation office for immediate dispute intervention (to be reported back to the magistrate for further scheduling if still contested);*
 - (3) *guardian ad litem;*
 - (4) *attorney for the child(ren) in matters in which the Department of Social Services is a party or when a volunteer program for such appointments is available;*
 - (5) *court clinic;*
 - (6) *scheduling of future date for pre-trial conference;*

- (7) *immediate pre-trial conference when by agreement and deemed appropriate by the Magistrate in non-complex matters that do not involve extensive discovery and in which the parties are the only probable witnesses (e.g. child support or visitation);*
 - (8) *case management conference;*
 - (9) *referral to a judge for an immediate contested hearing on the merits or on temporary orders; and*
 - (10) *such other referrals as the magistrate determines to be in the nature of the above items.*
- ii. *To enter the following orders:*
- (1) *temporary order incorporating a written stipulation/agreement of the parties;*
 - (2) *any order authorized to be entered in an Uncontested Assistant Register's Session;*
 - (3) *setting forth a discovery schedule;*
 - (4) *judgment of modification on written agreement of the parties;*
 - (5) *dismissal of actions due to pendency of prior pending actions, pursuant to M.R.D.P. Rule 12(b)(9); and*
 - (6) *such other orders as the magistrate determines necessary within parameters established by the justices of the court.*
- iii. *No motions shall be scheduled prior to the Magistrate's Conference, unless so authorized by the magistrate in cases of emergency. If the request to schedule an emergency hearing is denied by the magistrate, an aggrieved party may present the emergency request to a judge.*
- iv. *In the case of domestic relations cases and guardianship of minor petitions, the summons or citation shall be accompanied by a notice of Magistrate's Conference, which shall include blank financial statements and a copy of an income assignment order and shall require the parties to bring with them the following documents:*
- (1) *In cases involving child support, alimony or property division, a completed, signed and dated current financial statement, the completed income assignment order, W-2 statement, and federal and state tax returns for the prior two years; and*
 - (2) *In cases involving custody or visitation, written statements indicating why each party believes he/she should have custody or visitation and the proposed terms of visitation.*

5. *The notice of Magistrate's Conference shall state the location of the Magistrate's Conference (including street address, floor and/or room number) where the parties are to report, reporting date and time, what is required of the parties, and a statement with language substantially providing that "A failure to appear may result in the entry of a temporary order, judgment, decree or the imposition of costs or an order restricting evidence which may be presented, as appropriate."*
6. *An order shall enter after every Magistrate's Conference setting forth the issues in the case and what action is being ordered with a time-line (e.g., referral for pre-trial, or scheduling of trial).*
7. *Any party aggrieved by action taken by a magistrate may seek judicial review of such action only by filing a Motion for Review within fourteen (14) days of the date of the action by the magistrate. The Motion for Review must:*
 - i. *Be titled "Motion for Judicial Review of Action by Magistrate";*
 - ii. *Include a copy of the magistrate's order;*
 - iii. *Set forth the date of the magistrate's action; and*
 - iv. *Contain a brief, concise statement of why the magistrate's action is an abuse of discretion, which is the standard for review, and may include reference to any legal authorities.*

The Motion for Review must be filed to the attention of the head of the Trial Department and simultaneously served upon the opposing party's attorney or the party if pro se, and the Motion shall contain a Certificate of Service. Within ten (10) days of the date of the Certificate of Service, the other party may file a written opposition, also to the attention of the head of the Trial Department and shall simultaneously serve a copy of the opposition upon the moving party and the written Opposition shall contain a Certificate of Service.

At the expiration of the above ten (10) day period, or earlier if both the Motion and Opposition have been received, the Trial Department shall deliver the Motion and Opposition to a justice for a decision upon said papers without oral argument. (The procedure for designation of a justice shall be established by protocol to be promulgated by the First Justice of each division.)

Uncontested Hearings

A high volume of uncontested matters are often scheduled, and it is not until the time of hearing that it becomes apparent that the requisite paperwork has not been completed (e.g. financial statements, wage assignment forms, child support guidelines); or that the matter has become contested; or that the Department of Revenue is an interested party and has received no notice. The magistrate would screen uncontested trial assignment requests before court appearances are scheduled. If the papers are in order, the case would be assigned; otherwise the magistrate will inform the parties in writing to complete the necessary paperwork.

We propose a Standing Order, set forth below, which will authorize the magistrate to screen uncontested matters to ensure their hearings proceed effectively. Upon the submission of a request for an uncontested hearing, all cases (except requests for protection from abuse) would be referred to the magistrate who would determine that service has been properly made, necessary forms are complete, and that the case is ready for hearing. The magistrate shall also review the file to identify the issue(s) to be heard by the court and to determine whether unnecessary duplicate complaints have been filed. The magistrate would be authorized to dismiss multiple complaints when there are prior pending actions involving the same issues or matters have become moot.

The magistrate would be authorized to hear uncontested modifications and contempt actions in which a jail sentence will not be imposed. Uncontested divorces and paternity complaints would continue to be heard by the judges.

Proposed Standing Order Regarding Magistrate's Uncontested Hearings

This Standing Order applies to all domestic relations matters, except Chapter 209A complaints, in which parties or attorneys file requests for uncontested assignments, and is promulgated to enhance the efficient hearing of such matters.

- 1. All requests for assignment of uncontested cases, except Chapter 209A complaints, shall, prior to assignment, be referred to the magistrate for determination of case readiness as described in Paragraph Two below.*

2. *The magistrate shall determine whether the case has a return of service, completed financial statement, completed income assignment, child support guidelines worksheet, executed separation agreement or stipulation, parenting class Certificates of Completion, current statement of arrears and sign-off from Department of Revenue/Child Support Enforcement Division. The magistrate shall notify the parties and attorneys of deficiencies in writing.*
3. *In modification and contempt actions, the magistrate shall also review the file, identify the issue(s) to be heard by the court and determine whether there are multiple complaints, one or more of which needs to be dismissed.*
4. *The magistrate shall have the authority to schedule for hearing before the magistrate uncontested modification or contempt actions (not involving a suspended or actual jail sentence), and shall also have the authority to dismiss multiple complaints when it appears there are prior pending actions or matters have become moot.*

The magistrate would be able to process many uncontested cases and would ensure that when a case goes before the judge, pleadings are in order, proper parties are joined and served, issues are defined, preliminary investigations and requests for clinical referrals have been made and Alternative Dispute Resolution (ADR) options explored. The magistrate would work in conjunction with the judges in determining the types of referrals to be made in various cases.

Ex Parte 209A Complaints

The Committee recommends further discussion with interested groups to explore the possibility of having magistrates who are appropriately certified in law, evidence, procedure, and family violence issues to hear certain aspects of *ex parte* (initial petition) Chapter 209A complaints for protection from abuse. Under this proposal, magistrates with specific authorization by the Chief Justice of this Department and First Justice of the court in which they sit may hear initial, *ex parte*, 209A complaints while allowing for an immediate hearing by a judge at the plaintiff's request.

Proposal for Exploration of New Legislation Regarding Magistrate's Hearing Certain Aspects of *Ex Parte* 209A Complaints

Some of the most sensitive matters heard by the Probate and Family Court are requests for orders for protection from abuse under G.L. Chapter 209A. The forms have been designed for ease of use by plaintiffs without attorneys. In fact the overwhelming majority of abuse prevention cases are filed by *pro se* plaintiffs. These requests are given priority over other court business; because they are initiated without notice to the other side and without advance scheduling, by necessity they interrupt the hearing of scheduled cases. Even so, in a busy motion session plaintiffs may be required to wait for some period of time to be heard on the initial emergency request.

In order to address the goals of expedited hearing of emergency or *ex parte* Chapter 209A requests and to allow the other scheduled business before the court to proceed uninterrupted, the following steps are recommended:

1. A collaborative effort must immediately be undertaken between the Administrative Office of the Probate and Family Court, the domestic violence advocacy community and other interested parties, under the leadership of the Chief Justice, to discuss drafting of legislation as further described below;
2. The working group (described above) will consider and propose:
 - i. Legislation authorizing magistrates, with specific designation by the First Justice and approval by the Chief Justice of the Department, to hear and decide initial requests for relief under Chapter 209A under limited specified circumstances;
 - ii. The limited and specified circumstances are that:
 - (1) only the plaintiff is present;
 - (2) the plaintiff, after being advised that the request can be heard initially by a judge, agrees in writing to have a magistrate hear the matter;
 - (3) the plaintiff is informed that if dissatisfied with the decision of the magistrate, he/she may immediately be heard by a judge without the judge being advised of the initial determination by the magistrate;

- iii. As a specific precondition to authorization by the First Justice and approval by the Chief Justice for a magistrate to hear Chapter 209A cases as described above, the magistrate must first complete prescribed training;
- iv. The prescribed training shall be in the areas of sensitivity to family and domestic violence, as well as in statutory and case law and procedures for hearing and deciding Chapter 209A cases; and
- v. The prescribed training shall be developed and presented by the Judicial Institute of the Massachusetts Trial Court in consultation with the Administrative Office of the Probate and Family Court Department, the domestic violence advocacy community, and other interested parties.

The following proposed statutory language encompasses the above sections:

The magistrate is authorized to hear and decide ex parte requests for orders for protection from abuse under G.L. c. 209A, when only the plaintiff is present and the plaintiff agrees in writing. The plaintiff shall have the option to have the request heard by a judge in the initial instance. If the matter is heard and denied in any respect by a magistrate, there shall be an immediate right to be heard de novo by a judge. Notwithstanding the foregoing, however, a magistrate shall only be authorized to hear such c. 209A matters as set forth above when the magistrate has been certified by the Chief Justice for Administration and Management, upon the recommendation of the Chief Justice of the Probate and Family Court Department, after attending specific training in family violence dynamics and c. 209A legal and procedural issues, such training to be provided by the Judicial Institute of the Trial Court.

The creation of magistrates would bring the court closer to achieving the goal of efficient case management and delivery of justice which is embodied within this Report. A magistrate's duties and responsibilities are quasi-judicial and subject to direct judicial oversight by the First Justice. Accordingly, the magistrate(s) should be selected by the First Justice of the Division to which the magistrate is appointed subject to the approval of the Chief Justice of the Probate and Family Court Department and the Chief Justice for Administration and Management of the Trial Court. In the case of a magistrate position covering more than one Division, the appointment should be made jointly by the First Justices of those Divisions. Appointments should

only be for a specific term (e.g., five years), subject to renewal, similar to the First Assistant Registers.¹⁴ The number of positions in a given Division should be related to the caseload in the Division; for example, adjoining small Divisions might share a single magistrate (e.g. Franklin and Hampshire) while other higher volume Divisions (e.g. Suffolk and Worcester) would require more than one position. The Chief Justice of the Probate and Family Court should have the authority to assign a magistrate, appointed to one division, to other Divisions in the same manner as judges to provide necessary coverage in the event of illness or vacation.

Proposed Legislation Regarding Creation of Probate and Family Court Magistrate Position

There shall be a CHAPTER 217A of the General Laws which shall provide as follows:

SECTION ONE There shall be twenty-two authorized and funded magistrate positions in the Probate and Family Court Department to be appointed in the various divisions, namely: three in the Middlesex Division; two each in the Bristol, Essex, Hampden, Norfolk, Plymouth, Suffolk and Worcester Divisions; one each to serve in the Berkshire, Franklin and Hampshire Divisions, and two to serve the Barnstable, Dukes and Nantucket Divisions.

SECTION TWO Subject to the approval of the Chief Justice of the Probate and Family Court Department and the Chief Justice for Administration and Management of the Trial Court, a First Justice may appoint for a period of five years a magistrate to serve in that division. In the case of a magistrate position covering more than one Division, the appointment shall be made jointly by the First Justices of the Divisions subject to the approval as aforesaid. The magistrate may be removed for good cause shown during the period of service, said determination of good cause to be made by the First Justice(s) for the Division(s) to which the magistrate is appointed, subject to the approval of the Chief Justice of the Department and the Chief Justice for Administration and Management. Upon the expiration of the term of office, the magistrate shall continue to hold office and have full authority to perform all functions until reappointment or the appointment of a successor. The magistrate is eligible for reappointment at the end of each five year term. If the First Justice does not reappoint the magistrate, the magistrate shall have a right

¹⁴ Committee member, Pamela Casey O'Brien, Register of Probate, dissents from the majority report as to the section of the report which references the authority to appoint an individual to the magistrate's position. As reason therefor, this member opines that this subject matter is beyond the mission of this committee and is most appropriately addressed by the Future Staffing Committee of the Probate and Family Court established by Chief Justice Dunphy to address the specific issue of appointment authority and future staffing.

of appeal within thirty days of receiving written notice from the First Justice of the decision to not reappoint, said appeal to be to the Chief Justice of the Department and then to the Chief Justice for Administration and Management.

SECTION THREE A magistrate shall be a member of the Massachusetts Bar for at least five (5) years at the time of appointment and shall be knowledgeable as to substantive, procedural and evidentiary matters within the jurisdiction of the Probate and Family Court Department. The term of the appointment of the magistrate is five (5) years and is subject to renewal. The magistrate shall be paid three-quarters of the salary of an Associate Justice of the Trial Court. During the term of service, a magistrate shall not directly or indirectly engage in the practice of law, and may not engage in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers. The position of magistrate shall be subject to and governed by the provisions of the Code of Judicial Conduct, S.J.C. Rule 3:09.

SECTION FOUR The Chief Justice is authorized to assign any magistrate to Divisions other than where appointed, as needed, to accommodate absences for illness and vacation and other scheduling vagaries.

SECTION FIVE The magistrate shall work under the direct supervision of the First Justice.

SECTION SIX "Duties of the magistrate" Subject to the supervision and direction of the First Justice, the magistrate shall have the authority to:

- 1. Act upon such matters as specified by the Chief Justice;*
- 2. Perform the function of a case manager including, but not limited to, conducting "conferences" with the authority to enter scheduling and case management and discovery orders and make referrals, in both contested and uncontested cases;*
- 3. Perform such duties as are specified in the Uniform Probate Code;*
- 4. Hear and decide child support matters as contemplated by G.L. c. 221B; and*
- 5. Hear and decide ex parte requests for orders for protection for abuse under G.L. c. 209A when only the plaintiff is present. The plaintiff shall have the option to have the request heard by a judge in the initial instance. If the matter is heard and denied in any respect by a magistrate, there shall be an immediate right to be heard de novo by a judge. Notwithstanding the foregoing, however, a magistrate shall only be authorized to hear such c. 209A matters as set forth above when the magistrate has been certified by the Chief Justice for Administration and*

Management, upon the recommendation of the Chief Justice of the Probate and Family Court Department. Such certification will occur after the magistrate has attended specific training in family violence dynamics and G.L. c. 209A legal and procedural issues, which shall be provided by the Judicial Institute of the Trial Court.

Although there are obvious financial considerations to creating the position of magistrate, it is a sound financial investment in the future operation of the court. A system overwhelmed by *pro se* litigants will in all likelihood eventually require the creation of additional judicial positions to meet these demands at substantially higher cost. Magistrates would ensure that all cases would proceed at a more expeditious pace than the court is currently able to provide.

B. SIMPLIFIED DOMESTIC RELATIONS PROCESS

Many *pro se* litigants who come before the Probate and Family Court are there in the context of paternity and divorce actions. A large number of the matters filed by *pro se* litigants involve a limited number of issues such as child support or visitation. In an effort to move these matters more quickly to resolution, the Committee recommends the implementation of an optional “Simplified Domestic Relations Process” (SDRP).

This process would be similar to the “Small Claims” process in District Court in two significant ways:

1. Formal discovery would not be permitted, except as set forth in Supplemental Probate Court Rules 401 and 409 or by order of the court; and
2. Formal rules of evidence would be suspended.

The discovery process and compliance with formal rules have been identified by the Committee as major stumbling blocks faced by *pro se* litigants in presenting their cases in court.

Under the Simplified Domestic Relations Process, the court would be allowed to conduct the trial with “such methods of proof as it deems best suited to discover the facts . . .”¹⁵ Further, participation by counsel in the matter can be limited while consideration can be given to allowing non-attorneys to assist the parties in the presentation of the case when the court deems “such assistance would facilitate the presentation or defense”¹⁶ in a particular case.

The Simplified Domestic Relations Process, unlike the Small Claims process, could be elected by the parties either at the time of the Magistrate’s Conference or any time thereafter. To select the simplified process, both parties must sign a written election and a judge or magistrate must determine that the simplified process is appropriate for the circumstances of the case. The initial pleadings and the service requirements would remain the same as with the standard domestic relations process. It is anticipated that a substantial number of cases would

¹⁵G.L. c. 218 §§ 21-25 - District Court Small Claims Procedure

¹⁶G.L. c. 218 §§ 21-25 - District Court Small Claims Procedure.

be resolved using the “Simplified Domestic Relations Process.” This process will be available to both represented and unrepresented litigants.

The Committee proposes that this process be available in divorce and paternity actions, as well as for modifications of those actions . The need for additional pre-trial conferences would be eliminated and the case could be assigned immediately for trial at the Magistrate’s Conference once the election has been approved by a judge or magistrate.

The Simplified Domestic Relations Process, when combined with the new magistrate position, will greatly assist case flow management of matters involving *pro se* litigants. The flow chart on the following page depicts the movement of a case through the court utilizing both the magistrate and the Simplified Domestic Relations Process.

Implementation of the Simplified Domestic Relations Process would require the enactment of a new statute creating the process.

Simplified Domestic Relations Procedure & Magistrate Process Flow Chart

C. “CONTROLLED UNBUNDLING” OF LEGAL REPRESENTATION

More and more frequently litigants are appearing in court without the attorneys who have entered appearances on their behalf, although this is in violation of Massachusetts Rules of Domestic Relations Procedure. These attempts have primarily consisted of three scenarios: 1) where lawyers file appearances and then their clients file pleadings and motions on their own and show up for hearing at times with their lawyers, and at other times without their lawyers; 2) where lawyers draft pleadings and motions for clients but never file appearances (ghost writing); and 3) represented parties appear in court without their attorneys of record saying “it is only a small matter and I couldn’t afford to pay my attorney.” Under the first scenario, confusion reigns as to who should be given notice, who should be receiving notice, and who will be appearing in court. Under the second scenario, serious concerns have been raised by the Board of Bar Overseers and Bar Associations as to the drafting lawyer’s ethical duties and liabilities.¹⁷

The reality in the Probate and Family Court today is that many of the people the court serves are unable to afford legal representation for every issue that comes before the court. Attorneys specializing in family law generally require retainer fees and bill on an hourly basis. An under-employed or unemployed litigant cannot always afford to pay a lawyer to spend three hours in court to be heard, for example. Therefore, it is becoming more common that litigants are retaining attorneys but selectively using them depending on the nature of the court appearance. Someone may decide he/she needs his/her attorney to be present at the hearing on a temporary support motion, but not on a contempt hearing regarding visitation. It becomes confusing for the court because there is an attorney of record but the litigant is now filing a *pro se* appearance. This raises problems if there is an attorney on the other side as to whom he/she can negotiate with, the litigant or his/her attorney?

The courts and all parties benefit when legal representation is available. However, the reality is that funding cuts in legal service programs and the cost of legal representation for people not eligible for legal services programs put the cost of an attorney beyond the reach of many. One method of making legal representation more available is the concept of “controlled unbundling” of legal representation. The concept behind “controlled

¹⁷An attorney may provide limited background advice and counseling to *pro se* litigants. However, providing more extensive services, such as drafting (ghost writing) litigation documents, especially pleadings, would usually be misleading to the court and to other parties and therefore would be prohibited. Opinion of the MBA Committee on Professional Ethics, dated May 27, 1998.

unbundling” is that the attorney and the client would agree, consistent with revised Rule 11, that the attorney will handle certain aspects of a case, such as drafting documents and negotiating, but not handle other aspects, such as appearing in court in certain matters. This offers a reasonable way to keep attorneys’ fees affordable and at the same time enable litigants to avail themselves of an attorney at crucial junctures during the course of a case. The Committee does not recommend that domestic relations practitioners be forced to provide unbundled services and in fact encourages legal representation throughout the entire court process. However, if an attorney and litigant decide that an attorney will provide intermittent legal assistance it must to be done in accordance with the following proposed procedure¹⁸.

The proposed Rules change, allowing for this approach to “unbundle” legal services, would:

1. require an election in writing at the time of scheduling a hearing to go forward with or without their attorneys;
2. require clients to adhere to their election;
3. prohibit the “attorney of record” from appearing on a motion to reconsider a matter after a hearing where the client elected to appear without an attorney;
4. require the “attorney of record” to mark up a motion with notice if he/she wanted to withdraw;
5. require the “attorney of record” to appear at the Magistrate’s Conference, status conference, pre-trial conference and at the trial and prohibit litigants and attorneys from agreeing that the attorney would not appear; and
6. enable judges to use discretion to order attorneys to appear for hearings on a particular issue (i.e., discovery).

The priority of the court is to avoid confusion as to who should be getting notice, to maintain a level of predictability as to when attorneys will appear for hearings, and to avoid post-decision motions based on the premise that the client appeared at the hearing without counsel. In addition, although case law dictates otherwise, *pro se* litigants are, in fact, routinely afforded greater latitude in court procedure than attorneys, and it must be

¹⁸It should be noted that complaints filed under Chapter 209A and complaints for contempt are considered separate actions and under the current rules, it is acceptable for an attorney on the underlying matter not to appear at the contempt hearing or the hearing on the 209A.

noted that a *pro se* litigant who submits a “ghost written” document to the court certainly has an unfair advantage by in effect having the best of both worlds¹⁹.

The Committee recommends that “unbundling” should be allowed as long as any attorney providing services to a client files an appearance with the court. This appearance would identify the “attorney of record” who would receive all court notices, who would be responsible for notifying the client of all orders and hearing dates, and who would be responsible for certifying the client’s financial statement and service on the opposing counsel or *pro se* litigant. Service on the “attorney of record,” except in the case of a summons, would constitute service on the client.

The attorney and client would be allowed to agree when the client would appear in court without the attorney present, and the court forms would be modified to include a check-off box indicating when the client would be electing to appear without his or her attorney. However, all notices would continue to be served on the “attorney of record,” and the attorney would be responsible for drafting and serving all pleadings and motions. Opposing counsel would be able to speak with the litigant and negotiate that particular matter directly when the form indicated the litigant was electing to appear in court *pro se*. An example of when unbundling could be utilized is in the instance of a 1A divorce, wherein an attorney who has negotiated and drafted the agreement may with his client elect not to appear at the hearing²⁰.

¹⁹ABA Journal Article, “Afraid of Ghosts”, dated December 1997, references the U.S. Supreme Court case, Haines v. Kerner, 404 U.S. 519 (1972)(Court afforded *pro se* litigants certain leniency in pleading not provided to represented parties), and discusses how the leniency afforded *pro se* litigants would be exploited if ghost writing were allowed. The article discusses the opinions of other states, specifically Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F. Supp. 1075 (E.D. Va. 1997), where the court held that attorney’s practice of ghost writing complaints was inconsistent with procedural, ethical and substantive rules of the court, BUT that the attorney’s conduct of ghost writing did NOT warrant disciplinary proceedings or contempt sanctions absent a showing of intentional wrongdoing.

However, the states are not uniform. In Johnson v. Board of County Commissioners for the County of Fremont, 868 F. Supp. 1226 (D. Colorado 1994) the Colorado Court held that the ghost writing of documents for *pro se* litigants may subject attorneys to contempt of court. “Such ghost writing gives the *pro se* litigant an unfair advantage,” in that *pro se* litigants are granted greater latitude in hearings and are also allowed to evade the obligations that would normally be imposed on an attorney by statute. Thus, that ghost writing is in fact a misrepresentation of the litigant’s *pro se* status in violation of the ethical rules.

²⁰This example represents the opinion of a number of Committee members while a number of other Committee members believe that a hearing on a 1A divorce constitutes a trial and the presence of an attorney should be required.

The Committee believes this proposal strikes an acceptable balance between the need to make legal representation more affordable and the need to have an understandable and predictable legal process.

Enactment of the proposal would require amendment of court rules and revisions to the ethical rules governing attorneys' conduct.

D. RULES AND LEGISLATION

In addition to the legislative and rules changes which the aforesaid recommendations would require, the Committee has identified several specific areas that could be improved for all litigants by changes to existing rules and standing orders.

Rules and Standing Orders

Rule 11. Appearances and Pleadings

Consistent with the recommendation that some form of “controlled unbundling” be authorized, Rule 11 of the Massachusetts Rules Domestic Relations Procedure, should be amended to allow for the “controlled unbundling” of legal matters and clearly outline how attorneys and parties may proceed in this hybrid fashion.

Rule 11. Appearances and Pleadings currently reads:

(a) Signing. Every pleading of a party represented by an attorney shall be signed in his individual name by at least one attorney who is admitted to practice in the Commonwealth. The address of each attorney and his telephone number shall be stated. A party who is not represented by an attorney shall sign his pleadings and state his address and telephone number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay. If a pleading is not signed, or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading had not been filed. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

(b) Appearances.

(1) *The filing of any pleading, motion, or other paper shall constitute an appearance by the attorney who signs it, unless the paper states otherwise.*

(2) *An appearance in a case may be made by filing a notice of appearance, containing the name, address, and telephone number of the attorney or person filing the notice.*

(3) *No appearance shall, of itself, constitute a general appearance.*

(c) Withdrawals. *An attorney may, without leave of court, withdraw from a case by filing written notice of withdrawal, together with proof of service on his client and all other parties, provided that (1) such notice is accompanied by the appearance of successor counsel; (2) no motions are then pending before the court; and (3) no trial date has been set. Under all other circumstances, leave of court, on motion and notice, must be obtained.*

(d) Change of Appearance. *In the event an attorney who has heretofore appeared, ceases to act, or a substitute attorney or additional attorney appears, or a party heretofore represented by attorney appears without attorney, or an attorney appears representing a heretofore unrepresented party, or a heretofore stated address or telephone number is changed, the party or attorney concerned shall notify the court and every other party (or his attorney, if the party is represented) in writing, and the clerk shall enter such cessation, appearance, or change on the docket forthwith. Until such notification the court, parties, and attorneys may rely on action by, and notice to, any attorney previously appearing (or party heretofore unrepresented), and on notice, at an address previously entered.*

(e) Verification Generally. *When a pleading is required to be verified, or when an affidavit is required or permitted to be filed, the pleading may be verified or the affidavit made by the party, or by a person having knowledge of the facts for and on behalf of such party.*

Rule 11 of the Massachusetts Rules of Domestic Relations Procedure should be amended as follows:

ADD (f):

(f) Controlled Unbundling. *In the event that a party being represented by an attorney, who has filed an appearance in the underlying case, elects to represent*

him/herself on a particular matter before the court, he/she shall be allowed to do so provided he/she follows the requirements of this provision.

(1) The attorney of record shall file the pleading, effect service and give notice to the other party and the court that the moving party is proceeding without an attorney (pro se).

(2) Notice shall be given to the attorney of record representing the adverse party if said party is represented, or to the adverse party if not represented, by counsel.

(3) These requirements pertain to motions and complaints for contempt. They do not apply to pre-trial conferences, case management conferences, status conferences or trials. For these court events, an attorney shall be present and represent the party unless and until the attorney formally withdraws in the manner required by these rules. The judge shall have the discretion to require an attorney to appear at any other hearing.

(4) The attorney of record shall still be required to certify the client's Supplemental Probate Court Rule 401 financial statement even if the client is proceeding pro se.

The theory behind the proposed amendment to the rule is that if the attorney drafts proper pleadings or motions and advises his/her client of the process, even though the client is proceeding *pro se*, the administration of justice will be better served. The client will have a properly drafted pleading or motion, which appropriately raises the issues to be resolved, and which will be correctly served, and at the time of hearing the court will have pleadings or motions which are properly presented. The Committee recognizes that a represented party will at times appear *pro se* in his/her case.

Additionally, new forms for motions and contempt complaints need to be prepared to include a box to be checked off notifying the other side whether the party is proceeding *pro se* or by representation of counsel. Again, the lawyer remains in the case, but is not appearing for the client on that particular matter. The attorney for the other side may then contact the party directly on this matter. It will remain the lawyer's obligation to properly prepare pleadings and motions, serve and notify the other party or attorney.

Rule 77. Courts and Registers

Improper or incomplete complaints and pleadings and motions are continually being filed in the Registry of Probate by *pro se* litigants as well as attorneys. The Register's office is allowing many of these improper or incomplete pleadings to be filed and/or marked up for hearing. Under the current rule, all such pleadings must at least be accepted for filing and ruled on by the judge. Illustrative of the problem:

A Complaint for Modification is filed without listing the date of the prior judgment the Plaintiff is seeking to modify, or leaving blank the alleged change of circumstances; OR

A motion to reduce support is filed when there is no underlying action on file, or a complaint has been filed but never served.

These types of filings are either incomplete or inappropriate and addressing their deficiencies after they have been accepted for filing takes a great deal of time which impacts the Registry personnel and the judges as well as frustrating the *pro se* litigant whose case is delayed due to deficiencies in the documents.

To remedy this, the Register should have some limited authority to refuse to accept incomplete or improper pleadings and motions for filing. The Committee recommends an amendment to Rule 77 of the Massachusetts Rules of Domestic Relations Procedure. This would relieve court personnel and judges from spending valuable time trying to determine whether a case should even be before the court. Many times a judge is required on the bench to identify which of the multiple complaints or motions is appropriately before the court; which order is sought to be enforced or modified; or, if the venue is appropriate because relevant sections of the pleading are incomplete. This is a waste of judicial resources and causes delays in the hearing of other matters schedule before the court that day. The judge should be the final gatekeeper. While decisions relative to standing to file a complaint should solely be the responsibility of the judge, the Register should have the authority to refuse to accept a pleading under the following limited circumstances: 1) if it is clear on the face of the complaint that the venue is incorrect; or 2) that the pleading is not completed in its entirety.

It should be noted that Rule 77 of the Massachusetts Rules of Domestic Relations Procedures has a different significance in other Trial Court Departments (such as the Superior Court) where statutes of limitation are a factor, and where preventing someone from filing a complaint, however imperfect, may in effect deprive them of their cause of action. While amendment of this Rule could be extremely

detrimental to both attorneys and litigants in other Trial Court Departments for this reason, this is not the case in the Probate and Family Court Department.

Rule 77. Courts and Registers currently reads:

(a) **Courts Always Open.** *Unless otherwise provided by law, the courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning process, and of making and directing all interlocutory motions, orders, and rules.*

(b) **Register's Office.** *The register's office for each county with a register or assistant register in attendance shall be open during business hours on all days except Saturdays, Sundays and legal holidays.*

(c) **Filing Date of All Papers Received by Clerk.** *The clerk shall date-stamp all papers whatsoever received by him, whether by hand or by mail. Any paper so received, whether stamped or not, shall be deemed to have been filed as of the date of receipt. If at any subsequent time, any party disputes the fact of such filing, the court shall determine the question, taking whatever evidence it deems appropriate. Proof of mailing shall constitute prima facie proof of receipt.*

(d) **Notice of Orders or Judgments.** *Unless an order or judgment is entered in open court in the presence of the parties or their counsel, the register shall immediately upon the entry of an order or judgment serve a notice of the order including the terms of any order of custody, support or alimony by mail in the manner provided for in Rule 5 upon each party and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of entry by the register does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4 of the Massachusetts Rules of Appellate Procedure.*

(e) **Transmittal of Papers.** *At the direction of the Chief Judge, the registers of the several counties shall transmit the papers in any action from one county to another when a matter has been duly set down for hearing in a county other than that in which the action is pending. Pleadings, motions and papers to be filed in such case shall be filed in the*

office of the register for the county in which the case is pending. The register for the county in which the case is heard shall certify the proceedings had in his county to the Chief Judge of the Probate Courts and, at the direction of any judge of the court, shall return to the register for the county in which the case is pending all the papers, to be kept there on file.

Rule 77 of the Massachusetts Rules of Domestic Relations Procedure should be amended as follows:

ADD: Rule 77 (f):

*(f) **Improper or incomplete filings.** The register's office of each division shall not accept any new filing, complaint, pleading or motion that is not properly and fully completed by the party filing same and it is apparent on the face of the complaint that venue is not proper.*

Dismissal of Old Divorce Cases

Domestic relations cases filed by *pro se* litigants often languish for lengthy periods of time. Presently, many trial judges hearing a case discover that there are several other cases pending between the same parties that have never gone to judgment or been dismissed. The judge has to then “clean up the file” and attempt to clarify the present status of the matter. The existing Standing Order for automatic dismissal, in effect, allows a case a shelf-life of two years. This is too long and it is recommended it be reduced to one year. Further, the current Standing Order only applies to divorce cases, and should be enlarged to include other domestic relations actions. This will speed the flow of litigation and clean up cases without wasting Registry and judicial resources.

Standing Order 1-88 Time Standards, Article VII currently reads:

***VII. Dismissal of Old Divorce Cases.** Pursuant to Supplemental Rule 408 of the Probate and Family Court Department, divorce complaints on the docket for a year without any action shall be marked inactive and notice shall be given to the parties by the Register. If a second year then passes with no action being taken, the matter shall be dismissed.*

Standing Order 1-88 Time Standards, Article VII “Dismissal of Old Divorce Cases” should be amended as follows:

VII. Dismissal of Old Cases. Any Divorce Complaint, Paternity Complaint, Modification Complaint, Contempt Complaint, or Petition for Guardianship of Minor which has been on the docket for one year without any action shall be automatically dismissed. Notice to the parties shall be given at least ninety (90) days prior to dismissal.”

Supplemental Rule 408. Dismissal of Old Divorce Cases currently reads:

On the Tuesday after the first Monday of July in each year, every complaint for divorce, nullity or affirmation of marriage which has remained upon the docket for one year preceding, without action shown upon the docket, shall be marked inactive by the Register.

The Register shall give notice thereof to all parties who have entered an appearance not later than the Tuesday after the first Monday of September next following.

If within one year after a case has been marked inactive, it has not been tried or heard on the merits or disposed of, it shall, unless the court otherwise orders, be dismissed, without further notice or order, on the day following the expiration of said one year.

For cause shown the court may dismiss cases at other times.

Supplemental Rule 408 - Dismissal of Old Divorce Cases should be deleted.

Some of the concerns raised by this proposed change will be dealt with by giving the magistrate authority to screen cases and dismiss multiple filings or moot pleadings.

Multiple Filings

Pro se parties frequently file numerous complaints relating to the same subject matter, hence clogging the court schedule and unnecessarily enlarging their file. For example, an ex-husband files a Complaint for Modification to reduce his child support because he is unemployed. The ex-wife then files a Complaint for Modification to increase the support, alleging he is working under the table. The ex-husband foregoes prosecuting his action, but six months later files another complaint alleging the same circumstances. Weeks later he also files another complaint to modify his visitation order. The scenario can go on and on. *Pro se* litigants do not file a counterclaim or a motion to amend because they are not

versed in court procedures. Judges spend valuable time attempting to consolidate numerous filings for hearing and determining which pleading is properly before the court or should be dismissed. A new standing order should issue prohibiting these multiple filings. Forms should be created to enable *pro se* parties to file answers, counterclaims and motions to amend more readily.

A proposed Standing Order relative to “The Filing of Complaints for Modification and Counterclaims” should provide:

A party shall not be allowed to file a Complaint for Modification if there is a pending Complaint for Modification on file, but shall file a “Motion to Amend the Complaint for Modification” or an “Answer and Counterclaim for Modification,” and if allowed, shall file the Amended Complaint or Answer. The Register of each court shall have forms available that have been developed by the Chief Justice of the Probate and Family Court to assist the parties in filing these motions and pleadings.

Temporary Guardian of Minors

Many *pro se* litigants file petitions for appointment of Guardian of Minors and seek appointment as temporary guardian. These temporary appointments are limited to ninety (90) days by Probate Court Rule 29B. *Pro se* litigants frequently fail to effect service timely, fail to mark the permanent petition for hearing or simply let the temporary appointment lapse. Often hearings on contested permanent petitions cannot be scheduled within the ninety (90) day period given the need to complete Department of Social Service or Probation Department investigations or guardian *ad litem* evaluations. The result is that there are repetitive motions to extend the temporary guardian appointment.

The Committee proposes that Rule 29B be amended to give the judge the discretion to enter an appointment of temporary guardian for a period in excess of ninety days but to a date certain, for good cause shown.

Probate Court Rule 29B. Temporary Conservatorships and Guardianships currently reads in part as follows:

The appointment of a temporary conservator or temporary guardian shall be effective for a period of ninety (90) days from the date thereof, and each certificate of appointment issued shall have in a prominent place the following notation:

*“THE AUTHORITY OF THE – CONSERVATOR – GUARDIAN – NAMED
HEREIN IS LIMITED TO A PERIOD WHICH EXPIRES ON _____”*

The Committee recommends that Rule 29B be amended as follows:

The appointment of a temporary conservator or temporary guardian shall be effective for a period of ninety (90) days from the date thereof, except temporary guardian of minor that, for good cause shown, may be effective for a period longer than ninety (90) days which must be established at a date certain, and each certificate of appointment issued shall have in a prominent place the following notation:

*“THE AUTHORITY OF THE – CONSERVATOR – GUARDIAN – NAMED
HEREIN IS LIMITED TO A PERIOD WHICH EXPIRES ON _____”*

Parent Education Program Attendance

Some parties, particularly *pro se* litigants, do not register to attend the mandatory Parent Education Program until after the case has been pending for a long time. This delay defeats the purpose of the program, which has as its goal the education of divorcing parents to the effects of divorce on their children. Early intervention and education on these issues may result in less contested litigation regarding custody and visitation matters. Therefore, the Standing Order mandating Parent Education Program attendance should be amended to require registration to attend an approved program within the first sixty (60) days after service of a divorce complaint. A magistrate, at the preliminary hearing, may extend time for registration.

Consideration should be given to making Parent Education classes mandatory in paternity actions. In many instances parties who have never been married have had long-term relationships, and the effect of the dissolution of this relationship on children is the same as that on children where parents are seeking a divorce; in addition although many of these partners have no relationship with one another they would benefit by attendance at educational programs structured to assist them to focus on their children's needs.

Standing Order 1-99 Parent Education Program Attendance currently reads:

This court finds that the interests of the minor children of parties appearing before it would be well served by educating their parents about children's emotional needs and the effects of

divorce on child behavior and development. A program is hereby established in all divisions of the Probate and Family Court, with the exception of the Nantucket division, in which attendance by all parties to a divorce action in which there are minor children is mandated, except as herein provided.

WHEREFORE, in accordance with the authority vested by Section 107 of Chapter 460 of the Acts of 1993, IT IS HEREBY ORDERED THAT:

1. All parties to any action for divorce in the aforementioned divisions of the Probate and Family Court Department in which there are minor children shall attend and participate in an approved Parent Education Program (hereinafter, program). This requirement applies to divorces brought under Ch. 208 sec. I (fault divorces); and Ch. 208 secs. 1A and 1B (irretrievable breakdown).

2. Attendance at an approved program is mandatory for parties to such actions filed on or after July 1, 1999, in the Berkshire, Hampshire, Norfolk and Worcester Divisions; on or after July 1, 1997 in the Franklin, Hampden, and Plymouth Divisions; on or after July 1, 1998 in the Bristol, Essex and Suffolk Divisions; on or after December 1, 1998 in the Middlesex and Barnstable Divisions, and on or after July 1, 1999, in the Dukes Division; unless waived by the court. Parties are encouraged to complete this requirement within sixty (60) days of service of the original complaint upon the original defendant.

3. No Pre-trial Conference or Trial will be held by the court until the court receives a certificate of attendance from an approved program for each party, or waives the requirement. An uncontested divorce hearing may be scheduled pending attendance if the parties file confirmations of registration with the court; the hearing date will not be set for earlier than the latest program date. A Pre-Trial Conference in a contested case may be similarly scheduled pending attendance.

4. The court may waive the attendance requirement upon motion, with notice, for one or both parties. Waivers will only be granted upon a demonstrable showing of chronic and severe violence which negates safe parental communication; language barriers; institutionalization or other unavailability of a party; failure of the other party to complete a program; or where justice otherwise indicates.

5. Sanctions for non-attendance may be imposed by the court.

6. *The parties must attend programs approved by the Chief Justice of the Probate and Family Court. Attendance at an approved program, wherever run within the Commonwealth, is permissible. Programs which are not approved by the Chief Justice will not satisfy the attendance requirement. Program vendors will ensure that parties to an action do not attend the same session of any program. Lists of approved programs shall be available at all Registries of Probate.*

7. *A pamphlet entitled Parent Education Programs: Understanding the Effect of Divorce on Children, which lists the approved program providers shall be given to the plaintiff or his/her attorney upon the filing of a complaint for divorce involving minor children. The plaintiff or his/her attorney shall deliver a copy of said pamphlet along with the complaint and summons to the person authorized to make service pursuant to Mass.R.Dom.Rel.P. 4(c).*

8. *The parties shall each pay \$50.00 to the program in advance of the seminar to offset the cost of materials and facilitators unless said fee is reduced by court due to the indigence of a party.*

9. *Each party shall submit a copy of his or her approved affidavit of indigency or an allowed motion to waive fees and costs to register for a program at a reduced cost of \$5.*

10. *Nothing herein shall be construed to limit the authority of any Probate and Family Court justice from ordering parties to attend an approved program in any case involving visitation, custody or support of minor children.*

11. *All information submitted in compliance with the research component of the program shall be the work product of the Probate and Family Court Administrative Office. The material is for research purposes and shall not be discoverable.*

Standing Order 1-99 Parent Education Program Attendance, paragraphs 2 and 10, should be amended as follows:

2. *Attendance at an approved program is mandatory for parties to such actions filed on or after July 1, 1999, in the Berkshire, Hampshire, Norfolk and Worcester Divisions; on or after July 1, 1997 in the Franklin, Hampden, and Plymouth Divisions; on or after July 1, 1998 in the Bristol, Essex and Suffolk Divisions; on or after December 1, 1998 in the Middlesex and Barnstable*

Divisions, and on or after July 1, 1999, in the Dukes Division; unless waived by the court. Both Parties shall sign up and register for the program within 60 days of service of the original complaint upon the original defendant.

10. Nothing herein shall be construed to limit the authority of any Probate and Family Court justice from ordering parties to attend an approved program in any case involving visitation, custody or support of minor children. Justices are strongly encouraged to order parties to attend an approved program in any case, including actions filed under G.L. c. 209C (paternity actions).

Legislation

Funding Pro Se Initiatives

Many states charge nominal fees to file complaints for modification and assess court costs in contempt cases. This forces litigants to think seriously about filing cases and it deters disobedience of court orders. At present, many litigants file multiple actions asking for relief in serial fashion or repeatedly file seeking the same relief. There is no fee for such actions. It is recommended that a fee be assessed which could be used to help fund the *pro se* initiatives of our court. Such fees could be waived in the event of need, or could be required to be paid by the defendant.

New legislation to provide for funding the *pro se* initiative should be filed and enacted as follows:

“There shall be a twenty-five (\$25.00) dollar mandatory filing fee for any Complaint for Modification filed in the Probate and Family Court. This fee may be waived by the register, assistant register, magistrate or judge upon the approval of a signed Affidavit of Indigency.”

“Any defendant in a Complaint for Contempt filed in the Probate and Family Court who is adjudicated in Contempt of that court shall pay (\$50.00) fifty dollars in court costs to the Register. This fee may be waived at the discretion of the judge at the contempt hearing.”

These funds would be payable to the Chief Justice of the Probate and Family Court to be utilized for the creation, development and implementation of programs to assist *pro se* litigants.

In 1998, the Probate and Family Court collected \$7,313,181.00²¹ in filing fees. Consideration should be given to submitting legislation that would authorize a certain percentage of these fees to be returned to the Chief Justice of the Probate and Family Court for use in the development and funding of programs to assist litigants, both those appearing *pro se* and those represented by counsel.

²¹ Annual Report on the State of the Massachusetts Court System Fiscal Year 1998, p. 112

E. EDUCATION AND INFORMATION

Unrepresented litigants are, with rare exception, uninformed about crucial aspects of the law which affect the issues they seek to have addressed by our court system. They are also unfamiliar with the most basic procedural issues and matters of practice and decorum, which lawyers consider routine. Most *pro se* litigants face choices for which they have been ill prepared the minute they decide to initiate or respond to legal action without the assistance of an attorney: Which is the appropriate court in which to bring the action? What is the correct way of asking for, or opposing, the relief being sought? A complaint? A petition? A motion? Where in the courthouse should one go for answers to these questions? What are the right questions to ask? Is there a proper way to dress, to speak, to stand? Although the Committee recognizes that in many instances the appropriate response to a litigant's inquiry is a referral to legal counsel, litigants may still choose to represent themselves and when they do, the court must be prepared to respond with information which they can understand, and education which will help them to help themselves. In the long run, these efforts will help not only those *pro se* litigants who will directly benefit from this information and education, but the judges they appear before, as well as represented litigants whose attorneys must expend additional time in court when a *pro se* litigant comes before a judge ill prepared.

Likewise, court personnel have for the most part not been trained to respond effectively to the requests for advice and information which unrepresented litigants now seek on a daily basis in every courthouse in the Commonwealth. The often arcane language of historic common law practice still permeates our courtroom vocabulary; will a *pro se* litigant seeking a guardianship understand the instruction to "effect service prior to the return date?" Will the *pro se* litigant know what is expected of him or her on the return date? Because court personnel are aware of the prohibition against giving legal advice, they may respond with incorrect and/or insufficient information if the *pro se* litigant does not know how to pose the question. For example, when a *pro se* litigant asks how one goes about getting support payments lowered, will he or she be provided with a complaint for modification, even if several modifications are already pending, and/or the divorce has not yet gone to judgment?

The Committee recommends that consistent information and education about the court system be provided to unrepresented litigants in a variety of ways including orally and visually as well as in writing. The information should be cast in terms which are comprehensible to all, not too lengthy, and available in every language commonly spoken in the Commonwealth. To ensure accuracy and consistency in the information being disseminated an approval process should be instituted whereby the information should be reviewed and approved by the Chief Justice, the judges of the court and/or the *Pro Se* Coordinator. This recommendation is made for the following reasons:

- 1) To address the inconsistency which now permeates the information being dispensed from court to court, and from person to person within a court;
- 2) To respond to the needs of litigants in the Probate and Family Court who are likely to be experiencing extreme stress and anxiety, and who will need to receive the information they seek in a variety of ways in order to be able to assimilate it; and
- 3) To address the reality that not all litigants are able to read, speak or comprehend English at the same level or that some may have impaired hearing, sight or reading comprehension, there should be a variety of options from which to access the same information.

The Committee further recommends that a program of education and training of court staff and judicial staff, as well as Bar volunteers be implemented. Specifically, the Committee recommends that the following information mechanisms and training/educational vehicles be put into place:

Telephonic Courtroom Procedures Response System (“Auto Attendant”)

A Telephonic Courtroom Procedures Response system should be installed in order to ensure that litigants receive consistent information in response to inquiries about certain procedures, such as how to file and serve a complaint. This information can be made available in several languages depending on the population needs of the particular division. This information should be accessible by litigants (and attorneys) placing telephone calls to the courthouse from outside of the building, or by litigants who come to the courthouse in person, who may be directed to an in-house telephone. A bank of telephones which is dedicated to access of the information system should be installed in each court building.

The Probate and Family Court has already contracted for a new telephone system which currently has the capability of providing recorded responses to these inquiries without additional cost. The system

is called “Auto Attendant”. In order to implement the “Auto Attendant” system of information access, the following steps must be undertaken:

1. Identify information which should be conveyed by telephone

Some information may be provided in brief, recorded explanations while other information will require more detailed written or personal forms of communication; a sub-committee should be formed whose task it will be to identify the areas which lend themselves to telephonic recorded response. For example, one such area might be the filing of complaints for contempt; another area might be service of a complaint for contempt or a petition for guardianship of a minor.

2. Prepare scripts

In addition to an introductory message, scripts should be prepared which convey the information which is most often sought, and which may appropriately be provided through a recorded telephonic message. Scripted responses should also be prepared in various languages. For example: “Hello, you have reached the Middlesex Probate & Family Court Auto Attendant, a recorded voice information center. If you wish to hear your response in a language other than English, please press 1; otherwise please press 2 to obtain a listing of information available through this system.” [2] “The following information is available through Auto Attendant: for general information about the court, including location and directions to various courts in the county, hours of operation and personnel directory, please press 1, etc.”

3. Obtain translators

Certified translators will be needed to translate and read the scripted information. The languages most commonly spoken by the litigants of the various divisions should be identified, and made available on the Auto Attendant.

Court Information Center/*Pro Se* Facilitator

In order to assure that individuals, upon arriving at the courthouse, will have immediate access to consistent and accurate information about the court, its operation, and the location of important resources, the Committee recommends the creation of a permanent staff position of *Pro Se* Facilitator within each major Probate and Family Court building. For those courts too small to require a full-time position, the Committee recommends that two or more persons in existing staff positions be trained to perform this

function on a rotating basis. The facilitator would be located prominently in each courthouse, and should be available throughout the day to direct people to courtrooms and appropriate court resources.

Because this person is the first “in-person” contact the litigant will have with the court system, the facilitator must be trained to handle each inquiry with tact and sensitivity; the facilitator must be knowledgeable, each day, about the location of court departments, programs and judicial assignments; the facilitator must be able to direct the litigant to the appropriate resource, such as the appropriate desk or office for completion of 209A complaints, interpreter resources, mediation, Probation, Department of Revenue, Court Clinic, Lawyer for the Day, the divorce desk, the telephone banks which provide access to the “Auto Attendant” information system, etc.

NOTE: the *Pro Se* Facilitator is very different from the *Pro Se* Coordinator also recommended by the Committee. The latter would work within the office of the Chief Justice of the Probate and Family Court and be responsible for identifying and formulating responses to the *pro se* issue throughout the entire Probate and Family Court system.

Education/Training of All Court Personnel

All non-judicial personnel should receive education and training on an ongoing basis. The Committee recommends the institution of a program which offers training every six months, both for new personnel as well as for existing personnel in order that they may receive updated education and training. Because the Committee has found that much of the in-court delay related to hearings in which litigants appear *pro se* stems from misinformation, training should include updates on substantive issues relevant to the work of the personnel being trained, as well as training regarding the appropriate demeanor and treatment of the public. Substantive issues should include: when pleadings/motions may or may not be filed; how to answer questions about form completion without providing legal advice; and strategies for handling emotional/belligerent individuals. Additionally, all court personnel should be trained to be alert to the need for interpreter services, and to direct litigants to an appropriate staff person who can assist with arranging for the interpreter. Opportunities for periodic conferences with judges should also be considered. The importance of and interrelation of various non-judicial positions within the court system should be explained to personnel who hold these positions.

Video

The Committee recommends the use of videotapes to educate/inform *pro se* litigants about various aspects of the court-related process in which they are involved. The Committee believes that individuals seeking to acquire information about court related proceedings may be better able to process this new and often complicated information if it is made available in a variety of formats, including written, oral and visual presentations. As we have increasingly become a television and computer oriented society, individuals may feel most comfortable with videotaped presentations in conjunction with other forms; in addition, the information will be uniform and is subject to being translated into a variety of languages, as the needs of each division may require. The information may also be closed captioned for the hearing impaired.

The Committee recommends that the Probate and Family Court create a master videotape which contains basic information which begins with a statement from the Chief Justice explaining the purpose of the tape and should be shown to all litigants. The master videotape could be spliced into an adapted version which is particular to each division. Each division's videotape should feature that court's judges, Register, and some of the staff whom the litigants are likely to meet. The videotape might show where in each courthouse one goes to obtain forms, file documents, retrieve existing files, see the Lawyer for the Day, participate in dispute intervention or appear at a hearing. Courtroom etiquette could be highlighted including do's and don'ts of argument; courtroom decorum - no beepers, telephones, gum chewing, newspapers, etc. in the court sessions. Our review of existing videos of similar content suggest to us that the video is most effective when information is enacted and not just discussed.

In addition to a general information video, shorter additional videotapes which feature information about specific substantive areas (i.e., what to expect if you are involved in a divorce proceeding; a contempt proceeding; a paternity proceeding; mediation; etc.) should be developed.

A working group should be established to implement the production of these educational videos (See Appendix H). The group might consider the production of a long and a short version of the general information video. Availability of this long version should be advertised and litigants urged to borrow the videotape before appearing in court. The Committee recommends making the video available at public libraries, some major video stores, community centers and should be shown at parent education programs. The short version might be shown right in the courthouse. Consideration should be given to making the

viewing of certain videos mandatory prior to filing any action, or if an emergency, within thirty (30) days of filing. *Pro se* litigants need to be alerted to the fact that judicial and court staff time is limited and in serious demand by many litigants. Consequently, it is incumbent upon *pro se* litigants to avail themselves of educational resources and training to properly present their case.

Web-site/Computer Access to Information

Litigants should be able to obtain information about court procedures such as the completion and filing of complaints or other court forms, by accessing a Probate and Family Court web-site. Access to the web-site would be possible through any computer connected to the Internet. The Committee recommends that the web-site be interactive so that the least experienced user is able to access the needed information and/or to complete form complaints, financial statements and other documents. Access to the Registries' docket entries and indices should be available via the Internet as well.

The Massachusetts court system is in the early stages of computerization, and this may afford us a unique opportunity to incorporate into this system a user-friendly, computer accessible source of information for the public. The Administrative Office of the Trial Court has contracted with the consulting firm of Deloitte & Touche for advice in connection with the implementation of computer technology throughout the court system.

To use and create this informational system the following steps are necessary:

1. Identifying the type of information and amount of information that will be accessible through the web-site.
2. Each Probate and Family Court site must provide public access to the Internet.
3. Supply each division with computer equipment sufficient for the public to have access, as well as employee access for the purpose of data entry.
4. The creation of an interactive program to enable the general public to produce forms through this medium.

The Committee recommends that such information include a reminder that each case is unique and that the general information provided is not a substitute for qualified legal advice after consideration of the specific facts of the particular case. Caution must be used to ensure the litigant

does not perceive such information as only requiring a specific form without analysis of the case which an attorney's expertise provides.

Judicial Education

In order to respond to the needs of *pro se* litigants in a consistent and appropriate manner, the Committee suggests that the Probate and Family Court judges participate in a state-wide roundtable to discuss the proposals made by this committee, and to exchange information about successful ways of handling cases in which one or more of the parties are not represented.

The Committee recognizes there is much debate and many varied views within the judiciary regarding how much assistance a judge should or may ethically provide a *pro se* litigant while balancing his/her role as the independent fact finder in the case with the responsibility to ensure a fair hearing for all litigants. The details of this debate exceed the scope of this Report but the Committee urges that opportunities be extended to enable members of the judiciary to discuss this issue.

Lawyer for the Day

The Lawyer for the Day Program was initially created by Justice Nancy M. Gould while she was First Assistant Register of the Suffolk Probate and Family Court in 1990. Its goal was to assist indigent *pro se* litigants with filling out forms and affidavits. The Program was set up in cooperation with the Boston Bar Association which recruited its members to volunteer a day of service to provide assistance and advice. Since then the Program has expanded significantly. The Program has been adopted in different forms in nine divisions (See Appendix I). Volunteer attorneys have provided quality legal assistance to countless litigants, directing them regarding the appropriate forms to file to bring their issue(s) properly before the court, and the correct way to accomplish service of process. The Lawyer for the Day does not represent the litigant in the courtroom. This preliminary assistance however, has proved invaluable for the litigant and the court and helps relieve the press of inquiries on court staff. Consideration should be given to establishing a Lawyer for the Day program in each division.

This Program was intended to help those who could not afford an attorney. Therefore litigants should financially qualify for the services of the Lawyer for the Day. It is recommended that eligibility criteria be a slightly higher amount than the indigency guidelines (See Appendix J). As attorneys are volunteering their services to help indigent *pro se* litigants, financial guidelines should be enforced by

Registry staff, rather than leaving it to the volunteer attorney to explain to the litigant that he/she is not eligible for these services.

Each division should hold ongoing training sessions (at least once a year) to ensure volunteer lawyers are up to date with changes in rules and procedures as well as to attract new volunteers. As a recruitment and retention inducement, it is recommended that participants who sign up to volunteer be given the opportunity to attend a conference in which local Probate & Family Court judges will be available to answer questions about hypothetical cases, etc.

The Program's intent should be made clear at the outset to both litigants and attorneys. Attorneys who volunteer should be asked to review and sign a statement of expectations i.e., they must not represent the person being assisted (unless specifically authorized to do so by the First Justice of the division); they should find a replacement if they cannot attend on the assigned day; they may only assist people who meet the financial guidelines; and they should attend training programs provided by the court or county bar associations regarding updates in the law, practice and procedure.

The Supreme Judicial Court has enacted an aspirational rule, Rule 6.1 Voluntary *Pro Bono Publico* Service, as part of the Massachusetts Rules of Professional Responsibility. The Rule provides that it is the professional responsibility of every lawyer to provide *pro bono* legal assistance and suggesting at least twenty-five (25) hours of *pro bono* service be performed annually. Formal confirmation of participation in the Lawyer for the Day Program which could be retained by the attorney as proof of satisfaction of this requirement should be provided to volunteer attorneys. (See Appendix K)

Law Schools

There are seven law schools in Massachusetts, many of which offer clinical training programs and legal assistance programs (See Appendix L). Law student representation authorized under Supreme Judicial Court Rule 3:03 (See Appendix M) is a fertile resource to assist indigent *pro se* litigants, especially in uncontested divorces, modifications, paternities and guardianships of minors, cases in which *pro se* litigants often have great difficulty establishing a *prima facie* case sufficient to enable for the court to enter judgment. These cases often involve only one or two court appearances, making representation by the students in the courtroom feasible as such cases can often be completed within the semester the law student is participating in the course or clinical program.

It is recommended that the Office of the Chief Justice of the Probate and Family Court and the Deans of the various law schools coordinate efforts to maximize this resource and explore what other types of cases may lend themselves to law student representation.

Grants

Efforts should be made by the *Pro Se* Coordinator (described later in this Report) to explore the availability of grant money to establish a resource for the appointment of an attorney for children in complicated or volatile cases to ensure the adequate presentation of the issues. Programs like those which are currently operating in the Probate and Family Courts of Barnstable (funded by legislative appropriation) and Hampden and Hampshire (both of which are funded by a Massachusetts Bar Foundation I.O.L.T.A. grant) should be considered.

Interpreters

Approximately ten percent of the litigants who appear *pro se* before the Probate and Family Court do not speak English as their primary language and in some counties, the numbers are higher²²

There is a serious shortage of qualified court interpreters to assist *pro se* litigants, not only during courtroom proceedings but in the important out of courtroom aspects of the case, such as filing pleadings in the Registry, interviews in the Probation Office and interviews with the guardian *ad litem*. This problem is made somewhat more complicated by the fact that interpreters are not court employees but independent contractors whose services must be arranged for the particular case each time there is a court appearance.

The *Pro Se* Coordinator should be encouraged to work with the Court Interpreter's Committee that has been established by the Chief Justice for Administration and Management to periodically survey the needs of the court in this regard and to develop a more coordinated response to the language needs of *pro se* litigants.

²²Massachusetts Bar Association *Pro Se* User of the Court Survey issued August, 1999.

F. FORMS

A significant area of difficulty for *pro se* litigants is understanding and completing court forms. The degree of complexity found in many forms currently in use in the Probate and Family Court may be intimidating. Although complaints, motions and summonses are routine matters for most attorneys, they can be overwhelming and frustrating to the *pro se* litigant.

Pro se litigants often file the wrong pleading, fail to file an underlying complaint prior to filing a motion or fail to properly make service on the opposing party. The end result is that the court file becomes clogged with duplicate and unnecessary pleadings, matters must be rescheduled when necessary parties are not notified appropriately, and *pro se* litigants become frustrated making repeated trips to the court to obtain relief.

Court staff must be sensitive to the fact that many seeking assistance with completing forms may be doing so because they are not able to read or understand English sufficiently.

All forms made available in the Registry of Probate in the fourteen counties should be uniform. Only those forms that have been approved by the Chief Justice of the Probate and Family Court Department should be distributed. A lack of uniformity in forms poses a problem for both *pro se* litigants and attorneys alike, a form that has been promulgated in one division may not exist or exists in a substantially different format in another division.

The Committee recommends that all forms currently utilized in the Probate and Family Court Department be reviewed and simplified wherever possible. Although there is no substitute for competent legal counsel, the revision of commonly used forms will help to alleviate incomplete and improper filings. Some suggested changes are minor while other forms may need significant revision²³. An example of a simple improvement would be to enlarge spaces for information (for example, the current Guardianship of Minor and Joint Petition for Divorce forms could be improved by providing a larger space for the addresses). Additionally, “legalese” ought to be eliminated wherever possible and terminology of common usage substituted.

²³ The Committee acknowledges the considerable work of the Bench/Bar Committee on Pre-Trials, chaired by Judge Nancy M. Gould, which made recommendations in simplifying pre-trial forms and in preparing sample forms. This Committee suggests a review of those recommendations with a view toward possible further simplification.

Many forms must also be amended to expand instructions on their proper completion and on notice provisions including time frames and procedures. Step-by-step written instructions for completing forms as well as a description of court procedures (informing litigants what needs to be done to move their case forward in court), need to be prepared for distribution with the relevant blank forms.

Descriptive explanations on forms will also be of great assistance to those required to fill them out. For example, when a line requests “residence” a notation should be placed beneath it stating “full address”; or when a line requesting the “relationship”, a notation should be placed beneath it stating “i.e., maternal grandmother, paternal grandfather, etc.”; notations should be made if an item or items need to be checked or circled; and additional line items need to be included to reflect common requests (i.e., including the plea to remove the child[ren] from the Commonwealth). Many parents marry after a child is born, and in some instances a child is born during a marriage who is not the biological child of both parents; the Complaint for Divorce should reflect this current reality.

A number of the forms need to be revised to accurately reflect the nature of the actions for which they are used. For example, both the Complaint for Contempt and Complaint for Modification need to be changed to include the possibility that the parties were never married to each other for those matters stemming from Complaints for Paternity.

Additionally, several forms such as the Affidavit Disclosing Care and Custody Proceedings and the Military Affidavit are simply too complex. These forms would require a complete revision.

Prepared packets for specific types of filings would help to ensure that all necessary forms were completed before the plaintiff/petitioner requests court involvement. Forms and Instructions packages should be prepared for Joint Petitions for Divorce, Complaints to Establish Paternity and Complaints for Divorce.

The Committee also recognizes the difficulty non-English speaking litigants have in completing forms and therefore recommends creation of an overlay or template in languages other than English.

The following pages include examples of revised forms (See Appendix N for current forms and draft versions that include the proposed changes discussed above). Please note, for example, that the Motion form includes a check box to indicate when the moving party is proceeding *pro se* in accordance with recommendations

made elsewhere in this report addressing the “controlled unbundling” of legal services. A new summons form should be created to include a reference to the answer period and to assign a date for the parties to appear at the magistrate status conference. It is also suggested that a new form for filing an answer and counterclaim be created.

It is anticipated some of the difficulties presented in the courtroom by forms filled out incompletely or incorrectly would be alleviated by having the magistrate review the case before it is assigned for hearing. Nonetheless, efforts should be made to alleviate problems coming before the magistrate through implementation of the aforesaid suggestions.

G. PROBATION OFFICE

Probation officers (formerly referred to as Family Service Officers), unlike the magistrate, *Pro Se* Facilitator and *Pro Se* Coordinator positions mentioned in this Report, are positions that already exist in the Probate and Family Court and provide great assistance to the court in meeting the challenges presented by the *pro se* litigant. Although the mission of the *Pro Se* Committee is to address the challenges and issues presented to the Probate and Family Court by the *pro se* phenomenon, there is an underlying opportunity to assess many areas of the court's functioning and generate suggestions and ideas that will enhance the court's response in matters regardless of the status of legal representation.

Current Role of Probation Officers

Created by legislation in 1969, the Probate and Family Court probation officers were first placed in the Probate and Family Courts to assist with enforcement, collection and monitoring of both child and spousal support orders (historically, a significant proportion of litigants involved were unrepresented). Since the early 1970's the role of Probate and Family Court probation officer has evolved with a clear priority of aiding the court in dealing with the always existent but ever growing *pro se* caseload.

Pursuant to the mandate of G.L. c. 276 §85B which calls for report and recommendation on the conditions of dependent minor children before the court, the investigative arm of Probate and Family Court Probation has consistently offered the court the most available, efficient, professional and cost effective means of servicing the contested, often indigent *pro se* custody and/or visitation cases.

Acknowledging Chief Justice Warren Burger's admonition "that every case which reaches the court room stage is there only after the possibility of settlement has been exhausted," the dispute intervention component of the Probate and Family Court Probation Office has been relied upon to perform a number of functions including: resolving disputes, educating litigants, assisting attorneys, organizing and presenting cases, making recommendations and assisting litigants to prepare agreements in *pro se* cases.

Probate and Family Court probation officers are also frequently relied upon, especially in regard to *pro se* cases, in motion or contempt sessions to respond to the court's request for "informal investigations." This process requires the probation officer to obtain information necessary for the judge to make a decision, from a variety of sources including the Department of Social Services, mental health professionals, medical and school personnel and criminal records. Such contacts also frequently involve confirmation that service of process has been made, or require the actual provision of "telephone service" to bring an emergency "*ex parte*" matter forward.

Although responsibility for child support collection was assumed by the Department of Revenue, in recent years Probate and Family Court probation officers have acquired new responsibilities including supervision of unemployed or underemployed litigants referred to the Probation Department by court order to obtain full-time employment; coordinating and monitoring compliance of those litigants who have been court ordered to seek substance abuse treatment and to participate in random drug/alcohol testing; assessing the appropriateness of inquiries by adoptees for access to their adoption records and when allowed by the court, assisting them in the search process for their biological parents; working on cases wherein supervised visitation is required including interviewing and recommending approval of visitation supervisors; as well as recommending, securing and tracking guardian *ad litem* appointments. In some divisions cases in which both parties appear *pro se* are referred automatically for a "pre" pre-trial to the Probation Office before the case is heard by the court. If it is settled, it goes before the court that day for judgment. If not settled, it is assigned a pre-trial conference before a judge²⁴.

Though not part of any formalized process, Probate and Family Court probation officers are responsive to countless inquires and requests for information by *pro se* litigants prior to filing and throughout each stage of court intervention. As noted in the *1986 Report of the Special Commission*

²⁴ Recently the Probation Office in Suffolk Probate and Family Court has been sending notice to litigants which states in part, "*Your case has been referred to the Probation Department by a Justice of the Suffolk Probate and Family Court for a pre-trial dispute resolution conference. You are required to meet with a Probation Officer in Room 3.800 on _____ at _____ to discuss your case with the goal of reaching an agreement on all issues. If an agreement is reached you may be able to avoid further Court appearances. Please bring with you the items checked off below. . .*"

“. . . BY ORDER OF THE COURT: IF THE DEFENDANT DOES NOT APPEAR, THE CASE MAY GO FORWARD AND A FINAL JUDGMENT MAY ENTER IN THE PLAINTIFF'S CASE. IF THE PLAINTIFF DOES NOT APPEAR, THE CASE MAY BE DISMISSED FOR FAILURE TO PROSECUTE."

Relative to Divorce (established through Chapter 14 of the Resolves of 1984, chaired by Sen. Michael LoPresti, Jr. and Rep. Barbara Gray), the Probate and Family Court probation officer “will have the greatest effect of any court personnel on their divorce agreement. They must attempt to bring opposing parties to some resolution in less than optimal working conditions.”

Expanding the Role of Probation Officers

This Committee sets forth the following observations, conclusions and suggestions regarding the role of probation officers:

The Probate and Family Court Probation Office must place its primary focus on the tasks of: 1) dispute resolution at all levels and at each juncture at which parties appear before the court; and 2) its statutorily mandated investigatory functions. (Emphasis on the latter would address fiscal concerns *vis a vis* the cost of GAL appointments).

It is important to note that a balance of these two functions would also serve to address the needs of both the judges who require the daily presence of Probate and Family Court probation officers for the services they provide in the court sessions and the Office of the Commissioner of Probation which envisions a more active role for the Probate and Family Court probation officer in conducting investigations, overseeing supervised visitation arrangements, and implementing referrals for substance abuse treatment evaluation and testing, etc.

In both the areas of dispute resolution and investigation, with the creation of a magistrate position, as recommended by this Committee, Probate and Family Court probation officers would receive referrals from the magistrates and thereby enhance the management and expedition of cases.

Absent an investment of resources, it is difficult to envision the Probate and Family Court Probation Office assuming greater responsibility for the *pro se* population than that which it now bears. However, this department has already demonstrated strong commitment in both its provision of “hands-on” interventions and as a resource for information, education and third party resource referral.

Addressing the growing *pro se* phenomenon needs to be a collaborative effort. It is important that the Probate and Family Court be accessible, user friendly and responsive. The Probate and Family Court probation officer has had and will continue to have a front line role in making that happen.

Specific Recommendations

1. Undertaking dispute resolution and investigation referrals to the Probate and Family Court Probation Office from the proposed magistrates' hearings.
2. Appointment of Associate Probation Officers in the Probate and Family Court to perform supportive functions (referrals to and monitoring of drug/alcohol treatment and testing, visitation supervisor screening, approval and tracking, etc.). Such appointments would help free existing staff to perform additional dispute resolution and investigative functions.
3. Creation of educational/informational tools as previously noted, which could be facilitated through the Probate Probation.

Note: Many of the functions of Probate and Family Court probation officers are standardized by the Office of the Commissioner of Probation. However, autonomous flexibility within each Probate and Family Court Probation Office has allowed the specific needs of that court to be identified by each First Justice and addressed accordingly.

H. COURT CLINIC

It is recommended that a Court Clinic be established for each of the highly populated divisions or at least regionally. Such clinics should have sufficient staffing to enable the courts to make referrals for prompt evaluation and assessment. Many cases come in to court as emergencies in need of some immediate relief and present severe issues of mental and emotional problems, domestic violence and substance abuse. Myriad unsubstantiated accusations are presented by represented and *pro se* litigants on both sides. While the recently enacted Guardian *Ad Litem* tracking system has proved invaluable in monitoring the status of Guardian *Ad Litem* reports, too often there is a need for more immediate diagnosis and prescription. There can be significant time delays, despite best efforts, in identifying the Guardian *Ad Litem* and arranging the necessary appointments. Many Guardians *Ad Litem* are now requiring some portion of their fee to be paid in advance, similar to a retainer. Frequently, costs of the Guardian *Ad Litem* are not within the financial reach of the *pro se* litigant who cannot even afford an attorney. As a result the court system is assuming increased significant expense in this regard. A Court Clinic, with its own staff, would enable the court to respond more immediately to crises, prioritize cases, better control time frames within which cases are being completed, and reduce overall costs to the Commonwealth through use of a permanent staff.

I. *PRO SE* COORDINATOR POSITION

The Committee recommends the creation of a permanent full-time *Pro Se* Coordinator position within the Administrative Office of the Chief Justice of the Probate and Family Court. The Coordinator would be responsible for assuring the uniformity and consistency of information being disseminated. It would be the responsibility of the Coordinator to assist in the implementation of training, information, and education initiatives in each of the Probate and Family Courts, and to regularly review, update, and evaluate the efficacy of all such endeavors. The Coordinator would also be responsible for making recommendations to the Chief Justice regarding additional resources needed to assist *pro se* litigants.

The creation of such a position is critical to the institution and implementation of many of the recommendations contained in this report. Additionally, the Coordinator could continually monitor the effect of the implemented initiatives as well as recommend additional programs, reforms and methods that will continue to improve the ways the court meets the *pro se* challenge.

VI. SUMMARY

While the Committee's recommendations in this Report have been formulated in response to the rising number of *pro se* litigants who are appearing in the Probate and Family Court, we hope that these recommendations will improve the way the court processes all of its cases. What many refer to as the *pro se* "problem" is really an opportunity for the court to become more efficient and pro-active with respect to all parties, whether they are represented by counsel or not.

As was noted in the conclusion of the *Report of the Special Commission on Probate and Family Court Procedures 1980-1981* (chaired by former Probate and Family Court Chief Justice Alfred L. Podolski), "the Probate and Family Court cannot and should not provide every service to families in crises. What is needed is a coordination of services involving public and private community agencies, citizens and families themselves, the legal profession and the courts working together."

This Committee has recommended substantive changes, in philosophical approach to case management and court structure, many of which will require legislative enactment. The court cannot respond to the *pro se* challenge alone. It must work in partnership with the Bar to encourage parties to obtain an attorney, or to assist those who cannot afford one to obtain *pro bono* representation by an attorney.

The court also needs the cooperation and assistance of social service agencies and educational institutions to assist in disseminating many of the educational programs and materials that have been suggested in this Report. Finally, *pro se* litigants must be responsive to the materials and resources available to them.

The *pro se* challenge requires a major adjustment in practice before the court. It calls for creative and dynamic new programs on the part of the court. It also calls for a response from the Bar which will address the fact that at the present time *pro se* litigants often choose not to retain attorneys even when they are available.

The impact of *pro se* litigation on the court will be long standing. This Committee recommends creation of a *Pro Se* Standing Committee to review the recommendations of this report and to facilitate implementation of those changes which are adopted.

Until such time as the *Pro Se* Coordinator is appointed, the Standing Committee should meet annually with the Chief Justice and with representatives of various Bar Associations to assess existing programs and their effectiveness and to determine what additional programs and services might be instituted.

The Committee reiterates that there is no substitute for qualified legal representation; the Supreme Judicial Court in recent opinions has held that *pro se* litigants are to be held to the same standards as litigants represented by counsel²⁵. It is important for litigants to be educated to the fact that cases in the Probate and Family Court involve complex issues and that the outcome has a lasting impact on their lives and on the lives of their children. These matters cannot be effectively prosecuted by viewing a video, reading a brief informational pamphlet or following the instructions on the back of a form.

The Committee hopes that this Report will open lines of communication among the court, the bar, legislators, the Governor, and the citizens of the Commonwealth who are litigants or potential litigants and will ensure the adoption of changes useful for all who utilize the Probate and Family Court.

²⁵ See, Solimine v. Davidson 422 Mass. 1002, 661 N.E.2d 934 (1996) and Jordan v. Register of Probate for Hampden County 426 Mass. 1020, 690 N.E.2d 434 (1998).