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# Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self-Represented Litigants in Family Court

Jim Hilbert

*Mitchell Hamline School of Law*, [jim.hilbert@mitchellhamline.edu](mailto:jim.hilbert@mitchellhamline.edu)

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# Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self-Represented Litigants in Family Court

## **Abstract**

This article outlines the need to help self-represented litigants (SLRs or pro se parties) understand more about how they might resolve their disputes through settlement. The article discusses the remarkable growth in the number of people representing themselves in the legal system, particularly in family court. To supplement the existing support system for SLRs, the article proposes including settlement and negotiation educational workshops for SRLs so that they can better understand 1) the prominent role of settlement in our legal system, 2) their power within the settlement process, and 3) some fundamental guidance on how they might approach settlement negotiations. Utilizing existing programs such as self-help centers, and bridging eventually to limited representation programs utilizing lawyers where necessary, educational workshops on settlement for SLRs could be a key piece in helping SRLs navigate their way through court and find appropriate resolution to their disputes.

## **Keywords**

Pro Se Parties, Self-Represented Litigants, Unrepresented Parties, Family Court, Court Reform, Negotiation, ADR, Public Interest, Settlement Workshop, Pro Se Clinic

## **Disciplines**

Family Law

# Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self-Represented Litigants in Family Court

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JIM HILBERT\*

## I. Introduction

Over the last few decades, family court has been transformed from a courthouse with parties represented by lawyers pursuing legal claims through litigation to a multiservice resource center filled with unrepresented parties settling their disputes through negotiation and alternative dispute resolution (ADR). These two major developments have created new challenges for family law litigants and the court system.

The biggest change recently has been in the number of people representing themselves in family court. Today, in many jurisdictions, the majority of family court parties do not have legal counsel. Interestingly, the growth in the number of “self-represented litigants” (SRLs)<sup>1</sup> is not

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\* Jim Hilbert is Executive Director of the Center for Negotiation and Justice at William Mitchell College of Law, where he teaches Negotiation and Advanced ADR. He is Vice President of Professional Services for Alignor, an international negotiation firm ([www.alignor.com](http://www.alignor.com)). The author wishes to thank Mary Ann Archer, Associate Director for Public Services at the Warren E. Burger Library at William Mitchell College of Law, and Nick Wanka for their research support. Also, the author wishes to thank Nancy Ver Steegh, Vice Dean, William Mitchell College of Law, for her support and review of earlier drafts. The Center for Negotiation and Justice has been awarded a small grant by the Minnesota State Bar Association to create educational workshops for self-represented litigants on settlement and ADR for Hennepin and Ramsey County Courts (Minneapolis and St. Paul) in Minnesota.

1. The use of the Latin term *pro se* is increasingly falling out of favor. *See, e.g.*, Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 *RUTGERS L.J.* 105, 107 n.7 (2001) (describing how such terms “serve[] to reinforce the sense of alienation and inaccessibility that persons without legal training face upon entry into the court system”); Paula Hannaford-Agor

totally understood.<sup>2</sup> Certainly, economics plays a significant role, as the vast majority of self-represented parties cannot afford full legal services, and legal aid remains underfunded and unable to accommodate the number of needy clients. Other factors, however, play a role as well, such as concern about the role of lawyers in creating more conflict and taking more time, particularly in family matters. Regardless of the cause, SRLs are a major feature of our current system, and there is no indication that this issue will subside anytime soon.

As a result, courts, lawyers, and others have designed a number of different programs to address the issue. Most programs focus on litigation support and provide direct assistance on how to navigate through the often complex labyrinth of the legal system. These programs include simplified forms, self-help centers to answer questions concerning legal procedures, clinics to provide education and support on prosecuting or defending legal claims, and support from attorneys in limited representation or focused legal advice, among many other noteworthy programs. While these programs can be valuable resources for SRLs, they only provide part of the picture and perhaps reinforce a false presumption made by many SRLs that their cases will be resolved by judges or juries, rather than settlement.

In addition to the litigation-focused offerings, a number of ADR programs have emerged to help SRLs resolve their disputes. Just like cases where the parties are represented by lawyers, most SRL cases settle through negotiation, mediation, or some other ADR process. New ADR programs have developed to help manage the growing number of SRL cases and provide additional ADR resources, such as court-based mediation or other resources. These programs do not typically offer educational programs and are often underutilized by SRLs.

The existing programs for SRLs, however, leave a gap. SRLs are given substantial help in litigating their cases, but too little support on understanding the reality or value of settlement. Educational programs focus almost entirely on litigation strategies, such as filing forms and procedural

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& Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 163 n.1 (2003) (“traditional terms *pro se* or *pro per* are often rejected as needlessly legalistic and condescending to individuals who are unschooled in the finer points of law Latin”); *but see* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1992 n.23 (1999) (rejecting the term “self-represented” because many low-income SRLs do not really have a “choice” to forgo counsel and lack the information necessary to represent themselves effectively in court).

2. Stephen Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440 (2009) (“Presently, we have only the most fragmentary information about *pro se* trends and those who occupy the ranks of the self-represented.”).

issues. ADR programs provide support for settling lawsuits, but do not provide educational programming on negotiation or settlement strategy. If SRLs are expected to proceed on their own, with guidance here and there from court personnel and lawyers, they also must have some support in how to think about the possible (and likely) settlement of their case. They could even use some guidance on how to approach the topic of settlement in advance on their own and with the other related parties and stakeholders.

This article suggests an additional tool in the efforts to provide support to self-represented litigants, through education about the most important activity they may undertake—settling their litigation. This article proposes including settlement and negotiation educational workshops for SRLs so that they can better understand the prominent role of settlement in our legal system, their power within the settlement process, and some fundamental guidance on how they might approach settlement negotiations.

This article will begin with a brief discussion of the increase in SRLs in family court. Next, it will discuss some of the specific challenges this phenomena creates for both the parties and the court system itself. The article will then discuss some of the initiatives that have been undertaken to support SRLs, many of which could provide important support to the proposed educational program. Finally, the article will lay out, in a very general manner, an outline and some ideas for the proposed educational programs and some additional issues.

## **II. Parties Without Lawyers: A Major Explosion in Family Court**

### *A. The Numbers*

Although the data is somewhat limited,<sup>3</sup> there is little doubt that the number of litigants without lawyers is rising and has been growing for quite some time. Researchers describe the increase as an “explosion” in the number of SRLs “flooding” state and federal courts.<sup>4</sup> Judicial officials

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3. Commentators have lamented the lack of comprehensive data on SRLs for years. *See, e.g.,* Jona Goldschmidt, *Strategies for Dealing with Self-Represented Litigants*, 30 N.C. CENT. L. REV. 130, 130 (2008) (noting that “precise data on the distribution of SRLs across courts and case types is sparse”).

4. *See* AYN H. CRAWLEY, MARYLAND LEGAL ASSISTANCE NETWORK, HELPING PRO SE LITIGANTS TO HELP THEMSELVES 1 (2002), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/HelpThemselves.pdf> (finding that “[i]t is the common experience of most court system [sic] in the United States that there has been a rising tide of pro se litigants flooding a justice system designed, in large part, for the traditional full representation model”); JOHN M. GREACEN, CENTER FOR FAMILIES, CHILDREN & THE COURTS, CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, SELF-REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS, WHAT WE KNOW 1 (2002), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatweknow.pdf> (“By now everyone . . . knows that we are

and court personnel have been reporting this trend for years.<sup>5</sup> Indeed, the dramatic number of individuals helped by self-help centers and other court programs designed for SRLs speaks to the remarkable volume of SRLs in the court system. In 2007, for example, the self-help center in Hennepin County (Minneapolis, Minnesota) assisted over 43,000 unrepresented litigants,<sup>6</sup> a dramatic number that likely represents only a fraction of SRLs in that court.<sup>7</sup> Numbers of SRLs are only expected to increase, boosted, in part, by the effectiveness of self-help centers and other support programs.<sup>8</sup>

The increase of SRLs in family courts is even more pronounced. By the end of the last decade, there were more SRLs in family court than any other part of the legal system.<sup>9</sup> Hennepin County now estimates that “approximately seventy percent” of the filings in the district’s family court are from SRLs.<sup>10</sup> According to a recent article in the Minneapolis Star Tribune, “the classic model of a pro se litigant is the one who goes to family court.”<sup>11</sup>

The trends from Minnesota are consistent with numbers from all over the country, particularly in urban centers.<sup>12</sup> As study after study found,

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experiencing an explosion of unrepresented persons appearing in the courts”); *see also* Berenson, *supra* note 1, at 107 (“There appears to be little dispute that the phenomenon of persons appearing in court without lawyers is increasing.”); Goldschmidt, *supra* note 3, at 130 (“The numbers of self-represented litigants (SRLs) has been rising steadily since the late 1990s”).

5. JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 1 & n.1 (1998) (detailing survey data showing that the vast majority of judges and court administrators have consistently reported increases in SRLs).

6. Grant Schulte, *Some Litigants Seek Self-Serve Justice in Court*, USA TODAY, July 16, 2008, available at [http://www.usatoday.com/news/nation/2008-07-15-self-represent\\_N.htm](http://www.usatoday.com/news/nation/2008-07-15-self-represent_N.htm) (featuring the Hennepin County self-help center in a national story about SRLs).

7. It is estimated that only twenty percent of the legal needs of low-income individuals are being met. JOHN GREACEN, BONNIE HOUGH & SUSAN LEDRAY, NAT’L ASSOC. FOR COURT MGMT., SELF REPRESENTED LITIGANTS: SELF HELP PROGRAMS—MAKING THE CASE TO THE BENCH AND BAR (2006), available at [http://www.nacmnet.org/conferences/PastConferences/2006Annual/03Greacen-Case\\_to\\_Bench\\_BarJune30\\_2006.pdf](http://www.nacmnet.org/conferences/PastConferences/2006Annual/03Greacen-Case_to_Bench_BarJune30_2006.pdf); *see also* REPORT OF THE STATEWIDE LAW LIBRARY/SELF-HELP CENTER PROJECT ADVISORY WORKGROUP 7 (2007), available at <http://www.lawlibrary.state.mn.us/StatewideLLReport.pdf> (finding that more help and materials are needed in self-help centers and law libraries to assist SRLs).

8. Goldschmidt, *supra* note 3, at 130 (“The flood of SRLs in our courts is expected to increase even further as a by-product of enhanced means of access to justice.”).

9. Jarvis C. Jones, *Pro Se Litigants and the Legal Profession*, BENCH & B. MINN., Aug. 2001, at 5, 5.

10. E-mail from Debra Swaden, Supervising Attorney, Minnesota’s Fourth Judicial District (Hennepin County) Court’s Self-Help Center (Oct. 28, 2008) (on file with author).

11. Paul Gustafson & Rochelle Olson, *Courting the Boom of Do-It-Yourselfers*, STAR TRIBUNE, May 28, 2007.

12. Ronald W. Staudt & Paula L. Hannaford, *Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers*, 52 SYRACUSE L. REV.

“the percentage of cases in which one or both of the parties appears without a lawyer is significantly higher in family law cases than in any other area of the law,” and the number is increasing.<sup>13</sup> In San Diego, for example, the number of divorce filings involving at least one pro se litigant rose from forty-six percent in 1992 to seventy-seven percent in 2000.<sup>14</sup> In the eight-year period from 1996 to 2004, the percentage of SRLs in family court for one Wisconsin district increased from forty-three percent to sixty-three percent.<sup>15</sup> While statistics vary by state, depending on the type of proceeding, studies show that in between fifty-five and eighty percent of family law matters, at least one party appears pro se.<sup>16</sup> In part as a result of the growing number of SRLs in family court, family law cases overall now comprise more than one-third of all civil filings nationally and continue to grow.<sup>17</sup> It is not just that SRLs are a growing phenomena, it is that they now represent a significant majority of litigants in family court.

### *B. The Challenges SRLs Face in Court*

Not unexpectedly, there are unique challenges for persons hoping to assert legal rights without lawyers within a system designed by and for lawyers. Simply put, they tend to lose more frequently than their counterparts with counsel,<sup>18</sup> a result even more potentially devastating in family

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1017, 1022 (2002); *see also* Memorandum from Madelyn Herman, Self-Representation: Pro Se Statistics, Mar. 25, 2006), <http://www.ncsconline.org/WC/Publications/Memos/ProSeStatsMemo.htm> (last modified May 8, 2009) (reporting that SRLs in some counties make up eighty-one percent of divorce litigants in Utah, fifty-eight percent in Iowa, seventy percent in New Hampshire, seventy-three percent in Florida, seventy-two percent in Wisconsin, and seventy-five percent in Boston).

13. Berenson, *supra* note 1, at 110.

14. BONNIE ROSE HOUGH, INTERNATIONAL LEGAL AID GROUP—HARVARD, DESCRIPTION OF CALIFORNIA COURTS' PROGRAMS FOR SELF REPRESENTED LITIGANTS (2003), available at <http://www.courtinfo.ca.gov/programs/equalaccess/documents/harvard.pdf>.

15. Leslie Feitz, *Pro Se Litigants in Domestic Relations Cases*, 21 J. AM. ACAD. MATRIM. LAW. 193, 193 (2008) (citing GREGG MOORE, TENTH DISTRICT COURT, TENTH JUDICIAL DISTRICT SELF-REPRESENTED LITIGANTS INITIATIVE: A FIVE-YEAR RETROSPECTIVE 1 (2005), available at <http://www.wicourts.gov/about/organization/programs/docs/10distlitigants.pdf>).

16. *Id.* at 194 (citing M. SUE TALIA, SUMMIT ON THE FUTURE OF SELF-REPRESENTED LITIGATION, ENGAGING THE PRIVATE BAR: A PATH TO REDUCING THE NEED FOR SELF-REPRESENTED LITIGATION SUPPORT 97 (2005), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=24>).

17. Deborah J. Chase, *Pro Se Justice and Unified Family Courts*, 37 FAM. L.Q. 403, 404 (2003) (reporting that family law comprises thirty-five percent of the total civil filings nationally and that these filings are increasing at a rate of 1.5% per year). In addition, this rate may even be higher if data are collected at the time of disposition, rather than at the time of filing. *See id.* at 405 (citing data that “suggests that some of those who can access legal representation at the start of a case are not able to maintain it throughout the process”).

18. *See* Brenda Star Adams, Note, “Unbundled Legal Services”: A Solution to the Problems Caused by Pro Se Litigation in Massachusetts Civil Courts, 40 NEW ENG. L. REV.

court.<sup>19</sup> In a California study of federal court SRLs, fifty-six percent of the pro se claims were unable to survive a preliminary motion to dismiss.<sup>20</sup> Pro se claims also frequently are dismissed through summary judgment motions.<sup>21</sup> Even if they happen to win some aspect of their litigation, SRLs likely forfeit important legal rights during the process.<sup>22</sup>

These results can be attributed primarily to the complexity of the procedural format and substantive laws of the current system. Without counsel, the legal system becomes incomprehensible to SRLs.<sup>23</sup> Even those SRLs who are prepared for court lack the legal knowledge and expertise to deal with even the most basic court proceedings.<sup>24</sup> Judges in family court find that “pleadings, motions and other documents filed by pro se parties are rarely or sometimes in proper order.”<sup>25</sup>

### *C. Why People Self-Represent*

Given the difficulties for SRLs in the family court system, why do so many people choose to go to court without an attorney? Importantly, the factors contributing to the phenomena reinforce the belief that SRLs will

303, 308 n.37 (2005) (citing BOSTON BAR ASS’N TASK FORCE ON UNREPRESENTED LITIGANTS, REPORT ON PRO SE LITIGATION 61 (1998), <http://www.bostonbar.org/prs/reports/unrepresented0898.pdf> [hereinafter BBA TASK FORCE REPORT] (finding that “unrepresented litigants do not obtain results as favorable as those with counsel”).

19. See Berenson, *supra* note 1, at 115 (“[T]he increase in the number of self-represented parties may result in miscarriages of substantive justice for the self-represented parties. . . [which is] particularly disturbing in the area of family law, given the fundamental importance of the issues involved in such cases.”).

20. Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT’L L. 103, 116 (2002) (citing Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 835 (1997) (analyzing statistical data for the year 1993)).

21. *Id.*

22. See generally Engler, *supra* note 1, at 1989 (chronicling the many hazards in store for SRLs as they navigate through the complex legal processes necessary for them to vindicate their legal rights).

23. See Adams, *supra* note 18, at 308 n.35 (“The current adversary system in our courts fundamentally assumes that lawyers will guide parties through the process.”) (quoting BBA TASK FORCE REPORT, *supra* note 18, at 60).

24. See Adams, *supra* note 18, at 309 n.45 (“Obtaining justice is a complicated process made unreasonably difficult by the sheer complexity of the legal system. . . . [I]itigants may avoid costly legal representation by representing themselves, but if they do so, they must confront bewilderingly complex requirements, processes and events for which they are ill prepared by normal experience.”) (citing CHARLES L. OWEN ET AL., ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS 15–16 (2002)); Carolyn D. Schwarz, Note, *Pro Se Divorce Litigants*, 42 FAM. CT. REV. 655, 655 (2004) (Pro se litigants “are thrown into a system that is unfamiliar and difficult for even attorneys to properly maneuver their way through after 3 years of law school, the bar exam, and firsthand experience.”).

25. Adams, *supra* note 18, at 311 n.55.

be a large factor in family court in the long term. Primarily, SRLs are without lawyers because they cannot afford them.<sup>26</sup> While there are well over one million lawyers in the United States, the reality is that there is “a desperate shortage of lawyers available to represent the poor.”<sup>27</sup> For low-income persons eligible to qualify, there are simply too few civil legal aid lawyers to even come close to addressing the need.<sup>28</sup> In addition, many litigants who do not qualify for legal aid assistance still cannot afford to hire a private attorney.<sup>29</sup>

While economic and financial considerations are the primary explanation people go to court without lawyers, it is not the only reason. For at least some SRLs, the choice to go unrepresented is voluntarily taken and not the result of economics.<sup>30</sup> Importantly, many believe that they will actually do better without lawyers.<sup>31</sup> At least some SRLs believe that their

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26. See Feitz, *supra* note 15, at 194 (“The poor and middle class are increasingly unable to afford adequate legal representation, yet their need for adequate representation continues to increase.”).

27. Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 368 n.5 (2008) (“Legal needs studies have consistently shown that anywhere from seventy to ninety percent of legal needs of the poor go unaddressed in America.”). This trend has been around for over fifteen years. See, e.g., Janet Reno, *Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School*, 63 FORDHAM L. REV. 5, 8 (1994) (“Ladies and gentlemen, at least eighty percent of the poor and the working poor in the United States do not have access to legal services.”).

28. Earl Johnson, Jr., *Justice for America’s Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393 (2009) (noting that there are only approximately 6,500 civil legal aid lawyers in the entire country, while there is somewhere between 50 and 90 million Americans who qualify for their assistance); see also Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1543–44 (2005) (“The net result [of the mismatch between funding and need] is that there is only one lawyer available to serve approximately 9000 low-income persons . . .”).

29. Feitz, *supra* note 15, at 195.

30. One study indicated that less than a third of pro se litigants have been “forced” to represent themselves due to the prohibitive cost of professional legal assistance, while nearly one-half chose to proceed pro se based on their belief that their case was “simple” and did not require a lawyer. Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 383–84 (2005); see also GREACEN, *supra* note 4, at 5 (citing a study from Hennepin County that found SRLs stating that they did not use a lawyer because “the case would proceed more quickly if he or she handled it” as “the third most frequent answer, following ‘could not afford a lawyer’ and ‘thought it would be easy’ and ahead of ‘did not want to spend money on a lawyer.’” (citing SUSAN LEDRAY ET AL., HENNEPIN COUNTY DISTRICT COURT PRO SE PROGRAMS: INFORMATION AND AN EVALUATION OF EFFECTIVENESS (2002))).

31. See Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 991–92 n.47 (2007) (“Another factor contributing to the pro se trend is the anti-lawyer sentiment among many people and their growing lack of trust in the justice system.”) (quoting PATRICIA A. GARCIA, LITIGANTS WITHOUT LAWYERS: COURTS AND LAWYERS MEETING THE CHALLENGES OF SELF-REPRESENTATION 8 (2002)); see also CRAWLEY, *supra* note 4, at 2 (citing the ABA Legal Needs Study where more than half of SRLs surveyed believed that “we would be better off with fewer lawyers”).

case is simple enough and worry that attorneys may complicate the matter.<sup>32</sup> Other reasons include increased literacy, pro-consumerism fervor, and the availability of self-help and other support mechanisms for SRLs.<sup>33</sup>

#### *D. The Impact on the Legal System*

In addition to creating issues for the SRLs themselves, many worry about the impact of pro se litigation in causing delays and placing other burdens on the judicial system.<sup>34</sup> For example, SRLs are “more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim.”<sup>35</sup> These missteps impact court staff who end up putting in additional time and effort to answer questions, helping to remedy improper paperwork, and guiding SRLs through the legal process.<sup>36</sup> SRLs are often ill-equipped to manage their cases in the courtroom, creating delays and headaches for court personnel and judges.<sup>37</sup> It may not even be an issue of time delay, as much as just the burdens and strains of keeping things moving orderly.<sup>38</sup> Moreover, these delays often affect other parties, even those with attorneys.<sup>39</sup> Indeed, the courts have set up dedicated systems just to

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32. Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 567 (1993); *see also* Feitz, *supra* note 15, at 195 (stating that some SRLs choose to represent themselves “not wanting to complicate a relatively simple matter”).

33. GOLDSCHMIDT ET AL., *supra* note 5, at 4; *see also* Landsman, *supra* note 2, at 439 (“Many laypeople believe that with the right guidebook they can master whatever legal challenge they face.”).

34. *See* Berenson, *supra* note 1, at 112 (“[I]t is undeniable that court appearances by persons without lawyers place burdens on court staff, administrators, judges, and our justice system itself that would not exist if all litigants were represented by lawyers.”); GOLDSCHMIDT ET AL., *supra* note 5, at 53 (“[S]elf-represented litigants’ ‘lack of experience and inability to understand elementary proceedings’ . . . caus[e] the prolonging of proceedings [and] plac[e] ‘a great burden on the court.’”); Staudt & Hannaford, *supra* note 12, at 1018 (2002) (“Self-represented litigants tend to place heavier demands on court resources, especially staff time, compared to litigants represented by counsel.”).

35. Buxton, *supra* note 20, at 114.

36. Feitz, *supra* note 15, at 195.

37. *See id.* at 195–96 (“When proceedings occur, unrepresented parties often find it difficult to abide by procedural or evidentiary rules or to present adequate and relevant information for the judge to make a final determination.”).

38. *See* Hannaford-Agor & Mott, *supra* note 1, at 165 (describing the various ways that SRL litigation can complicate the orderly administration of justice); *but see* Buxton, *supra* note 20, at 116 (noting that “the inefficiency feared by critics of pro se litigation may actually be less burdensome than it appears” because so many SRL claims fail early in the proceedings). Indeed, it is not altogether clear what impact SRLs are having. *See* Landsman, *supra* note 2, at 439 (“Despite the long-standing recognition of the right to self-representation in the Anglo-American legal tradition, its effects on the legal system are still poorly understood.”).

39. *See* Hannaford-Agor & Mott, *supra* note 1, at 165 (“The pervasive problem of litigants that fail to appear for scheduled hearings causes uncertainty for court staff about the number of cases to schedule on any given docket, causing unnecessary delay for other cases in the court’s

cope with the increasing number of SRLs.<sup>40</sup>

In addition, the abundance of SRLs creates ethical quandaries for court personnel and judges. The extra requests and questions raised by SRLs result in “personalized assistance” that could “jeopardize [the court’s] ability to adhere to ethical requirements of neutrality and objectivity.”<sup>41</sup> This assistance, whether provided by judges or court personnel, presents “a significant threat to the notion of a neutral, third party adjudicator that governs our judicial system.”<sup>42</sup> Judges are often caught trying to reconcile the requirement for providing SRLs an opportunity for a fair hearing with prohibitions on helping litigants meet the technical requirements for presenting evidence in court.<sup>43</sup>

### III. Existing Programs for SRLs in the Courts

In response to the growth of SRLs and the challenges they face in court, a number of courts and others have established a variety of programs to provide help. As one commentator put it, “Probably the only thing growing as fast as the number of self-represented litigants in our state and federal courts are the efforts to assist and accommodate them.”<sup>44</sup> As described below, while these resources do not meet all of the needs for SRLs (and are likely far from it), the programs have made significant contributions to SRLs, and, as importantly, they represent essential infrastructural support upon which new programs can be placed to offer additional support. The major programs are generally classified as pro se clinics and other educational programs, self-help centers, referral for legal services, and ADR programs.

#### A. Pro Se Clinics and Other Educational Programs for SRLs

There are already a significant number of educational programs for SRLs, often called “pro se clinics.”<sup>45</sup> Some clinics provide opportunities

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caseload.”); *see also* Jones, *supra* note 9, at 1 (“[T]he pro se issue is not simply a problem for the self-represented litigant; it is a systemic problem for the legal profession since it often adversely affects all participants in the legal proceeding.”).

40. *See infra* notes 44–73 and accompanying text (describing some of the primary programs set up by courts to assist SRLs navigate the court system).

41. Staudt & Hannaford, *supra* note 12, at 1018.

42. *See* Buxton, *supra* note 20, at 115 (noting that the added requests for assistance in the courtroom by SRLs is “threatening the court’s neutrality”). For a discussion of judicial ethical issues raised by SRL litigation, *see* Engler, *supra* note 27, at 387–88 (cataloging the related scholarship).

43. Hannaford-Agor & Mott, *supra* note 1, at 165.

44. Swank, *supra* note 28, at 1538.

45. *See* Berenson, *supra* note 1, at 128 (“[T]he classic pro se clinic. . . involves some sort of educational program, presented by either lawyers or non-lawyers, to a group of potential or actual self-represented litigants, designed to provide basic instruction and information neces-

for legal advice on individual cases (often on a walk-in basis), while others provide more traditional classroom-style instruction.<sup>46</sup> Nevertheless, while the structure of the clinics ranges from one-on-one legal consulting sessions to large classes, they always contain some sort of educational content.<sup>47</sup> Some clinics take place within the courthouses and are run by court staff, while others occur off-site and are managed by private attorneys or legal aid.<sup>48</sup>

Regardless of the format or who is providing the instruction, the focus of the clinics is typically on the legal procedures and substantive law. The clinics are structured “to provide sufficient information to allow participants to understand and access the type of pleadings required, basic rules such as service of process, basic information that the court will require to render a decision, and a sense of the range of remedies available.”<sup>49</sup> In other words, these clinics are typically designed for litigation rather than resolution.<sup>50</sup>

In addition, although pro se clinics and other educational programs have garnered positive responses from SRL participants, they have received considerable criticism. For example, some claim that litigants who participate in pro se clinics cannot possibly get all of the information or education they need and are thereby “lulled into a false sense of confidence by the necessarily limited information provided.”<sup>51</sup> There is concern that no matter how effective the training, “some litigants really need representation.”<sup>52</sup> Given how significant the obstacles can be for litigants in family court, legal representation in court proceedings for some might just be the

sary to the successful prosecution of certain types of legal cases.”).

46. See Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 *FORDHAM L. REV.* 1879, 1891 (1999) (surveying the many clinics throughout the United States that comprise the “community legal education” movement).

47. These clinics can even include community-based seminars similar to Street Law or the People’s Law School. Robert B. Yegge, *Divorce Litigants without Lawyers*, 28 *FAM. L.Q.* 407 (1994). For specific examples in California and Florida, see Buxton, *supra* note 20, at 123–24.

48. See generally Adams, *supra* note 18, at 328–32 (outlining the basic clinics available in Florida and other locations); Barry, *supra* note 46 (highlighting other examples of pro se clinics).

49. Barry, *supra* note 46, at 1883.

50. There is a growing number of ADR clinics, as described below. See *infra* notes 71–73 and accompanying text.

51. Berenson, *supra* note 1, at 138. In addition, “pro se clinics have been criticized for providing an excuse for the legal profession to foist its responsibility to provide access to justice off on poor litigants” who cannot afford legal counsel. *Id.* See also Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 *FLA L. REV.* 481, 488 (1996).

52. Landsman, *supra* note 2, at 455 (citing 3 *NAT’L CTR. FOR STATE COURTS ET AL., NATIONAL JUDICIAL CONFERENCE ON LEADERSHIP, EDUCATION AND COURTROOM BEST PRACTICES IN SELF-REPRESENTED LITIGATION: LEADERSHIP CURRICULUM 29* (2007)).

only viable option.<sup>53</sup> No matter how many times SRLs attend workshops, and regardless of the quality of the materials provided, “[e]ducation programs cannot turn laymen into lawyers—there is a ceiling on lay efficacy.”<sup>54</sup>

### *B. Self-Help Centers*

The central hub for most SRL activity, particularly in urban centers, is the self-help center, a court-sponsored program in the courthouse that provides model filing forms and educational materials about routine court procedures upon request.<sup>55</sup> Self-help centers are standalone facilities (sometimes available online as well) dedicated to providing assistance to SRLs.<sup>56</sup> Because these types of programs are cost efficient and require low maintenance, self-help centers are likely to be the first option for courts facing increased numbers of pro se litigants.<sup>57</sup> Family courts have begun to establish self-help centers dedicated to family law issues.<sup>58</sup>

Self-help centers play a key role as the focal point of services for SRLs, with generally quite positive reviews from all key stakeholders.<sup>59</sup> Often the first place SRLs go, even before their first filing, self-help centers have become a critical resource for guidance throughout the entirety of a case.<sup>60</sup> With such broad contact with so many SRLs, self-help centers operate as a major referral source for many other services for SRLs.<sup>61</sup> They are also quite flexible in how they provide their various services, using a variety of creative outreach mechanisms, including mobile homes and online

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53. See Staudt & Hannaford, *supra* note 12, at 1021 (chronicling the long list of obstacles SRLs face in resolving disputes and problems through the courts, including understanding all of “the formal requirements for conducting court proceedings” and “evaluating the relevance and reliability of evidence”).

54. Landsman, *supra* note 2, at 455.

55. Staudt & Hannaford, *supra* note 12, at 1019.

56. The classic model is the original self-help center established at the Superior Court in Maricopa County (Phoenix) Arizona. See GOLDSCHMIDT ET AL., *supra* note 5, at 71.

57. Buxton, *supra* note 20, at 121.

58. See generally Minnesota Family Court Self-Help Service Center Information, <http://www.mncourts.gov/district/2/?page=790> (last visited October 1, 2009) (outlining the services of the Ramsey County Family Court Self-Help Center); see also John N. Stanoch, *Working with Pro Se Litigants: The Minnesota Experience*, 24 WM. MITCHELL L. REV. 297, 309 (1998) (charting the development of the family court self-help center after the initial success of the main self-help center in Hennepin County).

59. See GREACEN, *supra* note 4, at 2 (noting that self-help programs are “universally appreciate[d]” by the self-represented litigants who utilize them); Feitz, *supra* note 15, at 204 (“The appreciation of the public often stems from the generally higher levels of preparation, self-confidence and better case presentation.”).

60. See Feitz, *supra* note 15, at 205 (“The centers seem to best serve the public when they are able to work with the litigant up front and conduct an initial ‘triage’ assessment to help move the case in the best direction.”).

61. *Id.*

resources, to reach as many people without lawyers as they can.<sup>62</sup> The self-help centers also act as a portal through which SRLs can access a variety of ADR services, as well as pro bono or unbundled legal services. Any new program, naturally, would need to be integrated into self-help-center activities and utilize the centers' broad reach for marketing and connecting to SRLs.

### *C. Referral to Pro Bono Lawyers or "Unbundled" Legal Services*

Even programs that work to support SRLs in their self-representation recognize that for many SRLs, an attorney is still a necessary resource. Despite the best efforts of clinics and self-help centers, the reality is that, for many SRLs, an attorney may be the best option.<sup>63</sup> Self-help centers in particular often provide referral services to pro bono, legal aid, or private attorneys who are willing to provide low-cost or limited representation.<sup>64</sup> Pro bono and legal aid resources, however, can only provide a fraction of the legal support that many low-income parties require.<sup>65</sup> For many others, there are private attorneys who often offer "unbundled services" or limited representation on particular aspects of the SRL's case.<sup>66</sup>

Even though economic considerations limit many SRLs access to legal representation, many are willing and able to pay for some type of limited assistance as they prepare for their day in court.<sup>67</sup> Even better, when people have been permitted to purchase limited scope legal services, "they have been pleased with the assistance, and attorneys tend to report equal satisfaction in providing unbundled services."<sup>68</sup>

62. "For example, Ventura County, California, has taken its successful Self-Help Legal Access and Family Law Self-Help Centers on the road by turning a camper van into a Mobile Self-Help Center." Berenson, *supra* note 1, at 127; *see also* Staudt & Hannaford, *supra* note 12, at 1019 n.10 ("posting materials on the Internet, bringing these materials to places where low-income people often congregate, developing educational materials in formats other than written materials and translating those materials to other languages"); GOLDSCHMIDT ET AL., *supra* note 5, at 73 ("[T]he Maricopa County Self-Service Center offers court forms, instructions, and educational materials, through a variety of media including an automated telephone system, in-house computer terminals, and Internet access to over 400 forms.").

63. Of course, having a lawyer is no guarantee of securing justice. *See* Swank, *supra* note 28, at 1579 (detailing the many other obstacles litigants confront in pursuit of their legal claims, even with legal counsel, such as attorney malpractice and deficiency).

64. Staudt & Hannaford, *supra* note 12, at 1019.

65. *See* Barry, *supra* note 46, at 1871 ("Pro bono legal service efforts have barely made a dent in the hugely unmet need for legal representation among the poor.").

66. *See generally* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 449 (1994) (asserting that this development is a promising and rational response to the high cost of legal representation and the increasing number of self-represented litigants, particularly in family court).

67. *See* Debra Burke et al., *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61, 73-76 (1994) at 74-76 ("some help by lawyers is probably better than no help by anyone").

68. Feitz, *supra* note 15, at 202.

Taking this approach one step further, the United States District Court for the Northern District of Illinois has implemented a Settlement Assistance Program to provide volunteer lawyers to serve as legal counsel to SRLs in settlement conferences in their employment discrimination cases.<sup>69</sup> The model provides some legal assistance to SRLs for purposes of improving settlement outcomes, but also has broader benefit and appeal to the bar. In addition to reaching early and beneficial settlements in some cases, the program also provides opportunities for volunteer lawyers, who are often junior associates looking for experience.<sup>70</sup>

#### *D. Alternative Dispute Resolution*

Other resources for SRLs include all of the various court-connected ADR programs. SRLs are often referred to ADR options through self-help centers or some other court-related referral service. The two most typical are mediation and Early Neutral Evaluation (ENE). In many jurisdictions, mediation in family law disputes is now mandatory (or at least highly encouraged).<sup>71</sup> Courts also utilize ENE, particularly early on in the process to help SRLs evaluate and assess the merits and value of their particular case.<sup>72</sup>

ADR programs have certainly brought many benefits to SRLs, but are far from perfect. SRLs often lack enough information to participate fully in the process, and sometime wait longer than they should to try various ADR options. Nevertheless, the data show that SRLs who use ADR programs can settle their cases at high rates. For example, about two-thirds of Hennepin County family court litigants chose ENE in 2008, and seventy-four percent of those settled in whole or in part.<sup>73</sup>

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69. James D. Wascher, *U.S. District Court for the Northern District of Illinois' Settlement Assistance Program: A Follow-up*, 55 *FED. LAW.* 47, 47 (2008).

70. *Id.*

71. Berenson, *supra* note 1, at 130. Indeed, the value of ADR may be particularly high for some SRLs. *See, e.g.*, National Standards for Court-Connected Mediation Programs (“pro se litigants are often the individuals who could most benefit from the lower cost and lack of procedural complexity of mediation.”).

72. *See* John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 *OHIO ST. J. ON DISP. RESOL.* 81, 99 (2008) (“The ENE process expands the parties’ information base for decisions about case development and about settlement, improves the quality of parties’ analyses, and sharpens the joinder of issues . . . [and] provides litigants with valuable impartial feedback from an expert about the merits of their positions . . .”). Courts also use less formalistic approaches to “triaging” SRL cases early in the process. *See* Peter Salem et al., *Triaging Family Court Services: The Connecticut Judicial Branch’s Family Civil Intake Screen*, 27 *PACE L. REV.* 741, 749 (2007) (describing a “triaging” process to refer parties in family cases to the most appropriate court intervention at the outset of their case).

73. According to its website, about two-thirds of Hennepin County family court litigants chose ENE in 2008, and seventy-four percent of those settled in whole or in part. *See* Hennepin

## IV. An Additional Tool in the Network of Support for SRLs

### A. Why Educational Workshops on Settlement Are Necessary

#### 1. SRLS SHOULD KNOW THE LIKELIHOOD AND UNDERSTAND THE EFFECTS OF SETTLEMENT

As a practical matter, SRLs ought to know at least something about settlement since that is a likely outcome to their dispute. Most family law cases settle, including those involving SRLs. Like other civil litigation, family law cases settle at a rate of over ninety percent in many jurisdictions.<sup>74</sup> While it is not altogether clear whether SRL cases settle at a lower rate than other cases, it is clear that the majority of SRL cases settle as well.<sup>75</sup>

In addition, SRLs should understand the potential benefits and consequences of settlement. It is, of course, no surprise that so many cases settle, given the obvious benefits of minimizing costs, saving time, avoiding the risks of uncertainty of trial, and perhaps even improving the relationship between the parties.<sup>76</sup> Yet, thinking about settlement may be

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County Family Court Services, Assistance Provided by Family Court Services, <http://hennepin.us/portal/site/HCInternet/menuitem.3f94db53874f9b6f68ce1e10b1466498/?vgnnextoid=1ffd091654000210VgnVCM2000000a124689RCRD> (last visited October, 1, 2009).

74. Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 488 n.19 (1985) (“Settlement rates of about 90% are remarkably constant in civil litigation, criminal cases, and family cases.”); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 124 (1997) (describing how most family cases settle, with minimal intervention of the court); ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD* 137 (1992) (noting that only one and a half percent of a sample of 933 California custody and visitation cases were decided by a judge).

75. At least two studies suggest that SRL cases are less likely to settle than non-SRL cases, often because SRLs default on their lawsuits at such a high rate. Hannaford-Agor & Mott, *supra* note 1, at 171 (2003) (finding that in Cook County the “appearance of an attorney for either party increased the settlement rate substantially”); *see also* Staudt & Hannaford, *supra* note 12, at 1038 (“Most cases brought by lawyers settle. Even disputes filed by self-represented litigants against other self-represented litigants settle, but not nearly as often as those in which lawyers are involved.”).

76. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 956–57 (1979).

There are obvious and substantial savings when a couple can resolve distributional consequences of divorce without resort to courtroom adjudication. The financial cost of litigation, both private and public, is minimized. The pain of a formal adversary proceeding is avoided. Recent psychological studies indicate that children benefit when parents agree on custodial arrangements. Moreover, a negotiated agreement allows the parties to avoid the risks and uncertainties of litigation, which may involve all-or-nothing consequences. Given the substantial delays that often characterize contested judicial proceedings, agreement can often save time and allow each spouse to proceed with his or her life. Finally, a consensual solution is by definition more likely to be consistent with the preferences of each spouse, and acceptable over time, than would a result imposed by a court.

*Id.*

difficult for SRLs, particularly right after filing their case. Negotiation may not feel like the appropriate next step once an SRL has brought her case to court.<sup>77</sup> Indeed, SRLs may very well get caught up in the momentum of the litigation and see settlement as a last resort, rather than a first choice. An awareness of the likelihood and prevalence of settlement will help balance that perspective.

## 2. SRLS NEED EDUCATIONAL INFORMATION CONCERNING SETTLEMENT

SRLs do not currently receive much, if any, educational information concerning settlement because current education programs focus on litigation. The vast majority of existing educational programs for SRLs focus exclusively on litigation. This is particularly true for the two most common forms of pro se support. Pro se clinics are structured “to provide sufficient information to allow participants to understand and access the type of pleadings required, basic rules such as service of process, basic information that the court will require to render a decision, and a sense of the range of remedies available.”<sup>78</sup> Self-help centers typically provide answers to procedural questions, streamlined forms and assistance with navigating the next step. Those programs that do foster ADR or other settlement-focused activities are typically limited to referrals, rather than educational support.<sup>79</sup> In other words, the clinics are designed for litigation and for furthering the prosecution of the SRL case, as opposed to resolution. Educational workshops on settlement and negotiation could fill the gap and give SRLs a better balance in knowing the possible outcomes to their disputes.

## 3. SRLS COULD BENEFIT FROM A BETTER UNDERSTANDING OF WHETHER AND HOW TO SETTLE

Some support on how to settle cases could benefit SRLs in a number of ways. For example, there are presumably some SRLs where settlement—even before any litigation—may be the best option. There are significant numbers of SRLs who have relatively simple cases with generally little conflict.<sup>80</sup> For these low-conflict situations, there is little if any value in

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77. See Robert D. Benjamin, *The Use of Mediative Strategies in Traditional Legal Practice*, 14 J. AM. ACAD. MATRIM. LAW. 203, 229 (1997) (“Americans do not like the idea of negotiating; they feel they are right and negotiation is tantamount to selling out or compromising their principles . . .”).

78. Barry, *supra* note 46, at 1883.

79. See Feitz, *supra* note 15, at 205 (“The centers seem to best serve the public when they are able to work with the litigant up front and conduct an initial triage assessment to help move the case in the best direction.”).

80. Family law parties have a wide range of dispute levels, with many just looking to formalize an agreement and others engaged in a difficult conflict. See Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB.

engaging in formal litigation, which could potentially create more conflict. These parties have gone to court to formalize their agreement and could benefit in ensuring that they have reached a good agreement and covered the major issues. If they already possess good working relationships, these parties could even negotiate directly face-to-face or at least begin discussions that culminate in mediation or another ADR process that seals the deal.

At the other end of the spectrum, there are some SRLs where settlement education may be useful to help them avoid being coerced into bad settlements or agreeing to bad deals.<sup>81</sup> Because of their lack of experience in the court system, SRLs can often be taken advantage of by unscrupulous lawyers, for instance. Without some training in basic negotiation principles, like knowing that settlement is a voluntary choice, SRLs are quite vulnerable in settlement discussions. This susceptibility is compounded by the confusing court system and complex legal structure. Indeed, without some support, many SRLs are simply not able to negotiate competently for themselves.

#### 4. SRLS MAY HAVE THE WRONG IDEA ON HOW TO APPROACH SETTLEMENT

While SRLs may have some experience in negotiating, most of those lessons are probably ill-suited to help them resolve their family law disputes. Most people have very limited views of how to resolve conflict, particularly when they are one of the parties to the dispute. Moreover, family law matters bring additional stress that may make negotiating quite difficult. Previous patterns of acrimony or dysfunctional communication are unlikely to improve during a legal dispute over marital property, custody of children, or other family issues.<sup>82</sup>

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POL'Y & L. 989, 990 (2000) ("At one end of the continuum are those divorcing parents who are basically cooperative and are frustrated with the rigid rules and adversarial nature of litigation. They would like a more informal and cooperative, less legalistic, process. At the other end of the spectrum are parents who are frustrated because their spouses exploit the legal process by filing unnecessary legal motions, relitigating minor issues, and often failing to comply with judicial decisions. These spouses wish to harass and or punish their co-parent or to delay the legal process in hopes, for example, that the co-parent will reconsider their demands and reconcile."); *see also* MACCOBY & MNOOKIN, *supra* note 74, at 272 ("[M]ost divorcing families have little legal conflict over the custodial or financial terms of the divorce decree.").

81. *See, e.g.,* Engler, *supra* note 74, at 103. ("Pro se litigants are more easily convinced to accept a settlement for several reasons: (1) they have little desire to proceed to a trial they have no knowledge of how to participate in; (2) they must make the decision to settle or proceed to trial in haste (not knowing that they could settle at any point during the trial); and (3) they are faced with the promise of a definite reward if they choose to settle. However, settling is not always in their best interest.") 40 *NEW ENG. L. REV.* 303, 313.

82. *See* MACCOBY & MNOOKIN *supra* note 74, at 54–55 ("The strong emotions attending the spousal divorce may pose a formidable barrier to collaborative, cool, and rational problem-solving. Joint problem-solving and negotiation work best with clear communication and good lis-

With their focus squarely on the litigation, SRLs are likely to employ more competitive strategies to resolving their dispute.<sup>83</sup> They may also focus too much on the narrow legal issues, rather than the broader issues that might be relevant to any possible resolution. Even if they partake in ADR, they may not have any understanding of how to prepare and may fail to fully utilize the opportunity. To make matters worse, the public is subjected to lousy lessons in negotiating on television and other media, where resolving legal disputes or other deal-making scenarios are often portrayed in over-the-top negotiation wrestling matches.<sup>84</sup>

### *B. Likely Topics for an Educational Workshop on Settlement for SRLs*

While the following may not be a comprehensive list, at least three basic points could comprise the lesson plan for SRLs in better understanding settlement.

#### 1. SETTling LAWSUITS REQUIRES ADDITIONAL INFORMATION

SRLs must understand why and when settlement may be appropriate (or inappropriate). There are two basic ideas on settlement that SRLs should understand at the outset. First, SRLs should understand that settlement is likely and may be beneficial. Few nonlawyers understand just how likely settlement of their case is.<sup>85</sup> Of course, despite not knowing the likelihood, most people still manage to settle their case. The problem is often that they could have settled much earlier, avoiding the costs of litigation and conflict for the families involved (as well as

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tening skills. Many couples lacked these skills during the marriage itself, and divorce is obviously an extremely difficult time to develop them.”)

83. Most family law disputes are probably better handled by an interest-based approach, where the parties focus on satisfying their underlying needs, rather than focus on dividing limited resources. See MACCOBY & MNOOKIN, *supra* note 74, at 19–20 (discussing the “opportunities for divorcing parents to escape from the ‘zero-sum game,’ and, through cooperation, to make both better off”); Gary Voegele, Lindy Wray & Ronald Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 985 (2007) (“The principle of interest-based bargaining is widely accepted as having particular value in family law matters involving children, since many parents recognize that the importance of their common interests outweigh their differences.”); see also *infra* note 92 and accompanying text.

84. See, e.g., *Entourage: The Bat Mitzvah* (Home Box Office 2005), available at <http://www.youtube.com/watch?v=MTf3YDNAT70> (clip depicting a classic, overblown example of antagonistic haggling loaded with personal insults and expletives).

85. See, e.g., Robert L. Haig & Steven P. Caley, *More Bank for Your Litigation Buck: Cost-Effective Litigation Strategies*, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES PLI ORDER NO. H4-5185 13, 24 (March-April 1994) (noting that, while the settlement in federal courts is over ninety percent, “this reality is frequently overlooked by [parties] until the eleventh hour”).

draining resources from an already depleted court system).<sup>86</sup>

In addition to understanding how likely settlement may be, SRLs also need to understand—at the earliest point possible—that resolving their dispute earlier, rather than later, could be in their best interest. Indeed, it is the only predictable outcome that they themselves can control. When SRLs eventually understand the role of possible settlement in pursuing resolution, perhaps through mediation or other ADR processes, it is late in the game, and often after adversarial processes have been already engaged.

SRLs tend to focus all of their energy on the enormous task of litigating their dispute, particularly given the considerable hurdles they face as nonlawyers in a system designed for lawyers. While that effort may be appropriate, as SRLs must naturally comply with all procedural issues and assess the legal options they possess, they must also have balance, particularly given that settlement is a more likely result than formal adjudication and therefore deserves its own focus.

The second major idea on settlement, however, is in some respects contrary to the first. Despite the many benefits to early settlement, not every case should be settled, and parties may not understand their rights to accept or reject settlement offers. SRLs must understand their rights to say “no” with as much clarity as they understand the benefits to saying “yes” (and crafting) a settlement agreement.

The idea that settlement may not be appropriate has two dimensions. First, there may be some cases that are not yet “ripe” for settlement. More discovery or discussion is required before a good settlement can be reached. SRLs require empowerment to resist pressure to settle when settlement is not the appropriate outcome, at least at that moment. SRLs are often under intense pressure to settle their cases, even when it is not in their best interest.<sup>87</sup>

Second, there are some cases where negotiation, even mediation, may not be appropriate at all.<sup>88</sup> Circumstances where there are substantial power

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86. ROBERT MNOOKIN, ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 100 (2000).

87. Engler, *supra* note 74, at 103.

88. This is not to take an absolute position on the question of whether mediation is never appropriate in circumstances where there is a history of domestic violence between the parties, although most commentators agree that no one should be forced to attend mediation in such circumstances. See Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 528 (2001) (“[M]ediation may be inappropriate, and even dangerous, in high conflict cases, especially for women. The most serious danger is the harm to one of the parties if mediation is imposed in a case where the imbalance of power is too great, one of the parties is incapacitated or a victim of domestic violence, or if one of the parties is so vengeful as to sabotage the process.”); Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. ADVOC. 34, 35–36 (1995) (“Most medi-

imbalances, history of violence or abuse, or cases where the other party simply is unreasonable might best be left for litigation in the courts. Indeed, in these circumstances, lawyers may be necessary after all, at least to ensure that legal rights are understood. Regardless, SRLs must at least understand that even if most cases are negotiated, not every case must settle.

## 2. SETTLING LAWSUITS REQUIRES MORE INFORMATION AND PREPARATION THAN LITIGATION

As a preliminary matter, the point of the settlement workshops is not to transform SRLs into negotiating world-beaters. Just as pro se clinics and self-help centers are not replacing three or four years of legal education, the proposed settlement workshops are merely supplemental programs to help provide some support.<sup>89</sup> Nevertheless, this is not to suggest that SRLs cannot learn and apply basic negotiation principles and improve their understanding of what matters most in their dispute, so that they can generate and evaluate ideas on how to move toward resolution. Indeed, training of individuals to be better negotiators can work for anyone.<sup>90</sup>

To provide this modest amount of support, a few basic lessons must be covered. As a starting point, SRLs must understand the value and nature of preparing for settlement. Indeed, just understanding the importance of preparation is an important lesson for SRLs in advance of any negotiations or mediation.<sup>91</sup> More specifically, SRLs must also know that preparing for settlement requires thinking and work that is independent and in addition to whatever work they have done on the litigation side.

As a philosophical matter, SRLs must understand the importance of learning and identifying the interests of all parties involved, including

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ation proponents agree . . . that victims of abuse should not be required to mediate.”); see also Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 WM & MARY J. WOMEN & LAW 145, 145–206 (2003) (discussing the current understanding of mediating cases where there is domestic violence history between the parties).

89. Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to be Heard*, 96 YALE L.J. 1641, 1651 (1987) (“A better-educated pro se litigant may still fare better if she were represented by counsel, but the alternative—leaving the litigant in total ignorance—is clearly much worse, for both the litigant and the court.”).

90. See MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 112 (1992) (reporting on a study where managers who trained in integrative negotiation practices outperformed negotiators who had lots of experience but no training in integrative techniques).

91. Just understanding the importance of preparation is an important lesson for SRLs. See Gary Mendelsohn, *Lawyers as Negotiators*, 1 HARV. NEGOT. L. REV. 139, 159 & 160 n.65 (1996) (“We believe effective planning and preparation to be the most critical elements in achieving negotiation objectives. With effective planning and goal setting, most negotiators can achieve their objectives; without it, results occur more by chance than by what the negotiator does.” (quoting ROY J. LEWICKI & JOSEPH A. LITTERER, NEGOTIATION 45 (1985))).

their own interests. While “interest-based” negotiation<sup>92</sup> is viewed for the most part as the most effective way to negotiate, its ideas are not always obvious or even easy to understand.<sup>93</sup> Indeed, negotiating and resolving disputes is challenging enough, even for the experts.<sup>94</sup>

To keep it simple, interest-based negotiating can be broken into three discrete steps: (1) who is involved and what do they need; (2) what can be done by one or more of the parties to satisfy those needs; and (3) what are the consequences of not reaching agreement, or continuing to litigate. By isolating the necessary steps, the process focuses on what is required for both preparation and implementation of an interest-based approach.<sup>95</sup>

The first step of the process is identifying all of the stakeholders involved and what those stakeholders need. It begins with the SRL herself and an understanding of all of the issues that matter to her. Next, the SRL must identify other stakeholders to the situation, not just the parties, but others who may be affected by the outcome. This could include children, other relatives, new relationships, business relationships, and many others. After understanding who is involved, the SRL identifies what each stakeholder cares about—their interests. Interests are the needs of the stakeholders on any particular issue.<sup>96</sup> Interests are the key to understanding what you need and also developing a better understanding of the other party.

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92. The term “interest-based negotiation” is used as an oversimplified, umbrella description for the integrative, problem-solving and collaborative approaches to negotiation. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce M. Patton ed., 1981); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION: HOW TO RESOLVE CONFLICTS AND GET THE BEST OUT OF BARGAINING* (1982); Carrie Menkel-Meadow, *Toward Another View of Problem Solving Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 795 (1984).

93. See Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 98 (2001) (“[W]e still have a long way to go in the conceptualization and operationalizing of teaching all of the elements of good legal problem solving and judgment”).

94. The challenges to understanding and conducting effective negotiations can be overwhelming and intimidating to anyone. In his editorial about the 1932 Disarmament Conference in Geneva, Albert Einstein remarked, “What the inventive genius of mankind has bestowed upon us in the last hundred years could have made human life care free and happy if the development of the organizing power of man had been able to keep step with his technical advances.” Albert Einstein, *The 1932 Disarmament Conference*, THE NATION, Sept. 23, 1931. See also Bruce M. Patton, *On Teaching Negotiation*, 15–16, in *TEACHING NEGOTIATION: IDEAS AND INNOVATIONS* 54, n.14 (2000) (“There is a story, possibly apocryphal but in character, that Einstein was asked, shortly after the Second World War, why, when the nearly incomprehensible secrets of the invisible atom had been unlocked, we had still not solved the familiar problem of war. His alleged reply: ‘Politics is more complicated than physics.’”).

95. See JOHN SHULMAN, *LEVERAGING RELATIONSHIPS FOR SUSTAINABLE VALUE* 38–44 (2007) (detailing application of the “three-step process”).

96. In any decision or negotiation, people evaluate how well any set of options will satisfy their interests. Interests are therefore the engine driving all decisions and negotiations. Importantly, the analysis must focus on the stakeholder’s actual needs from the stakeholder’s

The second step of the process is developing possible actions that could satisfy the needs of the stakeholders. Part of the process is brainstorming creative ways of satisfying the various needs of the stakeholders, including those of the SRL herself. Because the focus is on all of the stakeholders' interests, the brainstormed list is much more comprehensive than what might otherwise be generated. In this way, new solutions might create additional value rather than have the parties get stuck in a debate over the toughest issue.

The third and final step is understanding the risks of not doing the deal. This would include the costs of continuing litigation, in terms of time, relationships, money, and other issues. In this step, SRLs must also evaluate other potential negative impacts of not resolving the matter, including "fighting alternatives." Unlike the concept of BATNA ("best alternative to a negotiated agreement"),<sup>97</sup> fighting alternatives are the things stakeholders might do not only to satisfy their own interests unilaterally, but also things they could do that might harm the interests of others.<sup>98</sup>

### 3. MEDIATION (AND OTHER ADR TOOLS) CAN BE HELPFUL IN ASSISTING SETTLEMENT

SRLs need to understand the benefits and value of ADR for their particular case, and how to utilize ADR to promote a resolution that is in their best interest. Many parties do not fully understand the benefits of using ADR and may fail to utilize it to the fullest effect. The particular focus should be on mediation, while other ADR processes are certainly impor-

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perspective, not what might be "typical" for that type of person or client. Menkel-Meadow, *supra* note 92, at 804.

97. FISHER & URY, *supra* note 92, at 100. The term BATNA is firmly entrenched in negotiation and dispute resolution courses. See MNOOKIN ET AL., *supra* note 86, at 326 n.5 ("The term has gained wide acceptance in the negotiation literature.")

98. While certainly parties must understand their "Plan B" in case there is no agreement, the concept of fighting alternatives goes beyond just what a party might do in the alternative to an agreement. Parties will not only pursue their respective BATNAs, but they will also likely pursue courses of action that could harm the interests of the other parties, whether intentional or not. Negotiators must also understand the impact of what other parties might do if there is no agreement. See David A. Lax & James K. Sebenius, *The Power of Alternatives or the Limits to Negotiation* 98–99, in *NEGOTIATION THEORY AND PRACTICE* (J. William Breslin and Jeffrey Z. Rubin, eds. 1999) (discussing the necessity for close examination of the alternatives to a negotiated agreement that are available to all parties). See also SHULMAN, *supra* note 95, at 44 n.1.

While "fighting alternatives" is similar to "BATNA," I have found that in the real world the absence of a negotiated agreement means more than just people trying to satisfy their own interests unilaterally. The absence of a negotiated agreement—particularly when you are dealing with difficult people—often means conflict! And conflict means people impose consequences against their perceived adversaries even when those imposing the consequences do not themselves benefit from the consequences.

*Id.*

tant and could be included.<sup>99</sup> The educational workshops on settlement could also cover basic information on ADR processes, such as mediation and early neutral evaluation, so that at the very least SRLs understand what those processes entail and have some sense of how to prepare.<sup>100</sup> Often parties will go to mediation without giving any thought or preparation as to what they actually want to achieve. Judges, mediators and commentators have all reported that mediation could be vastly improved if parties would engage in proper presentation in advance and if they understood the process before it began.<sup>101</sup>

Yet, with at least some advance training and clear definitions, SRLs could benefit substantially from more effective use of ADR. For example, in Hennepin County, the family court self-help center offers early neutral evaluation and mediation programs, both of which have enjoyed considerable success.<sup>102</sup> ADR processes are typically much simpler than the complex web of adjudicative process, particularly in family law. While more formal than direct negotiation, but usually far cheaper and faster than litigation, SRLs can enjoy a “forum” for working through the dispute.<sup>103</sup>

The process of mediation creates a formal structure for SRLs to work together and focus on solutions, rather than continued conflict.<sup>104</sup> With the

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99. Salem, *supra* note 72, at 373 (2009) (“[M]ediation remains at the heart of the family dispute resolution continuum. . . and is more available than other family dispute resolution processes”). Part of its popularity is the positive outcomes reported. *Id.* at 373–74.

100. See Beck & Sales, *supra* note 80, at 1012 (“For most people, mediation is a new setting with behavioral norms that are not generally understood in advance.”).

101. See Center for Dispute Settlement & The Institute of Judicial Administration, National Standards for Court-Connected Mediation Programs (“A major barrier to the use of mediation is the lack of knowledge of availability and understanding of the process by individual litigants and their attorneys. Although lawyers’ knowledge of mediation has increased dramatically in the past ten years, lack of familiarity remains. The public at large knows much less.”); see also Braswell D. Deen, Jr., *Arbitration Improves the Justice System*, 50 DISP. RESOL. J. 57 (1995) (“the public today is mostly unaware of the benefits to be derived from alternatives to traditional litigation”); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 778–79 (1999) (“Parties, particularly those without lawyers, often enter mediation without a real understanding of the process and leave mediation without a real understanding of the result.”).

102. See *supra* note 73 and accompanying text.

103. See Dori Cohen, *Making Alternative Dispute Resolution (ADR) Less Alternative: The Need for ADR as Both a Mandatory Continuing Legal Education Requirement and a Bar Exam Topic*, 44 FAM. CT. REV. 640, 642 (2006) (“[M]ediation provides an outlet for the expression of emotion, validating the needs and concerns for each of the individual parties”); Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 53 (2007) (“ADR can make justice accessible to parties who do not have knowledge of legal jargon, retain long-term relationships that are often hurt by litigation, and provide accessible forums in which to resolve many kinds of disputes”).

104. See Robert Kershaw, *Access to Justice in Maryland: A Visionary’s Model*, 37 JUN MD. B.J. 50 (2004) (“[Mediation] is a process that can help people in conflict develop the skills to sit down together, to deepen their understanding of the underlying issues, and to work on

guidance of an expert mediator, SRLs can often build comprehensive agreements that create “mutually agreeable resolutions that may advance both parties’ needs to some degree.”<sup>105</sup> Also, as in negotiation, the parties’ control over the agreement and role in crafting its terms “makes them more likely to comply with its provisions.”<sup>106</sup> Mediation can also help SRLs create more specific agreements than what might be generated without some outside guidance.<sup>107</sup> All members of the family can benefit. Studies have shown that children whose parents have mediated their agreement are more likely to have both parents involved in their lives after divorce than those whose parents resorted to litigation.<sup>108</sup>

### *C. Additional Considerations for Structuring the Workshops*

#### 1. WORKSHOPS ARE MERELY AN ADDITIONAL TOOL, RATHER THAN A STANDALONE PROGRAM

The provision of educational workshops to SRLs on settlement and negotiation is only one piece of the larger puzzle in providing comprehensive support to SRLs. The proposed workshops do not on their own provide enough for SRLs to make their way through the legal system—in fact, many SRLs may still require significant legal resources from court personnel and attorneys to effectively handle their cases. The workshops are not a standalone fix to all issues for SRLs, but merely an additional tool in the comprehensive effort targeted at assisting with ADR and settlement preparation.

Indeed, the workshop must be integrated into existing programs for SRLs and leverage those programs. It is important that SRLs understand how this program connects to the array of other support mechanisms. The workshops would be connected to the existing programs for SRLs already in place, such as self-help centers, other educational programs or clinics,

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creative win/win solutions.”) (quoting Robert M. Bell, Chief Judge, Maryland Court of Appeals); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) (“In most mediations, the emphasis is not on determining rights or interests, or who is right and who is wrong, or who wins and who loses because of which rule; these would control the typical adjudicatory proceeding. The focus, instead, is upon establishing a degree of harmony through a resolution that will work for these disputants.”).

105. Shweder, *supra* note 103, at 53.

106. See Beck & Sales, *supra* note 80, at 991 (“the goals and advantages of mediation are argued to be empowerment and self-determination . . . develop agreements that are more satisfying to both parties, thereby increasing the likelihood that the parents will comply with them over time”).

107. ANDREW I. SCHEPARD, *CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES* 63 (2004).

108. *Id.* Indeed, children profit from parenting plans that are crafted privately by their parents through mediation. *Id.* at 66–67.

and online and other informational resources. The workshops would be positioned as a supplemental resource to support these other resources as part of a comprehensive package for SRLs.

## 2. LEVERAGE TECHNOLOGY AND OTHER LEARNING TOOLS

In addition, the workshops should provide opportunities for participation by SRLs in both in-person classroom settings and online offerings. In-person workshops are invaluable for providing hands-on, face-to-face learning opportunities with practice and feedback.<sup>109</sup> Also, for many SRLs, online offerings are still beyond their reach, either because of literacy issues or lack of access.<sup>110</sup>

Yet online offerings can provide critical support for at least two reasons. First, the Internet offers SRLs with the opportunity of accessing the workshop at any time they need, and as many times as might be appropriate. This “on-demand” feature will ensure that SRLs could practice right before a mediation, review particular situations, or reinforce key learning lessons ongoing. In addition, the Internet offers the only real option that could reach the massive numbers of SRLs—it is scalable to reach as high a number as needed, where the sheer numbers of SRLs in urban counties alone reaches tens of thousands each year.

## 3. LIMITED REPRESENTATION

In addition to providing purely educational support, the workshops could also incorporate limited representation and other services by lawyers. There is already a program that could provide a model. In the Chicago program described above, volunteer attorneys offer limited representation to SRLs on federal settlement conferences.<sup>111</sup> A similar structure could be added to the educational workshops whereby a list of volunteer attorneys could be consulted by interested SRLs for mediations, to review draft settlement agreements before signing, or to represent the SRLs only

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109. This does not mean just lecturing. The workshops, whether in-person or online, must include interactive learning opportunities. See Patton, *supra* note 94, at 18 (“Lecturing someone on the theory and techniques of riding a bicycle will not prepare them to go peddling down the street on their own.”).

110. See VanWormer, *supra* note 31, at 1015 (“[An online] system, however, may not be effective without some physical, clinical manifestation. Although the internet is rapidly becoming ubiquitous, not all households are able to afford or have access to the internet; this may be particularly true of the low-income segment of the pro se population.”); Judith L. Maute & Cheryl Lynn Wofford Hill, *Delivery Systems Under Construction: Ongoing Works in Progress*, 72 UMKC L. REV. 377, 411–12 (2003) (“Effective use of technology-based self help tools will be difficult for clients with low literacy skills, limited access to or unfamiliarity with computers, or some mental disabilities.”).

111. See *supra* notes 69–70 and accompanying text.

for the purpose of negotiation (settlement counsel). The program could even utilize law school students and clinical programs supervised by attorneys.

## **V. Conclusion**

The challenges for SRLs in the family court system are significant and require immediate attention on all fronts. Right now, the vast majority of educational programs focus entirely on litigation, and the ADR and other settlement programs often exist without any educational component. Utilizing existing programs, such as self-help centers, and bridging eventually to limited representation programs, utilizing lawyers where necessary, educational workshops on settlement for SRLs could be a key piece in helping SRLs navigate their way through family court and find appropriate resolution to their disputes.

