



## Administrative Conference of the United States

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# **SELF-REPRESENTED PARTIES IN ADMINISTRATIVE HEARINGS**

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States**

*This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendations expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.*

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## **Introduction**

Federal agencies conduct millions of hearings each year, making decisions that can establish, maintain, or eliminate eligibility for important benefits and services ranging from disability or Veterans' benefits, to immigration status, to home or property loans. In many of these adjudications, claimants appear unrepresented for part or all of the proceeding and must learn to navigate hearing procedures, which can be quite complex, without expert assistance. The presence of self-represented parties<sup>1</sup> in administrative hearings can create challenges for both administrative agencies and for the parties seeking benefits. Further, the presence of self-represented parties raises a number of concerns relating to the consistency of hearing outcomes and the efficiency of processing cases.

Because of these concerns, in the spring of 2015 the Department of Justice's Access to Justice Initiative asked the Administrative Conference to co-lead a working group on self-represented parties in administrative hearings, and the Conference agreed.<sup>2</sup> The working group, which operates under the umbrella of the Legal Aid Interagency Roundtable (LAIR), has been meeting since that time.<sup>3</sup> During working group meetings, representatives from a number of agencies, including the Social Security Administration (SSA), Executive Office for Immigration Review (EOIR), Board of Veterans' Appeals (BVA), Internal Revenue Service (IRS), Department of Health and Human Services (HHS), Department of Agriculture (USDA), and Department of Housing and Urban Development (HUD) participated, and shared information about their practices and procedures relating to self-represented parties.

In working group meetings, agency representatives agreed that hearings involving self-represented parties are challenging, and expressed interest both in learning more about how other agencies and courts handle self-represented parties and in improving their own practices. In general, procedures toward self-represented parties in administrative hearings are not well-studied, and there has been little cross-agency communication on the topic. In most cases, data are scarce and rigorous evaluation of self-representation and its effects is lacking.

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<sup>1</sup> Throughout this report, the term "self-represented" is used to denote parties who do not have professional representation, provided by either a lawyer or an experienced nonlawyer. Representation by a non-expert family member or friend is included in this report's use of the term "self-represented." Although agencies generally use the term "self-represented," most courts use the term *pro se* to denote parties who represent themselves. This report treats the two terms as synonymous, and uses "self-represented" throughout, both to reflect the report's focus on administrative hearings and for the sake of consistency.

<sup>2</sup> The author co-leads the working group with Amber Williams, Attorney Advisor at the Administrative Conference of the United States, and Bob Bullock, Senior Counsel for the Office for Access to Justice at the Department of Justice. The author wishes to thank Mr. Bullock for his partnership and support throughout the working group and project.

<sup>3</sup> LAIR was established in 2012 by the White House Domestic Policy Council and the Department of Justice. See *White House Legal Aid Interagency Roundtable*, U.S. DEP'T OF JUST., <https://www.justice.gov/lair> (last visited Aug. 16, 2016). It was formalized by Presidential Memorandum in the fall of 2015. See Memorandum from the President to the Heads of Exec. Dep'ts and Agencies (Sept. 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/24/presidential-memorandum-establishment-white-house-legal-aid-interagency>. The author has represented the Administrative Conference at several LAIR meetings since 2015.

This report provides an overview of self-representation in the administrative context, and begins to build a better understanding of agency practices and procedures regarding self-represented parties. It identifies innovations that can aid both agencies and self-represented parties in administrative hearings, and makes recommendations to agencies for improvement.

Because information on self-representation in the administrative context is scarce, the report draws heavily from the state civil court context. Many courts have been grappling with issues related to self-representation for over two decades, and have significant experience in identifying common problems and solutions. Although there are important differences between procedures in administrative hearings and in the civil court context, available information indicates that the two contexts share many of the same problems – and solutions – for dealing with self-represented parties.

The report draws from state courts, as opposed to federal courts, for several reasons. Most importantly, certain types of state court cases, particularly in the family law arena, share substantial similarities with administrative hearings, both in terms of the nature of the case and the type of claimant involved. In addition, self-represented parties have been heavily studied in the state court context,<sup>4</sup> and state courts have very diverse practices when dealing with self-represented parties.

It is important to note at the outset several limitations to the scope of this report. First, this report only addresses the subset of administrative agencies that conduct their own administrative hearings. A number of federal agencies – including HUD, HHS, and components of USDA – do not conduct hearings directly, and instead delegate adjudication responsibilities to state or local entities. Because the challenges faced by this second set of agencies are distinct from those faced by administrative agencies that conduct their own hearings, they would be best studied in a separate project and are not covered here. Second, it is important to emphasize that, in examining this subject, the author makes no normative judgment on the presence of self-represented parties in administrative hearings. This report assumes that there will be circumstances in which parties will need, or choose, to represent themselves, and seeks to improve the resources available to those parties. The report does not reach the normative issue of whether or not a “civil *Gideon*” is desirable.<sup>5</sup> However, it should be noted that the circumstances under which the due process clause would require the provision of counsel would be very rare, given the Supreme Court’s recent holding in *Turner v. Rogers* that an indigent individual in a civil contempt proceeding is not automatically entitled to counsel, even when facing incarceration.<sup>6</sup> In *Turner*, the Supreme Court sketched out several “substitute procedural safeguards” that would mitigate the risk of an “erroneous deprivation of liberty” in cases of self-

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<sup>4</sup> For instance, both the Self-Represented Litigation Network and the National Center for State Courts focus primarily on state courts.

<sup>5</sup> See, e.g., Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y REV. 503, 503 (1998); Stephen Loffredo, *Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 329 (2009) for discussion of a “civil *Gideon*.”

<sup>6</sup> *Turner v. Rogers et al.*, 131 S. Ct. 2507 (2011).

representation;<sup>7</sup> however, not only are the factors provided by the Supreme Court narrowly constrained to the civil contempt context, but they are also so minimal that existing agency practice significantly exceeds these standards.<sup>8</sup>

This report is divided into four sections. The “Background” section provides a brief overview of self-representation, and identifies problems presented by self-representation for the parties themselves and for the adjudicators and entities responsible for hearing their cases. The section addresses self-representation in administrative agencies where such information is available. However, it supplements agency-specific information with relevant discussion of self-represented parties in the civil court context. The second section of the report summarizes lessons learned from civil courts in dealing with self-representation, and draws on information gained from informal interviews with twelve experts on self-representation. This section provides an overview of innovations designed to assist self-represented parties, in addition to flagging some potential areas for caution. The third section begins to explore the issue of self-representation in administrative hearings by providing case studies of four administrative agencies: SSA, EOIR, BVA, and USDA’s National Appeals Division. Each case opens with a brief overview of the agency’s hearing procedures and discusses the resources each agency offers to assist self-represented parties. Several targeted recommendations are provided to each agency in Appendix A. It should be noted that these recommendations are not part of the overarching recommendations that the Conference Assembly is asked to consider, and are instead provided largely for consideration by each specific agency. The final section of the report provides a series of broader recommendations for federal agencies to consider, and is aimed at improving both procedural efficiency and consistency of outcomes when dealing with self-represented parties in administrative hearings. These recommendations are intended to benefit not only self-represented parties, but the system more generally. While improvements may carry upfront costs, they will also likely provide offsetting benefits in efficiency over time.

## **I. Background**

Improving access to justice is an ongoing concern, and the challenges related to self-represented parties have been the focus of significant attention in the court context. Commentators have repeatedly, and vehemently, stressed the need for greater access to justice for parties seeking redress from the judicial system. Concerns focus in particular on low income

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<sup>7</sup> *Id.* at 2519.

<sup>8</sup> *Id.* The risk of an “erroneous deprivation of liberty” is significantly reduced if “substitute procedural safeguards” are provided, including:

- (1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding;
- (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

and low education populations,<sup>9</sup> with proposed solutions ranging from increasing resources available to self-represented parties;<sup>10</sup> to creating a more active role for adjudicators;<sup>11</sup> to promotion of a “civil Gideon,” in which all parties in civil cases would have a right to representation.<sup>12</sup>

Only relatively recently have parallel concerns received similar attention in the administrative context – for instance, the Department of Justice’s Office for Access to Justice was created in 2010 to help the justice system “efficiently deliver outcomes that are fair and accessible to all.”<sup>13</sup> A small number of authors have addressed access to justice issues in the federal administrative context,<sup>14</sup> but the topic has been studied much less intensively in federal agencies when compared to the courts. Based on the literature that addresses the administrative context,<sup>15</sup> and through conversations with agency officials as part of the working group and throughout research for this report, it is clear that the two contexts share many common problems – and solutions. Unfortunately, as Richard Zorza observes, there has been little “cross-pollination of ideas” between the courts and administrative agencies, in spite of the fact that such information sharing would benefit both groups of adjudicators.<sup>16</sup> This project aims to begin that dialogue. Many of the challenges presented by self-represented parties are caused, or exacerbated, by their increased presence in court and administrative proceedings over the last two decades. Since the mid-1990s, courts around the country have seen a significant increase in self-represented litigants in civil cases.<sup>17</sup> In part, this growth is due to the high cost of legal services, which place these services out of reach for many parties.<sup>18</sup> Declining financial support

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<sup>9</sup> For general information on solving the “access to justice” problem, see generally Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156 (2011) [hereinafter *Access to Justice*].

<sup>10</sup> See, e.g., Richard Zorza, *Self-Represented Litigants and the Access to Justice Revolution in the State Courts: Cross-Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative Law System*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 63, 82-86 (2009) [hereinafter *Self-Represented Litigants*]. For a good list of examples of court innovations to provide assistance to self-represented parties, see generally JONA GOLDSCHMIDT ET AL., *MEETING THE CHALLENGES OF PRO SE LITIGATION* (1998) [hereinafter *MEETING THE CHALLENGES*].

<sup>11</sup> See generally, Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 447 (2007) [hereinafter *Fair Hearing*].

<sup>12</sup> See, e.g., Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y REV. 503, 503 (1998); Stephen Loffredo, *Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 329 (2009).

<sup>13</sup> *Office for the Access to Justice*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atj> (last visited Aug. 16, 2016).

<sup>14</sup> See, e.g., *Self-Represented Litigants*, *supra* note 10; *Fair Hearing*, *supra* note 11.

<sup>15</sup> For instance, Richard Zorza writes that “The administrative law and state court systems function in ways that are becoming more and more similar. Therefore, the two systems have much to learn from each other.” *Self-Represented Litigants*, *supra* note 10, at 90.

<sup>16</sup> *Id.* at 65.

<sup>17</sup> See, e.g., *MEETING THE CHALLENGES*, *supra* note 10, at 3; Russell Engler, *And Justice for All-Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2047-69 (1999) [hereinafter *Justice for All*]; Bonnie Ross Hough & Justice Laurie D. Zelon, *Self-Represented Litigants: Challenges and Opportunities for Access to Justice*, 47 JUDGES’ J. 30, 30 (2008) [hereinafter *Challenges and Opportunities*]; Stephen Landsman, *The Growing Challenge of Pro Se Litigation*, 13 Lewis & Clark L. Rev. 439, 440 (2009); Zorza, *Self-Represented Litigants*, *supra* note 10, at 64.

<sup>18</sup> See *MEETING THE CHALLENGES*, *supra* note 10, at 8-10.

for legal services has contributed to this problem.<sup>19</sup> At the same time, more people who can afford an attorney are choosing not to use one, in part because of increasing education levels, a growth in “do it yourself” attitudes among parties, and a fear that legal assistance will not help.<sup>20</sup>

Because the courts are designed for use by trained advocates, the presence of self-represented parties can cause delay at a systemic level,<sup>21</sup> and self-represented parties may place significantly more demands on court and staff resources when compared to attorneys.<sup>22</sup> Self-represented parties may appear at the court-house and expect clerks to provide resources that may or may not exist, and generally expect more information and assistance than clerks can provide.<sup>23</sup> Clerks are often instructed that they may provide “legal information” but not “legal advice,” which is a distinction that both clerks and self-represented parties struggle to keep clear.<sup>24</sup> Clerks often spend “extensive time and effort” providing information to self-represented parties, and often end up inadvertently providing poor and limited legal advice in the process.<sup>25</sup> It is not uncommon for court staff to reject filings by self-represented parties due to procedural insufficiencies, and they may need to do so several times before the paperwork is completed appropriately.<sup>26</sup>

After the paperwork is filed, self-represented parties can cause a number of additional challenges for court staff and judges. They may fail to file supplemental pleadings on time, or struggle with common court procedures, such as service of process, which can create additional time and resource burdens for court staff.<sup>27</sup> Self-represented parties often do not appear for scheduled hearings, adding uncertainty and inefficiency throughout the system. Court staff often expend resources reminding or notifying self-represented parties of hearings, and inefficiencies are generated by the lack of certainty concerning how many cases to schedule and the necessity of rescheduling missed hearings.<sup>28</sup> Paperwork may be incomplete or difficult to interpret, placing additional burdens on judges to determine what relief has been requested or whether the litigant has a basis for his or her claim.<sup>29</sup>

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<sup>19</sup> *Id.* at 444

<sup>20</sup> *Id.* at 445; MEETING THE CHALLENGES, *supra* note 10, at 11-14.

<sup>21</sup> *Challenges and Opportunities*, *supra* note 17, at 30.

<sup>22</sup> See Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Consideration*, 24 JUST. SYS. J. 163, 164 (2003). *But see* JOHN M. GREACEN, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS 2 (n.d.) [hereinafter RESPONSES]. John Greacen notes in this report that in certain case types, cases involving self-represented parties take less time than cases with lawyers. *Id.*

<sup>23</sup> *Hannaford-Agor & Mott*, *supra* note 22, at 164-65.

<sup>24</sup> *Id.* at 165; *Justice for All*, *supra* note 17, at 1992-93.

<sup>25</sup> *Justice for All*, *supra* note 17, at 1998.

<sup>26</sup> *Hannaford-Agor & Mott*, *supra* note 22, at 265.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*



Another common problem caused by self-represented parties has to do with judicial ethics and neutrality.<sup>30</sup> Traditional judicial training directs judges to maintain impartiality, which can create difficulties when self-represented parties are involved.<sup>31</sup> As Jona Goldschmidt writes:

Judicial ethics principles have obvious relevancy to the thorny dilemma confronting the trial judge: balancing the duty of impartiality in appearance and in fact with the duty to provide a fair and meaningful hearing. The judge who provides any form of assistance to a self-represented litigant whose adversary is represented risks being accused of unfairness by the opposing attorney. Yet, by maintaining complete passivity when a self-represented litigant makes errors jeopardizing the claim or defense sought to be made, some would argue that the judge runs afoul of the meaningful hearing requirement of the due process clause and the rights of access to the court, self-representation, and an open court.<sup>32</sup>

These issues are not unique to trial court judges, and administrative hearing officers face many of the same challenges when working with self-represented parties. Although hearing officers sometimes have special duties to assist self-represented parties,<sup>33</sup> they face many of the same challenges as trial court judges.<sup>34</sup> Like trial court judges, hearing officers must thread the needle between providing enough guidance to self-represented parties so they can adequately present their cases, while avoiding either bias or the appearance of bias. Richard Zorza comments that although hearing officers have more flexibility than court judges, they still feel “acutely constrained” in their decision-making when it comes to self-represented parties, and are limited by the fear of creating bias.<sup>35</sup>

That said, in recent years, “a very significant change in judicial attitudes is taking place” with respect to self-represented parties.<sup>36</sup> Judges are being encouraged to be less passive in dealing with self-represented parties, and to find ways to elicit evidence from self-represented parties that are non-prejudicial and maintain both neutrality and the appearance of neutrality.<sup>37</sup> The ABA recently updated its Model Judicial Code to explicitly allow judges to provide assistance to self-represented parties. ABA Model Rule 2.2 states that judges should decide cases with “impartiality and fairness,”<sup>38</sup> and the associated comment notes that judges may make “reasonable accommodations” to ensure self-represented parties are fairly heard.<sup>39</sup>

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<sup>30</sup> See, e.g., *Justice for All*, *supra* note 17, at 2012-2021.

<sup>31</sup> *Hannaford-Agor & Mott*, *supra* note 22, at 265.

<sup>32</sup> MEETING THE CHALLENGES, *supra* note 10, at 25.

<sup>33</sup> See *Justice for All*, *supra* note 17, at 2017-18.

<sup>34</sup> *Fair Hearing*, *supra* note 11, at 448.

<sup>35</sup> *Self-Represented Litigants*, *supra* note 10, at 80.

<sup>36</sup> Richard Zorza, *Trends in Self-Represented Litigation Innovation*, in *FUTURE TRENDS IN STATE COURTS* 85, 85 (Carol R. Flango et. al. eds., 2006) [hereinafter *Trends*].

<sup>37</sup> *Id.* at 85.

<sup>38</sup> MODEL CODE OF JUD. CONDUCT r. 2.2 (AM. BAR. ASS’N 2010).

<sup>39</sup> *Id.* r. 2.2 cmt.

In addition to the burdens placed by self-represented parties on adjudicators, self-represented parties may also face a disadvantage when entering a legal proceeding without representation. Self-represented parties are typically unfamiliar with relevant rules and procedures in court, and are often intimidated by court processes, leading to suboptimal results for the self-represented party.<sup>40</sup> Jona Goldschmidt and his co-authors comment in their “Report and Guidebook for Judges and Court Managers” that “[i]t cannot be denied that the barriers encountered by self-represented litigants both outside and inside the courtroom deprive them of access to justice.”<sup>41</sup> Russell Engler notes that structural features of court procedures that are designed for attorneys have “devastating” consequences for self-represented parties, and adds that “[t]he forfeiture of rights flows from the barriers facing unrepresented litigants at each stage of the proceeding and each encounter with the various players in the system.”<sup>42</sup>

In the administrative context, Paris Baldacci comments that a self-represented party is forced to become a “litigator within an adjudicatory system that she does not understand, either procedurally or substantively, and that effectively silences her.”<sup>43</sup> Baldacci emphasizes that this happens even in nonadversarial administrative hearings.<sup>44</sup> Baldacci comments that the fundamental problem for self-represented parties in administrative proceedings is not their inability to understand, but the challenges of navigating structural features designed for attorneys.<sup>45</sup> Complexity has been cited as a fundamental problem in administrative hearings – even in those hearings designed specifically to be manageable for a layperson.<sup>46</sup>

In response, courts have implemented a number of innovations designed to provide assistance to self-represented parties, and agencies are beginning to implement similar changes.<sup>47</sup> Court innovations will be discussed in more depth in the next section of this report, but it is worth noting at the outset that, although rigorous evaluation is lacking,<sup>48</sup> existing reports on self-help programs are very positive. Richard Zorza notes that customer surveys of users of self-help services show “overwhelming” levels of satisfaction.<sup>49</sup> In addition, surveys of court personnel support the idea that self-help services improve court efficiency.<sup>50</sup> John Greacen conducted a preliminary study evaluating costs of self-help services provided to self-represented parties, and found that many self-help services, including workshops, one-on-one interactions with self-

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<sup>40</sup> *Challenges and Opportunities*, *supra* note 17, at 30.

<sup>41</sup> MEETING THE CHALLENGES, *supra* note 10, at 4.

<sup>42</sup> *Justice for All*, *supra* note 17, at 1989.

<sup>43</sup> *Fair Hearing*, *supra* note 11, at 449.

<sup>44</sup> *Id.* at 449.

<sup>45</sup> *Id.* at 450.

<sup>46</sup> Michael P. Allen, *Veterans' Benefits Law 2010-2013: Summary, Synthesis, and Suggestions*, 6 VETERANS L. REV. 1, 73-76 (2014).

<sup>47</sup> See sources cited *supra* note 10.

<sup>48</sup> See generally Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295 (2010).

<sup>49</sup> See *Trends*, *supra* note 36, at 85.

<sup>50</sup> *Id.*

represented parties, and provision of settlement and paperwork assistance, can provide significant cost savings to courts.<sup>51</sup>

## **II. Interviews with Court Representatives and Pro-Se Experts**

The author conducted unstructured interviews with twelve individuals who have expertise in dealing with self-represented parties, primarily in the court context.<sup>52</sup> Most of these individuals are affiliated with particular courts, but the author also spoke with several experts who have experience dealing with self-represented parties nationwide, including Katherine Altender of the Self-Represented Litigation Network, Deborah Smith of the National Center for State Courts, and John Greacen of Greacen Associates, LLC. A full list of interviewees, their titles and organizational affiliations, and the interview date, can be found on page 10.

The author began this portion of the project by identifying and reaching out to courts with particularly robust self-represented litigant services. During the initial interviews, the author asked interviewees for recommendations of other people to contact, then conducted additional interviews based on these recommendations. Interviews lasted between 30 minutes and an hour each and were unstructured; the interviewer guided initial discussion toward relevant topics in working with self-represented litigants, but each conversation took a different shape over the course of the interview.

It should be noted that two interviews are “outliers,” in that the interviewees are neither involved with a particular state court nor do they study self-represented parties in the court context. First, the author conducted an interview with New York City’s Office of Administrative Trials and Hearings (OATH), which is involved with significant work in administrative hearings at the local level. More detail can be found about OATH’s hearing procedures in Part D of this section. Second, the author conducted an interview with Michael Hayes, Senior Programs Manager, Division of Program Innovation at the Office of Child Support Enforcement in the U.S. Department of Health and Human Services. The author included discussion of both of these interviews in this section because of the significant insight these interviewees provided into dealing with self-represented litigants; the author did not want to exclude them from the study based on a technical distinction.

Though the author was not expecting disagreement, the author was somewhat surprised by how much consistency of opinion there was among interviewees. Although there were minor differences of opinion in terms of the best services to use to assist self-represented parties, interviewees largely agreed about the primary challenges associated with self-represented parties as well as the conceptual framework for accommodating them. As such, although the author interviewed a relatively small number of individuals, the author feels confident that the research

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<sup>51</sup> JOHN GREACAN, THE BENEFITS AND COSTS OF PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS 12-13 (2009) [hereinafter BENEFITS].

<sup>52</sup> As is noted in the introduction, this report uses “self-represented” throughout for the sake of consistency. Most courts use the term “pro se” instead, and the report treats the terms as interchangeable.

captures the most important issues pertaining to self-represented parties as well as the most current school of thought on how to accommodate them.

The table on the next page identifies interviewees as well as their institutional affiliations and interview dates. Throughout the following section, where a particular interviewee is referenced, or where a particular state's practices are cited, assume that the information was obtained from the relevant interview in the table below, unless a different citation is provided. For the sake of clarity, although several of the interviewees represented county-level self-help centers, this report references the state in which the centers were located when discussing the interviews.

<b>Interview Date</b>	<b>Name</b>	<b>Title Organization</b>
July 7, 2016	Shawn Friend	Director, Law Library Resource Center, Maricopa County Superior Court, Arizona
July 7, 2016	Sara Gonsalves	Manager, Self-Represented Litigant Program, Minnesota Judicial Branch
July 8, 2016	Bonnie Hough	Principal Managing Attorney, Center for Families, Children and the Courts, Judicial Council of California
July 11, 2016	John Burns	First Deputy Commissioner, Supervising Administrative Law Judge, Office of Administrative Trials and Hearings, City of New York
	Marisa Senigo	Assistant Commissioner for Public Affairs and Communications, Office of Administrative Trials and Hearings, City of New York
July 12, 2016 July 28, 2016 <sup>53</sup>	Katherine Alteneder	Coordinator, Self-Represented Litigation Network
July 19, 2016	Deborah Smith	Knowledge and Information Services Senior Analyst, National Center for State Courts
July 20, 2016	Mary Jane Ciccarello	Director, Utah State Courts' Self Help Center
July 22, 2016	Pamela Ortiz	Director, Access to Justice Department, Administrative Office of the Courts, Maryland
July 26, 2016	Stacey Marz	Director, Self-Help Services, Alaska Court System
July 26, 2016	Michael Hayes	Senior Programs Manager, Division of Program Innovation, Office of Child Support Enforcement, U.S. Department of Health and Human Services
July 27, 2016	John Greacen	Principal, Greacen Associates, LLC

#### ***A. Self-represented Parties in the Courts***

The court representatives the author spoke with deal with significant numbers of self-represented claimants, particularly in family law, probate cases, landlord-tenant disputes, contract cases, guardianship and conservatorship, and protective orders. These case types are

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<sup>53</sup> Due to scheduling conflicts, the interview with Katherine Alteneder was conducted in two parts on different dates.

both high volume and have high percentages of self-represented parties. For instance, court representatives estimated that between 60% and 90% of family law cases had at least one self-represented party.<sup>54</sup> By all accounts, this range seems fairly consistent nationwide.<sup>55</sup> Very high percentages of self-represented parties were cited in other areas as well – for instance, Bonnie Hough (Principal Managing Attorney, California Center for Families, Children and the Courts) estimated that 90% of tenants in landlord-tenant disputes were self-represented, and Mary Jane Ciccarello, (Director, Utah State Courts’ Self-Help Center), estimated that close to 100% of defendants in debt collection cases, and nearly as many defendants in eviction cases, are self-represented.

Interviewees largely agreed that the number of self-represented parties had either held constant over the last few years<sup>56</sup> or had increased,<sup>57</sup> and no interviewees thought there was a decrease in the number of self-represented parties seen in their courts. As Michael Hayes (Senior Programs Manager, Department of Health and Human Services) pointed out, in some contexts rates of self-representation have been so high that there has been little room for increase over the past several years. However, Deborah Smith (Senior Analyst, National Center for State Courts), cautioned that, although most sources cite the number of self-represented parties as growing, there are not good data nationwide to back up that supposition. This is in part because of definitional issues – states have traditionally had different definitions of self-represented parties and struggled to consistently count cases in which a party loses or gains representation part-way through.<sup>58</sup> It should also be noted that in some states, many parties can obtain assistance with their pleadings without having an attorney of record – this type of assistance may be very common, even in areas with very high numbers of self-represented parties.<sup>59</sup>

Self-represented litigant services often center on family law. This is in part because of the high raw number of family law cases – for instance, about 15% of non-criminal cases in

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<sup>54</sup> Telephone Interview by Connie Vogelmann with Mary Jane Ciccarello, Dir., Utah State Courts’ Self Help Ctr. (July 20, 2016); Telephone Interview by Connie Vogelmann with Shawn Friend, Dir., Law Library Resource Ctr., Maricopa Cnty. Super. Ct. (July 7, 2016); Telephone Interview by Connie Vogelmann with Sara Gonsalves, Manager, Self Represented Litigant Program, Minn. Judicial Branch (July 7, 2016); Telephone Interview by Connie Vogelmann with Bonnie Hough, Principal Managing Attorney, Ctr. for Families, Children & the Courts, Judicial Council of Cal. (July 8, 2016); Telephone Interview by Connie Vogelmann with Stacey Marz, Dir., Self-Help Servs., Alaska State Court Sys. (July 26, 2016).

<sup>55</sup> Interview with Bonnie Hough, *Id*; Telephone Interview by Connie Vogelmann with Deborah Smith, Knowledge & Info. Analyst, Nat’l Ctr. For State Courts (July 19, 2016).

<sup>56</sup> Interview with Mary Jane Ciccarello, *supra* note 54; Telephone Interview by Connie Vogelmann with Michael Hayes, Senior Programs Manager, Div. of Program Innovation, Office of Child Support Enf’t, U.S. Dep’t of Health & Human Servs. (July 26, 2016); Interview with Stacey Marz, *supra* note 54.

<sup>57</sup> Interview with Sara Gonsalves, *supra* note 54; Interview with Bonnie Hough, *supra* note 54.

<sup>58</sup> NCSC and the State Justice Institute recently published a document to address these issues. *See generally* NATIONAL CENTER FOR STATE COURTS, DEVELOPING STANDARDIZED DEFINITIONS AND COUNTING RULES FOR CASES WITH SELF-REPRESENTED LITIGANTS (2013), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/Other%20Pages/SRL%20Project%20%20Final%20Report%20121913.ashx>.

<sup>59</sup> Interview with Bonnie Hough, *supra* note 54.

California’s Superior Courts have to do with family law<sup>60</sup> – combined with the high percentage of self-represented parties seen in these cases. Family law cases, perhaps more than other areas of law, have also seen the percentage of self-represented parties increase,<sup>61</sup> and lawyers have largely priced themselves out of the market in the family law arena.<sup>62</sup> Family law also tends to be an area where parties are particularly likely to be self-represented – parties have a desire to control their case, and feel like they are the best expert on their own issues.<sup>63</sup> Parties in family law cases also might feel a sense of urgency about their case, increasing the likelihood that a party will choose self-representation.<sup>64</sup>

In addition to cost, several interviewees cited a growing “Do-It-Yourself” phenomenon as contributing to high rates of self-representation in the civil courts – caused by both increased availability of resources available on the internet, and a higher percentages of parties who are college educated and feel they should be able to handle their cases by themselves.<sup>65</sup>

### ***B. Challenges in Dealing with Self-Represented Parties***

Self-represented parties bring a number of challenges to legal proceedings. As Katherine Altener (Coordinator, Self-Represented Litigation Network) stressed, self-represented parties often do not understand that their problem is even a legal problem, much less know what type of legal problem it is or how to handle the case in court. Self-represented parties are often confused about what charges are being brought against them or what rules they may have broken. Self-represented parties often conflate emotional complexity with legal complexity, and struggle to separate their emotions from discrete legal issues.<sup>66</sup>

The importance of creating a simplified system that could be easily understood by a lay audience was a theme that was repeated in almost every interview. John Greacen (Principal, Greacen Associates, LLC) commented that many self-represented parties experience the legal system as a “labyrinth, full of traps.” He added that parties do not understand the elements they need to show for relief or how to establish them. Self-represented parties are often not familiar with basic terms that lawyers take for granted – including the very meaning of the term “pro se,” which is used in most courts to identify a party without representation.<sup>67</sup> Pamela Ortiz (Director, Maryland Access to Justice Department), emphasized that it is unrealistic for self-represented

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<sup>60</sup> JUDICIAL COUNCIL OF CALIFORNIA, 2015 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2004-2005 THROUGH 2013-2014 Preface (2015), <http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf>.

<sup>61</sup> Interview with Bonnie Hough, *supra* note 54.

<sup>62</sup> Interview with Stacey Marz, *supra* note 54.

<sup>63</sup> *Id.*

<sup>64</sup> Interview with Sara Gonsalves, *supra* note 54.

<sup>65</sup> *Id.*; Interview with Mary Jane Ciccarello, *supra* note 54; Interview with Stacey Marz, *supra* note 54.

<sup>66</sup> Telephone Interview by Connie Vogelmann with Katherine Altener, Coordinator, Self-Represented Litig. Network (July 12, 2016); Telephone Interview by Connie Vogelmann with John Burns, First Deputy Comm’r, Supervising A.L.J., Office of Admin. Trials & Hearings, N.Y.C., & Marisa Senigo, Assistant Comm’r, Pub. Affairs & Commc’ns, Office of Admin. Trials & Hearings, N.Y.C. (July, 11, 2016).

<sup>67</sup> Interview with Shawn Friend, *supra* note 54. California courts use the term “pro per” instead of “pro se,” but are trying to switch to “self-represented” to provide clarity, see Interview with Bonnie Hough, *supra* note 54.

parties to understand the world of lawyers and judges: they are in the legal world for one day or for one problem, and it is important to create a world they can understand intuitively.

Interviewees stressed the importance of providing clarity, breaking down processes into simple steps, and “putting yourself in the shoes” of self-represented claimants when creating services for self-represented parties. Katherine Altener emphasized that a crucial challenge comes in creating a process that allows people to break down their problem into its constituent parts, then identifying the best services and required level of assistance to help with each part of the problem. A related difficulty comes in figuring out how to balance providing self-represented parties with enough information to complete their claim, while simultaneously keeping the number of steps small enough so that self-represented parties do not become overwhelmed.<sup>68</sup>

Michael Hayes commented that in the family law context a common problem occurs when parents discount the importance of the information they provide. Parents in child support cases tend to have low income and education, and often assume that what they say in their case does not matter. They often believe that the adjudicatory process is more interested in efficiency than in helping them, and feel powerless about the outcome of their own case. As a result, they often fail to provide relevant information in support of their cases. In dealing with these parties, providing information in plain language, breaking the hearing process down into simple steps, and explaining the importance of their participation is necessary for a well-functioning system.

Another common challenge is getting parties to realize that they need to take active steps to continue their case – self-represented parties will often wait for a court response without realizing that they need to take additional steps.<sup>69</sup> Parties may, for instance, fill out a set of forms online, but fail to realize that they need to print them out and submit them to complete the filing process.<sup>70</sup> Having self-represented parties respond to summons and attend hearings was also identified as a common problem when dealing with self-represented parties,<sup>71</sup> and one court has begun implementing text message reminders to self-represented parties prior to hearings.<sup>72</sup>

Interviewees also stressed the importance of addressing language access issues in dealing with self-represented parties – both in terms of creating forms and other materials that are at a reading level that self-represented parties can understand, and in creating the language resources needed for parties with limited English proficiency.<sup>73</sup> Self-represented parties have wide-ranging experiences, and courts need to learn how to deal with this diversity: although some self-represented parties are fluent in English and are college educated, others may speak very limited English or be functionally illiterate.<sup>74</sup>

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<sup>68</sup> Interview with Shawn Friend, *supra* note 54.

<sup>69</sup> Interview with Bonnie Hough, *supra* note 54.

<sup>70</sup> Interview with Shawn Friend, *supra* note 54.

<sup>71</sup> Interview with Bonnie Hough, *supra* note 54.

<sup>72</sup> Interview with Mary Jane Ciccarello, *supra* note 54.

<sup>73</sup> Interview with Katherine Altener, *supra* note 66; Interview with Bonnie Hough, *supra* note 54.

<sup>74</sup> Interview with Mary Jane Ciccarello, *supra* note 54.



Another challenge cited by several respondents has to do with knowing what information can, and cannot, be provided to self-represented parties. Deborah Smith noted that this is a problem that extends to all “levels” of staff, from front-line clerks to judges. Many interviewees commented that self-help staff can provide legal information but not give legal advice,<sup>75</sup> though legal advice can be provided in one jurisdiction.<sup>76</sup> A closely related issue comes in managing the expectations of self-represented parties. The distinction between legal information and legal advice can be difficult for even trained practitioners in the legal field, and many self-represented parties contact a self-help center expecting legal advice. Clarifying what information can and cannot be provided can be challenging.<sup>77</sup>

### C. *Providing Assistance to Self-Represented Litigants*

Courts have developed a number of innovations to provide assistance to self-represented litigants, and services vary widely based on budgets, case-load, geography, and a host of other factors. Due in part to these differences, interviewees expressed some divergence in their preferred methods of providing assistance to self-represented parties. In spite of this, interviewees also expressed many common themes and ideas for providing effective assistance to self-represented parties.

It should be noted that, in general terms, interviewees felt that innovations to assist self-represented parties were well-received by claimants. Katherine Alteneder commented that, on a national level, innovations to assist self-represented parties have proven to be “incredibly effective” at improving both the efficiency of processing cases brought by self-represented parties and those parties’ experience with the legal process. Interviewees also noted that their services generally receive very positive feedback from claimants, and receive relatively few complaints.<sup>78</sup> However, interviewees cited several key concepts as being crucial for creating effective services for self-represented litigants.

#### 1. Overarching Principles and Concepts

Interviewees stressed the importance of triage and diagnostic tools as prerequisites to a well-functioning self-help system.<sup>79</sup> Since self-represented parties often do not have a good understanding of their legal problems, self-help services need to be able to gather information from the self-represented parties, break the problem down into its constituent parts, and assign the right level of help to the right parts of the problem. In some cases, the best solution for a self-represented party might be non-legal. The use of “front end” diagnostic tools to identify the

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<sup>75</sup> Interview with Shawn Friend, *supra* note 54; Interview with Sara Gonsalves, *supra* note 54; Interview with Bonnie Hough, *supra* note 54; Interview with Stacey Marz, *supra* note 54.

<sup>76</sup> Telephone Interview by Connie Vogelmann with Pamela Ortiz, Dir., Access to Justice Dep’t, Admin. Office of the Courts, Md. (July 22, 2016).

<sup>77</sup> Interview with Shawn Friend, *supra* note 54; Interview with Deborah Smith, *supra* note 55.

<sup>78</sup> Interview with Stacey Marz, *supra* note 54; Interview with Pamela Ortiz, *supra* note 76.

<sup>79</sup> Interview with Katherine Alteneder, *supra* note 66; Interview with Mary Jane Ciccarello, *supra* note 54; Interview with Stacey Marz, *supra* note 54; Interview with Deborah Smith, *supra* note 55.

problem and provide the right level of services is crucial to building an effective system.<sup>80</sup> Diagnostic tools can come in a number of forms; for instance, diagnosis can be provided through in-person meetings, live chat, or checklists provided by the courts.<sup>81</sup>

Furthermore, with the right tools, self-represented parties can engage in a certain amount of diagnosis themselves. In recent years, there have been a number of simple tools developed that can provide significant assistance to self-represented parties in helping them to identify the correct legal issue.<sup>82</sup> A good example is the use of decision-tree software to guide self-represented parties to the correct forms online in Maryland.<sup>83</sup>

Shawn Friend (Director, Maricopa County Arizona Law Library Resource Center) stressed the importance of developing a continuum of self-help services. In an ideal world, services would be provided based on the level of customer need and level of staff knowledge required to provide that assistance. Certain customers who need only a small amount of help on a minor issue could get the help they need from a staff member with a relatively low level of training or legal knowledge. In contrast, self-represented parties with a complex legal issue could obtain more in-depth assistance from someone with a significantly higher level of legal knowledge. The idea of triage and a continuum of services was a common theme throughout the interviews.

Katherine Alteneder also stressed the importance of building a system that is “always learning,” and always being revised to tailor the system to fit the needs of the self-represented parties. Deborah Smith emphasized the importance of periodic re-evaluation of the services provided, as well as a review of the information that is most frequently used by self-represented parties and of the areas that generate the most significant confusion. In order to do this evaluation, collecting the appropriate data and statistics on self-help services is critical. Self-help centers need to know how many people are using their services and which services receive the most use, and they need to identify common questions and sources for confusion among self-represented parties. With the appropriate data, a large-volume self-help system can easily begin to see patterns in which resources are useful and what needs additional development, and make changes accordingly.

Interviewees also stressed the importance of bi-directional assistance, regardless of the specific form of interaction. One-directional resources – in which self-represented parties can passively read information on a court’s website or in printed materials – are foundational, but Katherine Alteneder stressed that they are not sufficient to provide assistance to self-represented

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<sup>80</sup> Interview with Katherine Alteneder, *supra* note 66; Interview with Deborah Smith, *supra* note 55.

<sup>81</sup> Interview with Katherine Alteneder, *supra* note 66.

<sup>82</sup> Telephone Interview by Connie Vogelmann with Katherine Alteneder, Coordinator, Self-Represented Litig. Network (July 28, 2016).

<sup>83</sup> Katherine Alteneder specifically recommended the GuideClearly Plug-In for triage and streamlining of services. See SELF-REPRESENTED LITIGATION NETWORK, NEW GUIDECLEARLY PLUN-IN STREAMLINES TRIAGE AND INCREASES ACCESS ON SELF-HELP DESKTOP AND MOBILE WEBSITES (2016), <http://www.srln.org/node/931/new-guideclearly-plugin-streamlines-triage-and-increases-access-self-help-desktop-and-mobile>.

parties. To have a well-functioning system, Ms. Alteneder emphasized that it is critical that there be a method for self-represented parties to interact with someone from the court. Similarly, other interviewees commented that many self-represented parties struggle to understand written material, and giving them the opportunity to get live assistance helps close this gap in understanding.<sup>84</sup> Regardless of which interventions are chosen, it is important to provide a number of different modes to accommodate different groups of people and methods of processing information.<sup>85</sup>

Interviewees also emphasized the importance of proactive case management, and noted that it was important for court staff to follow-up with claimants about each subsequent step of the proceeding.<sup>86</sup> This leads to better outcomes for claimants, and gives courts the opportunity to break down relevant information into manageable pieces.<sup>87</sup> Pamela Ortiz also discussed the importance of providing information to self-represented parties after the hearings. Even if it is not a final decision, providing information in writing after a hearing can provide significant assistance. Since self-represented parties in courts are often under significant amounts of stress, they may not process what happened or remember decisions that were made without written assistance.

In general, simplification is a key element of self-help programs. Interviewees repeatedly stressed the importance of creating a system that self-represented parties could easily understand and access.<sup>88</sup> In addition, they noted that courts need to be aware that the self-represented parties using their self-help services are often confused and frustrated, and staff need to be trained in communicating with these parties. In creating a self-help system, courts should remember that legal procedures and processes were originally created for attorneys and other legal experts, and many steps that may be unnecessary are engrained in the legal culture.<sup>89</sup> As Stacey Marz (Director, Alaska Self-Help Services) pointed out, it is important to remember that self-help services should be created and tested with the end user in mind.

Interviewees also mentioned the idea of “procedural justice,”<sup>90</sup> and commented that parties that lose are more likely to accept the decision and comply with it if they understand why they lost and feel like they had an opportunity to be heard. Simplification of resources is a key component in fostering this understanding.<sup>91</sup> This is particularly important for situations in which

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<sup>84</sup> Interview with Shawn Friend, *supra* note 54; Interview with Stacey Marz, *supra* note 54.

<sup>85</sup> Interview with Stacey Marz, *supra* note 54.

<sup>86</sup> Telephone Interview by Connie Vogelmann with John Greacen, Principal, Greacen Assocs., LLC (July 27, 2016); Interview with Bonnie Hough, *supra* note 54.

<sup>87</sup> See *supra* note 91.

<sup>88</sup> Interview with Mary Jane Ciccarello, *supra* note 54; Interview with Bonnie Hough, *supra* note 54; Interview with Stacey Marz, *supra* note 54; Interview with Deborah Smith, *supra* note 55.

<sup>89</sup> Interview with Deborah Smith, *supra* note 55.

<sup>90</sup> For discussion of procedural justice, see Tom Tyler’s work broadly. In particular, see Tom R. Tyler, *Procedural Justice and the Courts*, 26, 26-31 (2007-2008).

<sup>91</sup> Interview with John Burns & Marisa Senigo, *supra* note 66; Interview with Bonnie Hough, *supra* note 54.

repeat players are expected: a party who has a good experience with the legal system is more likely to show up, participate, and feel better about the process the next time an issue arises.<sup>92</sup>

## 2. In-Person Self-Service Centers

A number of states provide significant assistance to self-represented parties through in-person self-service centers, some of which handle a very high volume of cases. The Maricopa County Superior Court Self-Service Center, for instance, has over 130,000 contacts with customers per year, and this number is trending upward.<sup>93</sup> Their Self-Service Center has several locations, as well as a Law Library that handles more complicated questions and a separate Protective Order Center. Centers are staffed by a total of 30 full-time staff and 34 part-time AmeriCorps members.<sup>94</sup> California has Self-Help Centers in each county, staffed by attorneys who work for the court.<sup>95</sup> A center in downtown Los Angeles serves 250-300 people per day, and has several staff attorneys, a number of support staff, and utilizes the services of student volunteers and nonprofits. About 1.2 million people visited the Self-Help Centers in California last year.<sup>96</sup> Maryland and Minnesota also run smaller in-person self-service centers.

Services provided by in-person self-service centers vary, and include providing basic legal information,<sup>97</sup> running workshops,<sup>98</sup> helping people prepare their pleadings,<sup>99</sup> creating form packets for claimants,<sup>100</sup> and guiding litigants to the correct building or correct room.<sup>101</sup> In Minnesota, there is a standing order from the Chief Justice that requires a mandatory review of filings for self-represented litigants in family law cases, so significant resources in Minnesota's walk-in centers are dedicated to performing this review.

Maryland is a little bit unusual, in that the attorneys at its Self-Help Centers can provide legal advice to self-represented claimants. This is because Centers are staffed by Maryland Legal Aid, and because the type of service provided in self-help centers is classified as "high volume." In high-volume situations, attorneys do not have to do a thorough conflict check, and can provide legal advice as long as they are not actually aware of a conflict. Other self-help centers make attorneys available periodically to provide limited legal advice. For instance, in Minnesota, pro bono attorneys attend clinics and can provide legal advice to self-represented parties. Similarly, Utah has been scheduling self-represented cases of a certain type onto one calendar, then bringing in pro bono attorneys to provide legal representation on a limited scope basis on those days.

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<sup>92</sup> Interview with John Burns & Marisa Senigo, *supra* note 66.

<sup>93</sup> Interview with Shawn Friend, *supra* note 54.

<sup>94</sup> *Id.*

<sup>95</sup> Interview with Bonnie Hough, *supra* note 54.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; Interview with Shawn Friend, *supra* note 54.

<sup>98</sup> Interview with Bonnie Hough, *supra* note 54.

<sup>99</sup> *Id.*

<sup>100</sup> Interview with Shawn Friend, *supra* note 54.

<sup>101</sup> *Id.*

Some self-help centers also make available lists of attorneys, and provide referrals to attorneys who offer low cost or unbundled legal services.<sup>102</sup> Stacey Marz in Alaska commented that fostering the development of unbundled legal services is a complementary service to self-help, and it is critical to improving outcomes for self-represented parties. Utah has worked with the Utah State Bar to establish a limited scope representation bar section and to provide an online lawyer directory that identifies lawyers who offer limited scope services.

For many of these states, in-person services are the primary method of communicating with self-represented parties. Sara Gonsalves (Manager, Minnesota Self-Represented Litigant Program) commented that nothing could substitute for a live person, and added that, regardless of what other services are provided, there will always be people who want to speak with someone face to face. Katherine Alteneder had a slightly different viewpoint, and stressed that although person-to-person services are foundational, these services can be provided in-person, or virtually through phone, video conference, or another method. In large part because of restrictions caused by geography and population density, some states have had to adapt to primarily – or completely – virtual services. Alaska’s self-help center is entirely virtual, and Utah’s services are primarily virtual as well, although they provide a number of hybrid services. For instance, Utah’s Self-Help Center staff provide virtual and in-person training to community service providers in rural jurisdictions. These community service providers often meet with self-represented parties in person, and have direct access to self-help center staff through an online chat system. Virtual services, including phone and email, will be discussed further in a later section of the report.

### 3. Workshops

More than any other resource for self-represented parties, opinion was split on the merits of workshops. Although some interviewees have had success with workshops, others expressed doubts as to their efficiency and efficacy. The function of workshops varies from one jurisdiction to another – some workshops consist primarily of one-directional instructional programs, whereas others provide more targeted assistance to claimants, such as in filling out forms. Because staff cannot provide legal advice in most jurisdictions, interactivity in workshops tends to be relatively limited.

Several courts have seen success with workshops. In particular, California runs a series of workshops, each with ten to twelve claimants. The workshops are aimed at providing practical assistance to self-represented parties, and during the workshops, parties can fill out TurboTax-like forms. Alaska has also had success with workshops: in family law cases, classes are court-ordered, and held on a bi-weekly basis. Every other week, they also hold an optional Hearing and Trial Preparation class. Court-ordered classes are limited to 20 people, and the optional workshops tend to have between five and twelve attendees each time they are offered.

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<sup>102</sup> *Id.*

Other interviewees were much more critical of workshops. For instance, Sara Gonsalves recommended against in-person clinics. She noted that Hennepin County, Minnesota tried workshops to relatively little success – they found workshops to be inefficient, and to be a drain on staff time, resources, and space. It was difficult for people to attend in person, and the people who did attend expected legal advice, despite their best efforts to explain the distinction between legal information and legal advice ahead of time. They found videos with the same information to be more effective and a better use of resources.

Katherine Alteneider also expressed concern about workshops. She commented that they can be useful in places that are particularly form heavy or have a high volume of caseload (such as in California), but thought they are difficult to make work well in other circumstances. She commented that workshops are predicated on the belief that people will be able to come to the courthouse, and that this is an unrealistic expectation in many circumstances. Instead, she preferred video workshops, and commented that she thinks methods of meeting people where they already are will be better than expecting people to come to you.

#### 4. Virtual Services – Phone, Email, Text, and Chat

Most courts also communicate with self-represented parties through a series of virtual services, including phone, email, text, and chat.

Many courts have robust call-centers and have significant interaction with self-represented parties via phone. Over the phone, staff generally cannot provide legal advice, but they can provide basic troubleshooting information (such as helping a party locate the appropriate form), direction on hearing procedure, options for proceeding with a claim, and provide legal and non-legal referrals.<sup>103</sup> Maryland has a state-wide call center, and took about 3,600 calls in June.<sup>104</sup> Hennepin County in Minnesota has a call center with three full-time staff-members, and they receive about 22,000 calls a year.<sup>105</sup> Hennepin County is in the process of hiring two more staff members, as their call center currently cannot keep up with call volume.<sup>106</sup> In Alaska, paralegal-level staff members answer the phone from 7:30 in the morning to 6:00 pm on Monday-Thursday, and take about 7,000 calls each year, with calls lasting between 15 and 20 minutes on average.<sup>107</sup> Utah handled 21,300 contacts last fiscal year, and the average call also lasts between 15 and 20 minutes. In addition, in Utah, almost all incoming calls receive follow-up emails from staff.<sup>108</sup>

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<sup>103</sup> Interview with Stacey Marz, *supra* note 54.

<sup>104</sup> Email from Pamela Ortiz, Dir, Access to Justice Dep't, Admin. Office of the Courts, Maryland, to Connie Vogelmann, Attorney Advisor, ACUS (July 15, 2016, 2:27 PM) (on file with recipient).

<sup>105</sup> Interview with Gonsalves, *supra* note 3; MINNESOTA JUDICIAL BRANCH, REPORT TO THE COMMUNITY 11 (2015), <http://www.mncourts.gov/mncourtsgov/media/assets/documents/reports/2015AnnualReport.pdf>.

<sup>106</sup> Interview with Sara Gonsalves, *supra* note 54.

<sup>107</sup> Interview with Stacey Marz, *supra* note 54.

<sup>108</sup> Interview with Mary Jane Ciccarello, *supra* note 54.

Katherine Alteneder noted that she thinks call-lines are one of the most, if not the most, efficient and informative method of providing assistance to self-represented parties, though added that email and chat can provide a valuable supplement. Ms. Alteneder commented that the “human touch” provided by call-lines can be extremely effective. Not only do call-lines tend to provide a good experience to callers, but they can be much more time-efficient for the court than face-to-face communication. She noted that the Alaska Court System did a micro-study on call-lines, and found that about 40 minutes of time spent talking in person could be shrunk to just a few minutes over the phone. Furthermore, she added that because calls are shorter, it is less likely for the main point to get obscured, as can happen in an in-person meeting. Ms. Alteneder also thought that call-lines provided a valuable service in providing evaluative information to the court: once a call center is up and running, its staff members will be able to quickly identify common questions and areas of confusion, and can then publish information on the court’s website to address these questions.

Chat has proven to be somewhat more controversial. In chat, staff can provide the same types of information as over the phone, but with the added advantage of being able to link parties directly to relevant forms or other documents. Maryland has developed a robust chat system to supplement its call-lines. The chat service is open from 8:30 in the morning until 8:00 p.m., and the state has found that it has a number of advantages over call-lines. First, they can embed a “chat” button easily on different web-pages, allowing instant support for parties that need assistance. Furthermore, the transcript from the chat is saved by the chat software. Attorneys have no access to identifying information, but if the same person contacts the self-help center again the transcript can be retrieved by the software by referencing the IP address. The chat transcripts also allow for easy review by a supervisor, and transcripts can be emailed to program visitors to aid them in remembering the conversation and in following through on the information provided. Finally, Maryland has seen gains in efficiency through the chat program, and has found that each attorney can handle about four chats simultaneously. Over the past several months, Maryland has done roughly 500-600 chats each month.<sup>109</sup>

In contrast, Utah used chat for some time, but Mary Jane Ciccarello noted they have since moved away from using the service. They found that the informal nature of chat was not conducive to providing meaningful legal information. Customers expected an instantaneous response through chat, and the medium bred a sense of immediacy and urgency that did not lead to positive results. Utah has seen better results with other services, including their call-center.

Some courts have also made use of texts to communicate short pieces of information to claimants. Some courts receive questions from claimants via text, and will respond to complicated questions by phone or email. Courts have also used text messaging to provide reminders to claimants about upcoming hearing dates or deadlines.<sup>110</sup> Utah routinely texts with parties, and have found it to be a useful service. Mary Jane Ciccarello commented that many

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<sup>109</sup> Email from Pamela Ortiz, *supra* note 104.

<sup>110</sup> Interview with Mary Jane Ciccarello, *supra* note 54.

low-income claimants are more likely to have a smart phone than a home computer, so making their services easy to use by phone has proven to be beneficial. In Utah, self-help center staff members will often follow-up on an initial texting conversation with an email, in order to respond in greater depth or to attach documents. Mary Jane Ciccarello also added that, in certain circumstances, they have begun texting self-represented parties the day before their hearings to provide a reminder.

Finally, courts have also made use of email communication with relatively high frequency. Staff can provide much of the same information over email as they provide over the phone, with the added benefit of being able to attach documents or provide links to relevant self-help resources.<sup>111</sup> The Maricopa County Law Library in Arizona, which handles more complex cases than its self-help centers, has a robust email communication system. Alaska also makes use of email as a secondary method of communication: although all contacts are initially made through calls, self-help center staff provide their direct email address to claimants for follow-up. This email follow-up is common, and the self-help center sends out a majority of its forms through email when callers cannot download them on their own. Other courts also make use of email to communicate with self-represented parties. For instance, Utah receives incoming emails, and will respond accordingly. Furthermore, Utah has a policy of following up on incoming phone calls and texts with tailored, specific emails, often with attachments of relevant forms and case pleadings.

##### 5. Plain Language and Translation Services

Many courts are also working on improving their language resources to make them more easily accessible to self-represented parties.

The courts the author spoke with all have past or ongoing efforts to make forms and other resources for claimants consistent with plain language principles. Interviewees stressed the importance of plain language forms and information as a prerequisite to other services. Interviewees commented that “plain language” goes beyond just the words used, and extends to the formatting and presentation of information as well.<sup>112</sup> Katherine Alteneder commented that the information must be broken down into easily digestible steps, and employing professionals who understand how to do this is critical for the success of plain language resources.

Grade level of plain language resources varied based on the court or office in question. Arizona, for instance, is working on getting all materials to a 7<sup>th</sup> grade reading level or below. NYC’s Office for Administrative Trials and Hearings (OATH) targets all forms at a 5<sup>th</sup> grade reading level – though the representatives the author spoke with noted that this is difficult to maintain in all contexts, given the complexity of legal issues involved. Utah tries to make all information, not just forms, accessible at a 5<sup>th</sup> to 8<sup>th</sup> grade reading level.

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<sup>111</sup> *Id.*

<sup>112</sup> Interview with Katherine Alteneder, *supra* note 66; Interview with Stacey Marz, *supra* note 54.



Most courts review their resources for plain language standards, either on a continuing or periodic basis. Mary Jane Ciccarello commented that Utah works on plain language all the time – and it is not uncommon for them to review resources and realize that a form they thought was in plain language needs to be changed for clarity. New York’s OATH reviews its plain language resources every two years.

Interviewees also stressed the importance of providing language and translation services for self-represented parties. Courts recommended comprehensive resources for non-English speakers, and emphasized the importance of, at a minimum, making resources available in English and Spanish.<sup>113</sup> Several courts also mentioned the importance of having bilingual staff at their self-help centers.<sup>114</sup> OATH has particularly high language needs – the office provides free translation services for over 250 languages, and translators can be used in any hearing.

#### 6. Forms, E-Filing, and Document Assembly

Interviewees noted the importance of providing easy-to-use forms, and cited them as a foundational service for self-represented parties. Forms should, at a minimum, be written in plain language and provide clear instructions to claimants explaining what type of information is being requested and how they should fill out the form to ensure it is complete and legally sufficient.<sup>115</sup> However, Deborah Smith warned that, although forms are very important, they can be very time-consuming to alter, particularly when taking into account multiple languages.

Most courts the author spoke with make forms available online, and are in the process of making e-filing available to self-represented parties. In Arizona, for example, forms can be filled out online, but must be printed and sent to the court to be filed. In California, e-filing is subject to different rules on a county-by-county basis. Most counties do not have e-filing for self-represented litigants, though there is often a requirement that attorneys e-file. This is something that is in the process of being expanded to include self-represented parties. Utah currently has e-filing for lawyers, but plans to expand e-filing to self-represented parties in the near future. Alaska is in the process of developing a statewide e-filing system that should be up-and-running for some case types by the end of the year. The system will be made available to all parties, both lawyers and self-represented parties, at the same time. E-filing is available, but optional, for self-represented litigants in Minnesota.

Several courts are also making use of so-called document assembly programs to help claimants fill out paperwork,<sup>116</sup> and John Greacen commented that document assembly is critical for providing assistance to self-represented parties. Document assembly programs resemble

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<sup>113</sup> Interview with Mary Jane Ciccarello, *supra* note 3; Interview with Pamela Ortiz, *supra* note 76.

<sup>114</sup> Interview with Shawn Friend, *supra* note 54; Interview with Sara Gonsalves, *supra* note 54; Interview with Bonnie Hough, *supra* note 54.

<sup>115</sup> Interview with Stacey Marz, *supra* note 54; Interview with Pamela Ortiz, *supra* note 76; Interview with John Greacen, *supra* note 86.

<sup>116</sup> Interview with Mary Jane Ciccarello, *supra* note 54; Interview with Sara Gonsalves, *supra* note 54; Interview with Bonnie Hough, *supra* note 54.

TurboTax, and ask litigants a series of plain language questions – once the litigants have answered all the questions, the software automatically generates completed forms. These interactive document assembly programs can be extremely helpful for self-represented parties, particularly those with limited education or English proficiency.<sup>117</sup> Document assembly has been used with particular success in the family law context, and courts are working to expand it to other types of cases as well.

## 7. Web Resources

Many courts also had significant web resources available for self-represented parties. For instance, California’s Self-Help Center has 4,000 pages of content, as well as a mirrored site in Spanish, and receives traffic from 6 million unique visitors each year. Although self-help websites vary significantly from one jurisdiction to another, California’s website provides a good example of the types of web resources available to self-represented parties. The California self-help homepage contains links to a number of common legal topics, including “Going to Court” and “Free & Low Cost Legal Help,” and provides links to specific case types, like divorce and child custody. Once a user clicks on a specific case type, he or she is taken to a separate page that explains the basics of the legal process, and includes FAQs and links to important forms.<sup>118</sup>

Several interviewees cited websites as one of the most important and effective resources available for providing assistance to self-represented parties.<sup>119</sup> As Stacey Marz pointed out, website improvements also dovetail well with work on forms, which are equally important. Deborah Smith noted that Virginia’s self-help website was designed by the Self-Represented Litigation Network, and intended as a template for other courts to use.

Interviewees stressed several important points about websites. First, they commented that it is important to recognize that web resources are not solely used by self-represented parties: making simplified resources available is critical for young attorneys or pro bono lawyers who may not have experience with the relevant case type,<sup>120</sup> and may also provide an important resource for low-level staff, too.<sup>121</sup> Second, interviewees stressed that when designing and updating a website for self-represented parties, organization is as important as content. Courts must always be thinking about how to make resources available in a format and organization that self-represented parties can find easily.<sup>122</sup> Third, interviewees stressed the importance of making content accessible for self-represented parties. Stacey Marz noted that it is important to be mindful of length and depth when designing a website. She added that Alaska’s website is written to target the highest number of cases and parties possible: they do not include

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<sup>117</sup> Interview with Deborah Smith, *supra* note 55.

<sup>118</sup> *The California Courts Self-Help Center*, CALIFORNIA COURTS, <http://www.courts.ca.gov/selfhelp.htm>.

<sup>119</sup> Interview with Mary Jane Ciccarello, *supra* note 54; Interview with John Greacen, *supra* note 86; Interview with Stacey Marz, *supra* note 54; Interview with Deborah Smith, *supra* note 55.

<sup>120</sup> Interview with Mary Jane Ciccarello, *supra* note 54.

<sup>121</sup> Interview with Katherine Alteneeder, *supra* note 66.

<sup>122</sup> Interview with John Greacen, *supra* note 86; Interview with Deborah Smith, *supra* note 55.

information on their website about scenarios that are theoretically possible but almost never exist – instead, they try to keep all content as short as possible to keep people from becoming overwhelmed. Ms. Marz also added that answers to FAQs should be no more than a few lines each.

Videos are a useful “arrow in the quiver” of courts,<sup>123</sup> and these resources are especially good resources for people with low reading levels.<sup>124</sup> Many courts make videos accessible on their websites. For instance, Maryland has a library of 8-10 minute videos. These videos range in topic from the relatively simple, like “Should I Represent Myself?,” to more complicated and substantive topics, like “Service of Process” and “Expungement.”<sup>125</sup> Alaska has a number of short videos as well.<sup>126</sup> Stacey Marz commented that almost all of their family law content has short videos associated with it, and that their “Behavior in the Court” and “Motion Practice” videos are their most viewed. As is mentioned above, Sara Gonsalves commented that Minnesota found in-person workshops to be relatively inefficient, and instead replaced the material provided in the workshop with videos. For instance, they released a “Child Support Modification” video<sup>127</sup> that gets a lot of views – the video is divided into a lot of small chapters, so as to be easier for viewers to understand and digest.

There are a number of other innovative tools that can be made available via the web, and a number of interviewees mentioned tools that are being employed by other states. For instance, Washington State is using graphic novel style videos instead of live action videos to provide information to self-represented parties – which makes it easier to update information as content changes.<sup>128</sup> Connecticut has also made a set of photo-novellas on social security, to guide self-represented parties through the application process.<sup>129</sup> Some states are also developing avatar systems that walk self-represented litigants through the process of filling out their forms. These systems are effective for people with low reading comprehension and limited English proficiency.<sup>130</sup>

Several interviewees also stressed the importance of mobile accessibility. For instance, Pamela Ortiz commented that half the people who use Maryland’s Self-Help Center are

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<sup>123</sup> Interview with Katherine Altneder, *supra* note 82.

<sup>124</sup> Interview with Deborah Smith, *supra* note 55.

<sup>125</sup> *Self-Help Videos*, MARYLAND COURTS, <http://www.courts.state.md.us/reference/videolibrary.html> (last updated Mar. 2016).

<sup>126</sup> *Self-Help Center: Family Law*, ALASKA COURT SYSTEM, <http://courts.alaska.gov/shc/family/shcabout.htm#videos> (last updated July 5, 2016).

<sup>127</sup> *Video: How to File a Motion to Modify Child Support (Expedited Process)*, MINNESOTA JUDICIAL BRANCH, <http://www.mncourts.gov/Help-Topics/Videos-Tutorials/Modify-Child-Support.aspx> (last visited Aug. 1, 2016).

<sup>128</sup> *See, for example, Video – Tenants, Landlords & the Laws of Washington State*, WASHINGTONLAWHELP.ORG, <http://www.washingtonlawhelp.org/resource/video-tenants-landlords-the-laws-of-washingto?ref=tOpfK> (last visited Aug. 1, 2016).

<sup>129</sup> *See, for example, Applying and Appealing for Disability and Social Security*, CTLAWHELP.ORG, <http://ctlawhelp.org/applying-and-appealing-disability-social-security#> (last visited Aug. 1, 2016).

<sup>130</sup> *See, for example, Iowa Legal Aid Online Intake*, STATE JUSTICE INSTITUTE, <https://caseq.iowalaw.org/intake/a2j.php?interview=english> (last visited Aug. 1, 2016).

accessing it from a mobile device, and Mary Jane Ciccarello in in Utah mentioned that low income and younger parties are more likely to have smart phones than home computers as their only access to the Internet and email. Some states are developing apps for claimants: for instance, the Maryland Law Help App provides access to all of the web-enabled tools that the state provides on a mobile platform.<sup>131</sup>

## 8. Judicial Resources and Training

Many interviewees also commented that they do significant work with judicial education.<sup>132</sup> Interviewees discussed this as an important issue from both an ethical perspective and a procedural perspective.

From an ethical perspective, John Greacen discussed the importance of training judges on how to deal with self-represented parties in the courtroom, and explained that there are widespread misconceptions among adjudicators about how to treat self-represented parties. Many adjudicators believe that providing assistance to a self-represented party is showing bias – however, Mr. Greacen commented that the “most lethal posture” a judge could take for a self-represented party is to sit and wait for the party to present information as if they were an attorney.

From a procedural perspective, Deborah Smith commented that it is important to teach judges how to speak with self-represented parties, and provided a number of details: before the hearing, judges should explain the role of the parties in the room, and provide a roadmap of the hearing. Afterwards, it is important for judges to ensure the self-represented party understood the outcome, and judges should explain any next steps that the party must take. Ms. Smith added that training for both judges and staff should include information on how to deal with specific scenarios, such as dealing with angry litigants or adjudicating cases with one represented litigant and one self-represented party. Other interviewees echoed similar sentiments,<sup>133</sup> and stressed the importance of routine, ongoing training.<sup>134</sup>

## 9. Steps for the Future

The representatives the author spoke with are busy implementing additional services for self-represented litigants in the future.

The most-commonly cited area for future development related to developing e-filing for self-represented parties or making other changes to forms and document assembly programs. For instance, given additional resources, Sara Gonsalves would like expand Minnesota’s online

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<sup>131</sup> *Maryland Law Help Mobile App*, MARYLAND LAW HELP, [http://marylandlawhelp.mobapp.at/landing/Desktop#.V6j2\\_7grK71](http://marylandlawhelp.mobapp.at/landing/Desktop#.V6j2_7grK71) (last visited Aug. 8, 2016).

<sup>132</sup> Interview with John Burns & Marisa Senigo, *supra* note 66; Interview with Bonnie Hough, *supra* note 54; Interview with Stacey Marz, *supra* note 54; Interview with Pamela Ortiz, *supra* note 76.

<sup>133</sup> Interview with John Burns & Marisa Senigo, *supra* note 66; Interview with Stacey Marz, *supra* note 54; Interview with Pamela Ortiz, *supra* note 76.

<sup>134</sup> Interview with Stacey Marz, *supra* note 54.

document assembly program, and tie it directly to e-filing. Although they currently have document assembly for certain case types, they would like to make additional case types available for document assembly. Pamela Ortiz commented that one of Maryland's next steps is to create document assembly program that would allow self-represented parties to answer natural language questions and come away with completed forms. She commented that they have not done this yet due to high upfront cost. Mary Jane Ciccarello commented that in an ideal world she would like to provide additional resources to self-represented parties in creating and reviewing forms in Utah. In a similar vein, Shawn Friend in Maricopa County is working on creating a set of detailed sample forms for claimants, so claimants can identify cases similar to their own for assistance.

Other work for the future includes re-working checklists to make them easier to follow,<sup>135</sup> developing additional video resources for self-represented parties,<sup>136</sup> dedicating additional staff time and resources to plain language and Spanish language resources,<sup>137</sup> and working to expand additional mobile accessibility to self-help resources.<sup>138</sup>

Michael Hayes mentioned that the Office for Child Support Enforcement at the Department of Health and Human Services is currently studying behavioral economics in the context of child support payments. The project aims to understand and address motivational and conceptual barriers for parents' participation in child support cases. They are studying specific interventions – including using plain language, changing the color and format of notice letters, providing advance notice to parents letting them know to be on the lookout for important materials, and personalizing materials to tie them to claimants' positive identities as parents. They are currently conducting eight pilot projects. Each pilot project has a rapid turnaround, and the goal is to obtain concrete data on each intervention in less than a year.<sup>139</sup>

#### ***D. Procedural and Structural Simplification***

Several courts throughout the country are also working to simplify certain case types that commonly involve self-represented litigants.<sup>140</sup> Although John Greacen commented that simplifying procedures is one of the areas in which he has seen the least success, several courts seem to be making strides toward simplification. For instance, Stacey Marz commented that Alaska has been conducting informal domestic relations trials for the past year, in which the formal rules of evidence are not in place by default. Claimants can submit what evidence they want, and the judge weighs it. There is no cross-examination in these cases, and the judge asks

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<sup>135</sup> Interview with Shawn Friend, *supra* note 54.

<sup>136</sup> *Id.*

<sup>137</sup> Interview with Mary Jane Ciccarello, *supra* note 54.

<sup>138</sup> Interview with Bonnie Hough, *supra* note 54.

<sup>139</sup> For more information about these behavioral interventions, see Office of Child Support Enf't, *Behavioral Interventions for Child Support Services Demonstration Programs (BICS)*, DEP'T OF HEALTH AND HUMAN SERVS. <http://www.acf.hhs.gov/css/grants/grant-updates-results/bics> (last visited Aug. 1, 2016).

<sup>140</sup> Although procedural simplification does not specifically target cases with self-represented parties, this simplification is likely to be especially beneficial to them.

questions of the parties.<sup>141</sup> Ms. Marz commented that these are modeled after similar programs in Idaho,<sup>142</sup> Utah,<sup>143</sup> and Deschutes County, Oregon.<sup>144</sup> These informal trials have been “widely embraced” across Alaska by many judges. She also added that lawyers can appear in these cases – although they cannot ask questions of parties, they can suggest questions or topics for the judge to consider, coach their clients, and make opening and closing statements.

New York’s Office of Administrative Trials and Hearings (OATH) provides an extremely interesting example of procedural simplification and streamlining. OATH is an independent adjudicatory body that is not housed within any city enforcement or regulatory agency. OATH’s sole mission is to conduct hearings – other administrative agencies within New York City refer cases to OATH to be adjudicated. OATH has two divisions: a trials division, where litigants are usually represented, and a hearings division, in which parties are self-represented in the vast majority of cases. The Hearings division handles about 700,000 summons each year, resulting in about half that number of hearings, from roughly 16 administrative agencies. Although penalties are set by the enforcement agencies, the same procedures are used for every hearing, regardless of the originating agency. OATH allows hearings to be in-person, or held by telephone, email, or video. Their goal is to make it as “easy as humanly possible” for people to go through the process without representation. OATH provides significant information to parties through its website and a 1-800 number, and is in the process of developing several other services targeting self-represented parties. For instance, OATH is in the process of creating a universal form for summons by the end of the year, and just established a clerk’s office to deal exclusively with self-represented parties. OATH is also in the process of setting up self-help desks at each office across the city.

More broadly, several interviewees questioned the place of the adversarial format in cases with self-represented litigants. Stacey Marz commented that adversarial proceedings can be damaging in family law or guardianship cases, and that a problem-solving approach may be more effective. Michael Hayes discussed alternatives to the contempt proceedings in child support payments, and emphasized the importance of “friendlier” approaches to communicate with parents. The Office of Child Support Enforcement is in the process of funding a project

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<sup>141</sup> For more information, see Self-Help Center: Family Law, *What is an Informal Trial?*, ALASKA COURT SYSTEM, <http://courts.alaska.gov/shc/family/shcdr-trials.htm#informal> (last visited Aug. 1, 2016).

<sup>142</sup> For more information, see Supreme Court, *Informal Custody Trial*, STATE OF IDAHO JUDICIAL BRANCH, <https://www.isc.idaho.gov/ircp16p> (last visited Aug. 1, 2016).

<sup>143</sup> For more information, see *Informal Trial of Support, Custody and Parent-Time*, UTAH COURTS, [https://www.utcourts.gov/howto/family/informal\\_trial/](https://www.utcourts.gov/howto/family/informal_trial/) (last visited Aug. 1, 2016).

<sup>144</sup> For more information, see Deschutes County Circuit Court, *Informal Domestic Relations Trials*, OREGAN JUDICIAL DEPARTMENT, <http://courts.oregon.gov/Deschutes/services/famlaw/Pages/Informal-Domestic-Relations-Trials.aspx> (last visited Aug. 8, 2016).

investigating some of these alternatives, and identifying methods that increase both the effectiveness and efficiency of getting parents to pay for child support payments.<sup>145</sup>

Along the lines of reducing the adversarial nature of proceedings, John Greacen mentioned Online Dispute Resolution as being particularly cutting edge – he gave an example in which a party who gets a traffic ticket makes a submission online. Law officers can weigh in, and a magistrate officer makes a settlement offer. The ticket holder can accept or reject the offer; if the offer is rejected, then the system establishes a date for the hearing, and the online system assembles the information for a decision maker to review.<sup>146</sup>

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As can be observed from this discussion, courts are doing significant work to aid self-represented parties. Although differences exist across courts, there was also a surprisingly high amount of agreement among interviewees from different courts and different contexts concerning the types of interventions that are the most useful in working with self-represented parties.

### **III. Case Studies on Self-Representation in Administrative Hearings**

The report uses a case-study approach to investigate self-representation in administrative hearings, working with four agencies: Board of Veterans' Appeals (BVA), Executive Office for Immigration Review (EOIR), Social Security Administration (SSA), and the United States Department of Agriculture's National Appeals Division (NAD). In contrast to the experiences described in the preceding section, there was significantly more diversity among the case study agencies. These four agencies differed significantly in terms of number and percentage of self-represented parties, statutory and regulatory requirements for dealing with self-represented parties, and resources provided by the agencies to assist these parties. Consequently, in this section information about the four agencies is presented in a case study format, instead of combined as in the court section above.

Case study agencies were selected for several reasons. First, all four case study agencies participated in the working group led jointly by the Administrative Conference and the Department of Justice's Access to Justice Initiative, and each shared information about its procedures toward self-represented parties during working group meetings. Second, each agency presents a unique viewpoint in dealing with self-represented parties, and this selection of agencies presents a good overview of the range of agency experience with self-represented parties. Three of the agencies – SSA, EOIR, and BVA – hear significant numbers of cases each year, but the agencies have very different statutory and regulatory requirements for dealing with

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<sup>145</sup> See ADMIN. FOR CHILDREN AND FAMILIES, DEP'T OF HEALTH AND HUMAN SERVS., EVALUATION OF THE PROCEDURAL JUSTICE INFORMED ALTERNATIVES TO CONTEMPT (PJAC) DEMONSTRATION HHS-2016-ACF-OCSE-FD-1171 (2016), [https://ami.grantsolutions.gov/files/HHS-2016-ACF-OCSE-FD-1171\\_0.pdf](https://ami.grantsolutions.gov/files/HHS-2016-ACF-OCSE-FD-1171_0.pdf).

<sup>146</sup> Mr. Greacen specifically referenced the Matterhorn platform as a useful resource for adjudicators interested in Online Dispute Resolution. See MATTERHORN HOME PAGE, <http://getmatterhorn.com/> (last visited Aug. 1, 2016).

self-represented parties. Furthermore, the proportion of self-represented parties varies significantly across the three agencies. The fourth agency – NAD – is a much smaller hearing office, and provides a good case study on dealing with self-represented parties in a smaller federal agency. Finally, all four agencies expressed a willingness to participate in this project.

#### A. Board of Veterans' Appeals

The Board of Veterans' Appeals (BVA) conducts hearings and decides appeals relating to the provision of benefits for veterans.<sup>147</sup> The Board's members, called "Veterans Law Judges" (VLJs), oversee hearings and are supported by staff and overseen by a Chairman and Vice Chairman.<sup>148</sup> While the majority of appeals to the Board concern disability compensation, the BVA handles other cases involving veterans' educational benefits, insurance benefits, burial benefits, pension benefits, vocational rehabilitation, dependency and indemnity compensation, health care delivery, home loan guaranties, and fiduciary matters.<sup>149</sup>

Between fiscal year 2011 and 2015, BVA received almost 250,000 appeals.<sup>150</sup> The Board issued 246,043 decisions during that time period, averaging 49,208 per year.<sup>151</sup> Over 95% of proceedings during this time period involved compensation.<sup>152</sup> A high percentage of claimants in BVA hearings are represented; between 2011 and 2015, only 10% of claimants were self-represented.<sup>153</sup> Most claimants were represented by Veterans Service Organizations (VSOs), with only a small percentage (10.5%) represented by an attorney.<sup>154</sup>

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<sup>147</sup> BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL REPORT, FISCAL YEAR 2015 1, 3 (2015), [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2015AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf) [hereinafter BVA FISCAL YEAR 2015].

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 26.

<sup>150</sup> See BVA FISCAL YEAR 2015, *supra* note 147, at 17; BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL REPORT, FISCAL YEAR 2014 1, 18 (2014), [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2014AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf) [hereinafter BVA FISCAL YEAR 2014]; BD. OF VETERANS' APPEALS, DEP'T OF VETERANS AFFAIRS, ANNUAL REPORT, FISCAL YEAR 2013 1, 17 (2013), [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2013AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf) [hereinafter BVA FISCAL YEAR 2013]; BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL REPORT, FISCAL YEAR 2012 1, 16 (2012), [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2012AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf) [hereinafter BVA FISCAL YEAR 2012]; BD. OF VETERANS' APPEALS U.S. DEP'T OF VETERANS AFFAIRS, ANNUAL REPORT, FISCAL YEAR 2011 1, 15 (2011), [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2011AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2011AR.pdf) [hereinafter BVA FISCAL YEAR 2011].

<sup>151</sup> See BVA FISCAL YEAR 2015, *supra* note 147, at 17; BVA FISCAL YEAR 2014, *supra* note 150, at 18; BVA FISCAL YEAR 2013, *supra* note 150, at 17; BVA FISCAL YEAR 2012, *supra* note 150, at 16; BVA FISCAL YEAR 2011, *supra* note 150, at 15.

<sup>152</sup> See BVA FISCAL YEAR 2015, *supra* note 147, at 26; BVA FISCAL YEAR 2014, *supra* note 150, at 26; BVA FISCAL YEAR 2013, *supra* note 150, at 24; BVA FISCAL YEAR 2012, *supra* note 150, at 33; BVA FISCAL YEAR 2011, *supra* note 150, at 21.

<sup>153</sup> See BVA FISCAL YEAR 2015, *supra* note 147, at 27; BVA FISCAL YEAR 2014, *supra* note 150, at 27; BVA FISCAL YEAR 2013, *supra* note 150, at 25; BVA FISCAL YEAR 2012, *supra* note 150, at 23; BVA FISCAL YEAR 2011, *supra* note 150, at 22.

<sup>154</sup> BVA FISCAL YEAR 2015, *supra* note 147, at 27; BVA FISCAL YEAR 2014, *supra* note 150, at 27; BVA FISCAL YEAR 2013, *supra* note 150, at 25; BVA FISCAL YEAR 2012, *supra* note 150, at 23; BVA FISCAL YEAR 2011, *supra* note 150, at 22.



## 1. Hearing Overview

A veteran may begin the BVA appeals process if he or she is unsatisfied with the benefits awarded by the VA.<sup>155</sup> To begin the appeals process, a veteran files a Notice of Disagreement<sup>156</sup> which offers an optional *de novo* review of the case through a Decision Review Officer (DRO) at the VA. The DRO can issue a new decision, but cannot overturn any favorable part of the prior decision. If anything less than the full benefits sought are awarded, the local VA office sends the claimant a justification for the decision, called the Statement of the Case (SOC).<sup>157</sup> Claimants may then file a Substantive Appeal by submitting VA Form 9 or its equivalent,<sup>158</sup> which allows the veteran an optional hearing before BVA.<sup>159</sup> The veteran may choose to submit additional evidence within 90 days of the BVA's receipt of the file from the local office.<sup>160</sup>

Claimants are rarely self-represented in BVA hearings, as they have a right to representation from a number of Veterans Service Organizations (VSOs) at no cost to the claimant.<sup>161</sup> By regulation, BVA is authorized to provide office space and other facilities for VSOs,<sup>162</sup> better enabling them to provide significant services for veterans. In 2015, over 75% of veterans who appeared before BVA were represented by VSOs or State Service Organizations, including the American Legion, Disabled American Veterans, and Veterans of Foreign Wars.<sup>163</sup>

BVA's hearings are "uniquely pro-claimant,"<sup>164</sup> and non-adversarial.<sup>165</sup> During the hearing, the claimant presents the case and any material and relevant witness testimonies or evidence.<sup>166</sup> The VLJ gives a "sympathetic" reading to the veteran's filings,<sup>167</sup> and must "explain fully the issues and suggest the submission of evidence which the claimant may have overlooked

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<sup>155</sup> DANIEL T. SHEDD, CONG. RESEARCH SERV., R42609, OVERVIEW OF THE APPEAL PROCESS FOR VETERANS' CLAIMS 9, 1 (2013) [hereinafter APPEAL PROCESS OVERVIEW].

<sup>156</sup> U.S. DEP'T OF VETERANS AFFAIRS, FORM 21-0958, NOTICE OF DISAGREEMENT 3 (2015), [www.vba.va.gov/pubs/forms/VBA-21-0958-ARE.pdf](http://www.vba.va.gov/pubs/forms/VBA-21-0958-ARE.pdf).

<sup>157</sup> BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, HOW DO I APPEAL? PAMPHLET 5, 7 (2015), [http://www.bva.va.gov/How\\_Do\\_I\\_APPEAL.asp](http://www.bva.va.gov/How_Do_I_APPEAL.asp) [hereinafter HOW DO I APPEAL?].

<sup>158</sup> See APPEAL PROCESS OVERVIEW, *supra* note 155, at 6, 8; BD. OF VETERANS APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, FORM 9, APPEAL TO BOARD OF VETERANS' APPEALS 1 (2015), <http://www.va.gov/vaforms/va/pdf/VA9.pdf> [hereinafter FORM 9].

<sup>159</sup> FORM 9, *supra* note 158, at 1.

<sup>160</sup> Veterans may request to have their local office review new evidence before it is submitted to the BVA. See Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 501, 126 Stat. 1165 (2012); APPEAL PROCESS OVERVIEW, *supra* note 155, at 10.

<sup>161</sup> See 38 U.S.C. § 5902 (2012); Telephone Interview by Connie Vogelmann with Steven Reiss, Veterans Law Judge, Bd. of Veterans' Appeals, (July 21, 2016).

<sup>162</sup> 38 C.F.R. § 14.635 (2012).

<sup>163</sup> BVA FISCAL YEAR 2015, *supra* note 147, at 27.

<sup>164</sup> *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998); see also *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000).

<sup>165</sup> 38 C.F.R. § 3.103 (2012) ("Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to a claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.")

<sup>166</sup> 38 C.F.R. § 20.1304(a) (2012).

<sup>167</sup> *Washington v. McDonald*, 592 Fed. Appx. 941, 943 (Fed. Cir. 2014) (citing *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004)).

and which would be advantageous to the claimant's position."<sup>168</sup> Upon finding that there is insufficient evidence to support a claim, the VLJ may leave the case open until such evidence is obtained, for up to sixty days.<sup>169</sup>

If the BVA denies a veteran's claim, the veteran may appeal to the Court of Appeals for Veterans Claims (CAVC) by filing a Notice of Appeal within 120 days of the date of the BVA's decision.<sup>170</sup> The CAVC is an Article I court with exclusive jurisdiction over BVA appeals.<sup>171</sup> The CAVC reviews a designated record of BVA hearings.<sup>172</sup> If the CAVC affirms the Board's determination, the veteran may appeal to the United States Court of Appeals for the Federal Circuit.<sup>173</sup>

## 2. Statutory and Regulatory Framework

Several statutes and regulations govern the composition of the Board and provide a procedural framework for BVA proceedings.

The formation, composition, and responsibilities of the Board are detailed in 38 U.S.C. § 7101-02. The Board's jurisdiction extends to "all questions of law and fact necessary to a decision by the Secretary...that affects the provision of benefits...to veterans or the dependents or survivors of veterans."<sup>174</sup> The BVA may only decide an appeal after providing an opportunity for a hearing to the appellant. Appellants can request that a hearing be in person,<sup>175</sup> but hearings may be held via video conference as well.<sup>176</sup>

The Secretary must make "reasonable efforts to assist" claimants in obtaining evidence needed to substantiate their claims for benefits.<sup>177</sup> In disability compensation claims, this includes helping claimants to obtain medical records and providing medical examinations, if needed.<sup>178</sup> Furthermore, the statute specifies that if there is an "approximate balance" of positive and negative evidence regarding a material issue, the agency "shall" give the benefit of the doubt to the claimant.<sup>179</sup> The statute also authorizes Veterans Services Organizations (VSOs) to provide representation in benefits cases.<sup>180</sup>

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<sup>168</sup> 38 C.F.R. § 3.103.

<sup>169</sup> 38 C.F.R. § 20.709 (2012); 38 U.S.C. § 5103A(a)(1) (2012).

<sup>170</sup> U.S. CT. OF APP. FOR VETERANS CLAIMS, FORM 1, NOTICE OF APPEAL (2009), [http://www.uscourts.cavc.gov/documents/NOA\\_Consent\\_Combined-Form.pdf](http://www.uscourts.cavc.gov/documents/NOA_Consent_Combined-Form.pdf).

<sup>171</sup> 38 U.S.C. §§ 7251-7252 (2012); 38 U.S.C. § 7266(a) (2012).

<sup>172</sup> See APPEAL PROCESS OVERVIEW, *supra* note 155, at 1.

<sup>173</sup> 38 U.S.C. § 7292(a) (2012).

<sup>174</sup> 38 U.S.C. § 511 (a) (2012); 38 U.S.C. § 7104 (2012) (granting decisional authority to the BVA).

<sup>175</sup> 38 U.S.C. § 7107(d)(1) (2012).

<sup>176</sup> *Id.* § 7107(e)(1).

<sup>177</sup> 38 U.S.C. § 5103A(a) (2012).

<sup>178</sup> *Id.* § 5103A(c).

<sup>179</sup> 38 U.S.C. § 5107(b) (2012).

<sup>180</sup> 38 U.S.C. § 5902(c)(1) (2012).

Extensive guidance for BVA hearings and appeals can be found in BVA regulations at 38 C.F.R. Parts 19 and 20. Hearings are non-adversarial,<sup>181</sup> and a hearing’s purpose is to allow the claimant to introduce into the record “any available evidence which he or she considers material, and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent.”<sup>182</sup> VLJs may question witnesses with the intent to “explore fully the basis for claimed entitlement,” but not to refute testimony or discredit the witness.<sup>183</sup> VLJs have considerable discretion in hearings, and hearing procedure is not limited by formal rules of evidence. Instead, “reasonable bounds of relevancy and materiality will be maintained.”<sup>184</sup> Pre-hearing conferences are contemplated to clarify the issues to be considered or to take other steps to make the hearing “more efficient and productive.”<sup>185</sup>

### 3. Resources Available to Self-Represented Parties

#### a. Structural and Procedural Benefits

BVA procedures provide significant assistance to self-represented parties. Claimants are entitled to a pre-hearing conference,<sup>186</sup> during which the VLJ tries to make the claimant feel more comfortable and able to present his or her case.<sup>187</sup> At the pre-hearing conference, the VLJ works to establish stipulated facts, identify issues on appeal, and make rulings on evidence admissibility.<sup>188</sup>

At the hearing, the VLJ determines the relevance of the evidence offered by the claimant independent of any formal rules of evidence.<sup>189</sup> VLJs must give veterans the “benefit of doubt” on an issue if the factors are otherwise balanced.<sup>190</sup> If there is insufficient evidence on the day of the hearing before the BVA, the VLJ can choose to keep the record open to allow for the collection of additional evidence.<sup>191</sup> The VLJ may also order independent medical opinions at the Board’s discretion<sup>192</sup> or at the request of the claimant.<sup>193</sup> The VA absorbs the costs of obtaining such an opinion and sends any new medical testimony directly to the claimant.<sup>194</sup> The VLJ’s

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<sup>181</sup> 38 C.F.R. § 20.700(c) (2012).

<sup>182</sup> 38 C.F.R. § 3.103(c)(2) (2012).

<sup>183</sup> *Id.*

<sup>184</sup> 38 C.F.R. § 20.700(c).

<sup>185</sup> 38 CFR § 20.708 (2012).

<sup>186</sup> 38 C.F.R. § 20.708 (2012).

<sup>187</sup> Interview with Steven Reiss, *supra* note 161.

<sup>188</sup> 38 C.F.R. § 20.708.

<sup>189</sup> 38 C.F.R. § 20.700(c) (2012).

<sup>190</sup> 38 U.S.C. § 5107(b) (2012).

<sup>191</sup> 38 C.F.R. § 20.709 (2012).

<sup>192</sup> 38 C.F.R. § 20.901 (2012).

<sup>193</sup> 38 C.F.R. § 20.902 (2012).

<sup>194</sup> 38 U.S.C. § 7109 (2012).

decision is not bound by precedent established in other cases,<sup>195</sup> so every decision is unique to the particular claimant.<sup>196</sup>

Deadlines for forms and evidence are also flexible for claimants who demonstrate good cause.<sup>197</sup> Claimants can submit additional evidence at nearly any point in the appeal process;<sup>198</sup> if a claimant misses the deadline to submit evidence to the BVA in advance of the hearing, he or she can introduce evidence for the first time at the hearing or show good cause for the delay.<sup>199</sup> Even if the claimant fails to appear for a hearing, the VA may assign a new hearing if the claimant can show good cause for his or her absence.<sup>200</sup>

b. Web and Electronic Assistance

BVA provides a number plain language resources on its website that, although not explicitly directed toward self-represented parties, would provide significant assistance to them. For instance, the 13-page “How Do I Appeal” booklet explains the appeal process to claimants. The booklet utilizes large text and bullet points, contains graphics, uses direct pronouns and short and simple sentences, and provides links to claimants to help them file an appeal.<sup>201</sup> BVA’s home-page also features a “Veterans Appeals Process Briefing” document that explains, in simplified terms, the appeals process at VA and BVA. The document uses bullet points and diagrams to present the information in an easy-to-digest manner.<sup>202</sup> Finally, BVA’s website includes a Frequently Asked Questions page that provides answers to common questions, with links to appropriate forms and documents.<sup>203</sup>

BVA’s homepage also has a “Connect with Us” box that provides several numbers for veterans to call with questions. The first number provided is BVA’s 1-800 line, which veterans can call to obtain information about their case.<sup>204</sup> As is discussed below, BVA is in the process of building a replacement to its current call center.<sup>205</sup>

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<sup>195</sup> 38 C.F.R. § 20.1303 (2012).

<sup>196</sup> 38 C.F.R. § 20.700(d) (2012).

<sup>197</sup> 38 C.F.R. § 20.303 (2012).

<sup>198</sup> 38 C.F.R. § 20.800 (2012).

<sup>199</sup> 38 C.F.R. § 19.37 (2012); 38 C.F.R. § 20.1304(a) (2012).

<sup>200</sup> 38 C.F.R. § 20.704(d) (2012).

<sup>201</sup> See HOW DO I APPEAL?, *supra* note 157.

<sup>202</sup> See generally U.S. DEP’T OF VETERANS AFFAIRS, THE VETERANS APPEALS PROCESS (2016), <http://www.bva.va.gov/docs/Veterans-Appeals-Process-Briefing.pdf>.

<sup>203</sup> See generally U.S. Dept’ of Veterans Affairs, *Frequently Asked Questions*, BD. OF VETERANS’ APPEALS, [http://www.bva.va.gov/Frequently\\_Asked\\_questions.asp](http://www.bva.va.gov/Frequently_Asked_questions.asp) (last updated June 15, 2016).

<sup>204</sup> See *Board of Veterans’ Appeals*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.bva.va.gov/index.asp> (last updated June 21, 2016).

<sup>205</sup> Telephone Interview by Connie Vogelmann with James Ridgway, Chief Counsel for Policy and Procedure, Bd. of Veterans’ Appeals (July 27, 2016).

### c. Future Developments

BVA is currently working on two major changes to its procedures and resources. While neither is specific to self-represented parties, both would provide significant assistance to them.

First, BVA is currently working to develop replacements to both its call-center and its online resources for veterans. The objective of the new system will be to make it easier for veterans to access the information in their case files, either by phone or through BVA's website. In the new system, veterans would be able to call a centralized VA call center; if needed, the call could be elevated to the BVA and a veteran could speak with a BVA representative about his or her case. BVA also hopes to provide veterans with access to their case file and other basic information on the website.<sup>206</sup>

Second, BVA is working with a number of VSOs, other stakeholders, and members of Congress to seek significant modifications to the BVA appeals process. The proposed modifications would create several "lanes" for veterans dissatisfied with their initial decision. In many cases, veterans could seek review of their claim by the Veterans Benefits Administration (VBA) instead of sending the case to BVA. This would allow for a simpler appeals process and a faster response time from the agency. It is hoped that such modifications would increase both the efficiency and quality of the appeals process.<sup>207</sup>

### 4. Recommendations for the Future

BVA's hearings are extremely, and uniquely, pro-claimant.<sup>208</sup> The duties placed on VLJs to assist claimants and the flexible and accommodating hearing procedures provide very significant assistance to self-represented parties. Nonetheless, BVA could make a few changes that might provide additional assistance to self-represented parties, including making revisions to BVA's website to make documents easier to locate, continuing existing efforts to make veterans' case information easily accessible by phone and on the agency's website, and publishing additional printed material specifically tailored toward assisting self-represented parties. Additional details can be found in Appendix A.

### ***B. Executive Office for Immigration Review***

The Executive Office for Immigration Review (EOIR) oversees the adjudication of immigration-related cases through a nationwide network of immigration courts, overseen by the Office of the Chief Immigration Judge (OCIJ).<sup>209</sup> In addition to removal proceedings, EOIR handles other cases involving immigration, including hearings related to employment of

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Interview with Steven Reiss, *supra* note 161.

<sup>209</sup> See generally EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL (2016), [https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice\\_manual\\_-\\_02-08-2016\\_update.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf).

unauthorized aliens, unfair employment practices related to immigration, and instances of fraud related to immigration.<sup>210</sup>

Between fiscal year 2011 and fiscal year 2015, EOIR received over 1.5 million immigration cases.<sup>211</sup> The agency completed 1.3 million cases during that time period, averaging 273,000 per year.<sup>212</sup> Well over 95% of cases were removal proceedings.<sup>213</sup> Between 2011 and 2015, respondents in slightly over half of all cases were represented for some portion of the case.<sup>214</sup>

### 1. Hearing Overview

Before a hearing, respondents receive written notice of their required appearance at the removal hearing, which includes the legal basis for the action.<sup>215</sup> The hearing notice includes the information necessary to advise the respondent of the date, time, and purpose of the next hearing.<sup>216</sup> Proceedings begin with an initial hearing, conducted in the language most comfortable to the respondent,<sup>217</sup> with translation services provided by EOIR.<sup>218</sup> At the initial hearing, an unrepresented party can request additional time to locate an attorney or other legal aid,<sup>219</sup> and immigration courts make available lists of pro bono service providers.<sup>220</sup> After the initial hearing, the judge will designate a date and time for the next hearing and advise the respondent that he or she must appear at the hearing to avoid an *in absentia* removal.<sup>221</sup> At subsequent hearings, a respondent may be asked to establish through witnesses and written evidence that he or she has a legal basis for a continued presence in the United States or consent to depart the U.S. voluntarily.<sup>222</sup> In general, self-represented parties are treated the same as represented parties in EOIR hearings. Although there has been guidance published for immigration judges in specific contexts, such as when dealing with unaccompanied alien

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<sup>210</sup> *Office of the Chief Administrative Hearing Officer*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer> (last updated Aug. 10, 2016).

<sup>211</sup> EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUSTICE, FY 2015 STATISTICS YEARBOOK A2 (2016), <https://www.justice.gov/eoir/page/file/fysb15/download>.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at B1.

<sup>214</sup> *Id.* at F1.

<sup>215</sup> 8 U.S.C. § 1229a(b)(5) (2012).

<sup>216</sup> Telephone Interview by Connie Vogelmann with Bernardo Rodriguez, Assistant Program Dir., Exec. Office for Immigration Rev. (July 26, 2016).

<sup>217</sup> *See* EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK, INITIAL HEARING – PRO SE 1 (2016), [https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Script\\_Initial\\_Hearing.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Script_Initial_Hearing.pdf) [hereinafter INITIAL HEARING - PRO SE]; IMMIGRATION COURT PRACTICE MANUAL, *supra* note 209, at 66.

<sup>218</sup> Interview with Bernardo Rodriguez, *supra* note 216.

<sup>219</sup> INITIAL HEARING – PRO SE, *supra* note 217, at 2.

<sup>220</sup> Interview with Bernardo Rodriguez, *supra* note 216.

<sup>221</sup> INITIAL HEARING – PRO SE, *supra* note 217, at 10.

<sup>222</sup> INITIAL HEARING – PRO SE, *supra* note 217, at 9.

children,<sup>223</sup> EOIR has not given specific guidance for judges in dealing with self-represented parties that is publicly available.<sup>224</sup>

## 2. Statutory and Regulatory Framework

A number of statutes and regulations govern EOIR removal proceedings. The Immigration and Nationality Act of 1952, and the 1965 amendments, constitute the majority of text governing removal proceedings.<sup>225</sup> Within the Act, 8 U.S.C. § 1229a provides broad guidelines for removal proceedings. The statute gives immigration judges the authority to administer oaths, receive evidence, examine and cross-examine aliens and witnesses, and specifies that hearings may take place in person or remotely.<sup>226</sup> The statute also grants aliens the right to representation, specifying that representation is at no expense to the government.<sup>227</sup> The burden of proof may rest either on the government or on the alien depending on the circumstances.<sup>228</sup> If an alien fails to appear at a hearing, he or she may be ordered removed in absentia.<sup>229</sup>

Additional guidance for removal proceedings can be found at 8 C.F.R. Parts 1003 and 1240. Immigration judges are directed to advise respondents of their right to representation, at no expense to the government, and must inquire as to whether respondents would like representation.<sup>230</sup> Immigration judges must also advise respondents of the availability of pro bono legal services and ensure that the respondent has received a list of pro bono legal service providers.<sup>231</sup> Finally, immigration judges must inform respondents that they will have an opportunity to examine and object to evidence against them, present evidence, and cross examine witnesses.<sup>232</sup> Immigration judges have broad authority over removal proceedings, and can receive into evidence any “material and relevant” oral or written statement.<sup>233</sup> An immigration judge can schedule a pre-hearing conference at his or her discretion and can order parties to file pre-hearing statements.<sup>234</sup>

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<sup>223</sup> Memorandum from David Neal, Chief Immigration Judge, Exec. Office for Immigration Rev., to All Immigration Judges, All Court Administrators, All Judicial Law Clerks, All Immigration Court Staff, Exec. Office for Immigration Rev. (May 22, 2007), <https://www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf>.

<sup>224</sup> In reviewing this document, EOIR noted that guidance likely exists, but was not able to provide additional detail at this time. EOIR will submit additional feedback prior to the publication of the final version of this document, and this statement will be revised if necessary.

<sup>225</sup> See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, §§ 1–6, 8–15, 17–19, 79 Stat. 911–920, 922 (2012); Immigration and Nationality Act of 1952, 66 Stat. 163 (codified as amended in sections of 8 U.S.C.).

<sup>226</sup> 8 U.S.C. § 1229a(b)(1) (2012).

<sup>227</sup> *Id.* § 1229a(b)(4).

<sup>228</sup> *Id.* § 1229a(c).

<sup>229</sup> *Id.* § 1229a(b)(5).

<sup>230</sup> 8 C.F.R. § 1240.10(a)(1) (2016).

<sup>231</sup> *Id.* § 1240.10(a)(2).

<sup>232</sup> *Id.* § 1240.10(a)(4).

<sup>233</sup> 8 C.F.R. § 1240.7(a) (2016).

<sup>234</sup> 8 C.F.R. § 1003.21 (2016).

The burden of proof in removal proceedings varies based on the specific circumstances. For example, if a respondent is charged with deportability, the government must prove by clear and convincing evidence that the respondent is deportable.<sup>235</sup> If an alien is in the United States without being formally admitted, the government must first demonstrate the alienage of the respondent. Unless the respondent demonstrates that he or she is lawfully in the United States, the respondent must prove that he or she “is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.”<sup>236</sup>

In issuing a decision, an immigration judge must include a finding on admissibility or deportability, and include his or her reasons for the finding.<sup>237</sup> Decisions may be oral or written.<sup>238</sup> A judge may rule against a respondent if the respondent fails to appear at a removal hearing.<sup>239</sup> In general, decisions of immigration judges are appealable to the Board of Immigration Appeals. However, an order of removal entered *in absentia* may not be appealed.<sup>240</sup>

Regulations also govern who may represent a respondent in removal proceedings.<sup>241</sup> This includes attorneys and non-attorneys, including law students, “reputable individual(s) of good moral character,” and “accredited representatives” of certain non-profit organizations.<sup>242</sup> Attorneys and accredited representatives must be registered with EOIR in order to represent respondents in removal proceedings.

### 3. Resources Available to Self-Represented Parties

#### a. Programmatic Assistance

EOIR operates a number of programs that provide assistance to self-represented parties through its Office of Legal Access Programs (OLAP). OLAP was established in 2000, with the goals of improving access to legal information and increasing representation rates for individuals in immigration proceedings.<sup>243</sup>

First, OLAP operates the Legal Orientation Program (LOP), under which EOIR funds nonprofit organizations to provide services to litigants in immigration proceedings.<sup>244</sup> The program provides group and individual orientation, self-help workshops, and pro bono referral for removal proceedings.<sup>245</sup> There are currently 38 LOP sites, 36 of which are located at ICE

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<sup>235</sup> 8 C.F.R. § 1240.8(a) (2016).

<sup>236</sup> *Id.* § 1240.8(c).

<sup>237</sup> 8 C.F.R. § 1240.12(a).

<sup>238</sup> *Id.*

<sup>239</sup> 8 C.F.R. § 1208.10 (2016).

<sup>240</sup> 8 C.F.R. § 1240.15.

<sup>241</sup> 8 C.F.R. § 1292.1 (2016).

<sup>242</sup> *Id.*

<sup>243</sup> EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP’T OF JUSTICE, FACT SHEET: EOIR’S OFFICE OF LEGAL ACCESS PROGRAMS 1 (2016),

<https://www.justice.gov/sites/default/files/pages/attachments/2016/08/08/olapfactsheet082016.pdf>.

<sup>244</sup> *See id.*

<sup>245</sup> *Id.*



detention centers. LOP has led to positive outcomes: participants are more likely to obtain representation and cases are completed more quickly, leading to fewer court hearings and ultimately to cost savings.<sup>246</sup>

Second, OLAP works with the Department of Health and Human Services' Office of Refugee Resettlement to run the Legal Orientation Program for Custodians of Unaccompanied Alien Children (LOPC). The program is similar to LOP, and provides orientation to the adult custodians of alien children involved in removal proceedings.<sup>247</sup> The program has been established in 15 sites around the country. In addition to the workshops and orientation programs provided by the program, LOPC also operates a national call center to expand the geographic reach of LOPC. Custodians can receive legal orientation over the phone and can obtain guidance in filing certain court forms.<sup>248</sup>

OLAP also recently launched an Immigration Court Helpdesk (ICH) program. Services began in five immigration courts in August 2016.<sup>249</sup> The program's goals are to orient non-detained individuals facing removal proceedings to the immigration court process and to provide information to respondents regarding possible remedies and available legal resources. ICH is modelled after LOP and LOPC, and services include both assistance to self-represented parties and information on pro bono resources.<sup>250</sup>

EOIR has also established Self-Help Legal Centers in select immigration court facilities.<sup>251</sup> These centers are facilitated by OLAP, but run by individual immigration courts.<sup>252</sup> The centers generally consist of bulletin boards with printed resources in English and Spanish, but they are not staffed.<sup>253</sup> These centers aim to facilitate respondent's access to legal information and provide guidance on the procedural aspects of the removal process. Self-Help Legal Centers provide both general legal information and information specific to the individual immigration court in question. The centers provide access to blank forms, as well a number of "how to" guides, compiled by several nonprofit and pro bono organizations. Although EOIR notes that it does not endorse these guides, the guides have been made publicly available on EOIR's website. The guides are generally written in plain language.<sup>254</sup>

OLAP runs several additional programs geared toward improving representation in immigration proceedings – including the Board of Immigration Appeals Pro Bono Project, the National Qualified Representative Program, the Baltimore Representation Initiative for

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 2.

<sup>248</sup> *Id.*

<sup>249</sup> Interview with Bernardo Rodriguez, *supra* note 216.

<sup>250</sup> FACT SHEET: EOIR'S OFFICE OF LEGAL ACCESS PROGRAMS, *supra* note 243, at 4.

<sup>251</sup> Exec. Office for Immigration Rev., *Self Help Materials*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/self-help-materials> (last updated May 17, 2016).

<sup>252</sup> Interview with Bernardo Rodriguez, *supra* note 216.

<sup>253</sup> *Id.*

<sup>254</sup> *Self Help Materials*, *supra* note 251.

Unaccompanied Children, and the Remote Access Initiative.<sup>255</sup> OLAP is also responsible for maintaining the List of Pro Bono Legal Service Providers for all immigration courts.<sup>256</sup>

b. Forms and Electronic Assistance

EOIR also provides online access to a variety of resources. First, EOIR makes basic forms available on its website, though e-filing is not currently supported. Available forms include those needed to file a change of address (EOIR-33/IC, “Alien’s Change of Address Form/Immigration Court”) and file for asylum (I-589, “Application for Asylum and For Withholding of Removal”), among others.<sup>257</sup> As is discussed below, the forms may prove challenging for use by self-represented parties.

EOIR makes a number of additional resources available online that may benefit self-represented parties. For instance, the “Self-Help Materials” portion of the website provides a number of documents – prepared by third party nonprofit organizations – to assist self-represented parties in answering specific questions, such as “Do You Need a Lawyer?” and “Did You Miss Your Hearing?”.<sup>258</sup> EOIR’s website also contains a “virtual law library” that provides self-represented parties the opportunity to read case law relevant to removal proceedings.<sup>259</sup> Finally, the agency published two explanatory documents, the “Immigration Court Practice Manual” and “Board of Immigration Appeals Practice Manual” on its website.<sup>260</sup> These documents provide explanation of the immigration court system and the Board of Immigration Appeals; detail removal procedures; and include information on logistics regarding evidence, filings, and representation. Some of the text is in plain language; however, both the volume of information and the depth is likely to be overwhelming to self-represented parties. The documents are 250 and 219 pages, respectively, and utilize legal terminology, acronyms, and statutory and regulatory citations to an extent likely to prove confusing to those not already familiar with EOIR’s procedures.<sup>261</sup>

4. Recommendations for the Future

EOIR is doing a lot to assist self-represented parties, particularly through its Office of Legal Access Programs. However, EOIR could improve access to legal resources for unrepresented parties in removal proceedings through a number of actions, including creating a

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<sup>255</sup> FACT SHEET: EOIR’S OFFICE OF LEGAL ACCESS PROGRAMS, *supra* note 243, at 2-3.

<sup>256</sup> Exec. Office for Immigration Rev., *Office of Legal Access Programs*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/office-of-legal-access-programs> (last updated Nov. 30, 2015).

<sup>257</sup> Exec. Office for Immigration Rev., *List of Downloadable Forms*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/list-downloadable-eoir-forms> (last updated Dec. 11, 2015).

<sup>258</sup> *Self Help Materials*, *supra* note 251.

<sup>259</sup> Exec. Office for Immigration Rev., *Virtual Law Library*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/virtual-law-library> (last updated Aug. 10, 2016).

<sup>260</sup> *See generally* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 209; EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP’T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL (2016), [https://www.justice.gov/sites/default/files/pages/attachments/2016/04/27/biapracticemanual\\_0.pdf#page=1](https://www.justice.gov/sites/default/files/pages/attachments/2016/04/27/biapracticemanual_0.pdf#page=1).

<sup>261</sup> *See supra* note 263.

web “portal” for self-represented parties, revising and expanding its online resources for self-represented parties, making it easier for self-represented parties to contact EOIR, and clarifying and expanding its guidance for Immigration Judges when dealing with self-represented parties. Additional details can be found in Appendix A.

### *C. Social Security Administration*

The Social Security Administration (SSA) administers programs related to retirement, survivor and disability insurance, and supplemental security income.<sup>262</sup> Administrative appeals are heard by the Office of Disability Adjudication and Review (ODAR),<sup>263</sup> with hearings conducted by over 1,400 administrative law judges (ALJs) in 169 hearing offices and five national hearing centers around the country.<sup>264</sup>

From fiscal year 2011-2014, SSA received over 800,000 cases at the hearing level annually, issuing between 680,000 and 820,000 decisions each year.<sup>265</sup> Over 99% of the cases heard by SSA pertain to Social Security Disability Insurance, Supplemental Security Income, or both.<sup>266</sup> About 77 percent of claimants in SSA hearings have representatives for some portion of the proceeding,<sup>267</sup> with the majority of represented claimants being represented by an attorney.<sup>268</sup>

#### 1. Hearing Overview

The Social Security Act created two programs—Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI)—in order to provide monetary benefits to persons who qualify based on age or disability.<sup>269</sup> Individuals may qualify for benefits if, among other things, they can meet the Social Security Act’s definition of disability.<sup>270</sup> The programs

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<sup>262</sup> *Organizational Structure of the Social Security Administration*, SOC. SEC. ADMIN., <https://www.ssa.gov/org/orgoc.htm> (last visited July 29, 2016); *About Us*, SOC. SEC. ADMIN., <https://www.ssa.gov/agency/> (last visited July 29, 2016).

<sup>263</sup> There are several levels in SSA’s hearing and appeals process. Hearings are heard by the Disability Determination Service (DDS) in the first instance. Claimants can request review of this decision by DDS, called a “reconsideration determination.” A claimant who disagrees with the reconsideration determination can request a hearing before an administrative law judge at ODAR, heard de novo. A claimant can then request review by the Appeals Counsel, and can finally appeal to federal court. *See* SOC. SEC. ADMIN., PUB. NO. 05-10041, *THE APPEALS PROCESS* (2015), <https://www.ssa.gov/pubs/EN-05-10041.pdf>. This report uses “administrative appeals” to refer to cases before administrative law judges at ODAR.

<sup>264</sup> SOC. SEC. ADMIN., PUB. NO. 13-11700, *ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN* 2.80 tbl.2.F8 (2015), <https://www.ssa.gov/policy/docs/statcomps/supplement/2015/supplement15.pdf> [hereinafter 2015 STATISTICAL SUPP.]; *Hearing Office Locator, Office of Disability Adjudication and Review*, SOC. SEC. ADMIN., [https://www.ssa.gov/appeals/ho\\_locator.html#&sb=0](https://www.ssa.gov/appeals/ho_locator.html#&sb=0) (last visited July 29, 2016).

<sup>265</sup> 2015 STATISTICAL SUPP., *supra* note 264, at 2.81 tbl.2.F9.

<sup>266</sup> *Id.*

<sup>267</sup> HAROLD J. KRENT & SCOTT MORRIS, *ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS* 7 (2013), [https://www.acus.gov/sites/default/files/documents/Achieving\\_Greater\\_Consistency\\_Final\\_Report\\_4-3-2013\\_clean.pdf](https://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Final_Report_4-3-2013_clean.pdf).

<sup>268</sup> SOC. SEC. ADVISORY BD., *ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS* 60 fig.55 (2012), <http://www.lb7.uscourts.gov/documents/1-11-CV-00224.pdf>.

<sup>269</sup> 42 U.S.C. §§ 401(b), 1381.

<sup>270</sup> *Id.* § 423(d).

share the same definition of disability: the inability “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”<sup>271</sup> Every year, millions of people apply for SSDI and SSI benefits, and SSA has created what may be the world’s largest adjudicative system to process these claims.<sup>272</sup>

In order to receive benefits, an individual must first apply with SSA. Claimants can do so in-person at a SSA field office, online, by telephone, or by mail.<sup>273</sup> Once an application is received by the SSA field office and certain technical requirements are met, the case is sent to a federally funded state Disability Determination Service (DDS) for the initial steps in the adjudication process.<sup>274</sup> In most states, a team consisting of a state disability examiner and a state agency medical and/or psychological consultant makes an initial disability determination on behalf of SSA.<sup>275</sup> If the first DDS team denies an individual’s initial claim, in most states the claimant may seek reconsideration by another DDS team.<sup>276</sup>

A claimant who is dissatisfied with the outcome of the reconsideration determination at the state DDS level may, in turn, request a hearing before ODAR.<sup>277</sup> The ALJ reviews the case *de novo* and may award benefits based on the written record or decide the claim after an adjudicative hearing conducted in person, by video teleconference, or, under extraordinary circumstances, by telephone.<sup>278</sup> Although SSA does not take a position on whether or not a claimant should have an attorney in agency hearings, ALJs ensure both that claimants are aware that they have a right to representation and that they understand that attorneys generally work on a contingent fee basis.<sup>279</sup> In hearing the case, the ALJ may consider additional medical examinations, vocational or medical expert testimony, or other non-medical evidence, as well as question the claimant or other witnesses.<sup>280</sup> In contrast to most administrative adjudications, these hearings are non-adversarial.<sup>281</sup> ALJs have an affirmative duty to develop the record

<sup>271</sup> *Id.* §§ 423(d)(1)(A), 1382c(a)(3)(A).

<sup>272</sup> *See Securing the Future of the Disability Insurance Program: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways & Means*, 112th Cong. 1 (2012) [hereinafter *Astrue Testimony*] (statement of Michael Astrue, Comm’r, Soc. Sec. Admin.), [http://waysandmeans.house.gov/uploadedfiles/mikeastrue\\_ss\\_6\\_27\\_12.pdf](http://waysandmeans.house.gov/uploadedfiles/mikeastrue_ss_6_27_12.pdf); *see also* Heckler v. Campbell, 461 U.S. 458, 461 n.2 (1983) (quoting JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS xi (1978)); SOC. SEC. ADMIN, APPENDIX E: SSA DISPOSITION COUNT BY REPRESENTATION (FY 2005-2011) A-9 (Sept. 28, 2012) (chart provided by SSA detailing annual number of dispositions from 2005 to 2011); *Information About SSA’s Office of Disability Adjudication and Review*, SOC. SEC. ADMIN., [https://www.ssa.gov/appeals/about\\_odar.html](https://www.ssa.gov/appeals/about_odar.html) (last visited July 29, 2016).

<sup>273</sup> *See* 20 C.F.R. §§ 404.614, 416.325.

<sup>274</sup> *See Id.* § 404.1613-18, 416.1013-18.

<sup>275</sup> *See Id.* § 416.1615; *see also* 42 U.S.C. § 421(a) (2012) (allowing states to make initial disability determinations).

<sup>276</sup> *See* 20 C.F.R. § 404.907, 416.1407; *Astrue Testimony*, *supra* note 272, at \*1.

<sup>277</sup> *See* 20 C.F.R. § 404.929-30; § 416.1429-30; *Astrue Testimony*, *supra* note 272, at \*1.

<sup>278</sup> 20 C.F.R. § 404.929, 416.1429; *Astrue Testimony*, *supra* note 272.

<sup>279</sup> Interview with Representatives from the Soc. Sec. Admin., *supra* note 397. *See also* HALLEX I-2-6-52.

<sup>280</sup> *See* 20 C.F.R. § 404.929-61; § 416.1429-61.

<sup>281</sup> 20 C.F.R. § 404.900(b), 416.1400(b). The Department of Veterans Affairs (“VA”) is the other most notable example. *See, e.g.*, Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (discussing “the historically non-adversarial system of awarding benefits to veterans” and stating that “[t]his court and the Supreme Court both have

irrespective of whether or not the claimant has representation, and many courts have found that ALJs have a heightened duty in cases with self-represented claimants.<sup>282</sup>

If a claimant is dissatisfied with an ALJ's decision, he or she may request Appeals Council review.<sup>283</sup> In deciding whether to review a case, the Appeals Council considers all the evidence in the hearing record, and may consider additional evidence in certain circumstances.<sup>284</sup> If the Appeals Council denies a claimant's request for review, the ALJ's decision becomes SSA's final decision, and the claimant may seek judicial review in federal court based on the full administrative record.<sup>285</sup>

## 2. Statutory and Regulatory Framework

Congress delegates broad authority to SSA to "make rules and regulations and to establish procedures...which are necessary or appropriate to carry out [the] provisions [of this title]."<sup>286</sup> Congress authorizes SSA both to permit representation of claimants and to promulgate rules to guide such representation before SSA.<sup>287</sup> Congress requires SSA to notify claimants about their options to enlist representation, including providing information about organizations that offer free legal services.<sup>288</sup> Regardless of whether or not a claimant is represented, Congress requires SSA to develop the evidentiary record.<sup>289</sup>

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long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant"); *see also* *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (referring to proceedings before the VA as "informal and nonadversarial").

<sup>282</sup> *E.g.*, *Byes v. Astrue*, 687 F.3d 913, 915-16 (8th Cir. 2012) (same); *Hildebrand v. Barnhart*, 302 F.3d 836, 838 (8th Cir. 2002) (describing the duty of an ALJ to "fully and fairly develop[] the facts of the case"); *Thornton v. Schweiker*, 663 F.2d 1312, 1316 (5th Cir. 1981) (same); *see also* *Sims v. Apfel*, 530 U.S. 103, 111 (2000) (noting "ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits"); *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (noting adjudicator's duty to develop the facts). The ALJ's duty to develop the record is "less pronounced when . . . a claimant is represented by counsel." *Newcomb v. Astrue*, No. 2:11-CV-02GZS, 2012 WL 47961, at \*10 (D. Me. Jan. 6, 2012), *aff'd*, No. 2:11-CV-02-P-S, 2012 WL 206278 (D. Me. Jan. 24, 2012) (citing as examples, *Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991) and *Hawkins v. Chater*, 113 F.3d 1162, 1167-68 (10th Cir. 1997)).

<sup>283</sup> 20 C.F.R. § 404.967-68; § 416.1467-68. Note that "[t]he Act does not require administrative review of an ALJ's decision. If the AC issues a decision, it becomes [SSA's] final decision. If the AC decides not to review the ALJ's decision, the ALJ's decision becomes [SSA's] final decision." *Astrue Testimony*, *supra* note 272.

<sup>284</sup> 20 C.F.R. §§ 404.970(b), 416.1470(b).

<sup>285</sup> 42 U.S.C. §§ 405(g), 1383(c)(3); 20 C.F.R. 422.210. If the Appeals Council grants the claimant's request for review and issues a decision, the Appeals Council's decision becomes SSA's final decision. 20 C.F.R. §§ 404.981, 416.1481. The Appeals Council may also grant the claimant's request for review and remand the case to an ALJ. 20 C.F.R. §§ 404.977, 416.1477.

<sup>286</sup> 42 U.S.C. § 405(a) (2012); *see* 20 C.F.R. § 404.3 (2016).

<sup>287</sup> 42 U.S.C. § 406(a)(1) (2012); *see* 20 C.F.R. §§ 404.1705, 404.1740; *see also*, *GN 03910.001 Representation of Claimants*, SOC. SEC. ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0203910001> (last updated July 29, 2008), (providing an overview of process through which a claimant appoints a representative and how the representative is compensated); *GN 03910.010 Claimant's Right to Representation*, SOC. SEC. ADMIN., <https://secure.ssa.gov/apps10/poms.nsf/lnx/0203910010> (last updated July 12, 2012) (setting forth the SSA policy surrounding a claimant's appointing representation).

<sup>288</sup> 42 U.S.C. § 406(c); 20 C.F.R. § 404.1706.

<sup>289</sup> 42 U.S.C. § 423(d)(5)(B) (2012); 20 C.F.R. § 404.1512(d).

In its regulations, SSA tracks its statutory mandate by reiterating an ALJ’s duty to develop the record. As summarized in Frank Bloch’s treatise, SSA ALJs must “participate actively both before and at the hearing in developing written evidence and obtaining relevant testimony from the claimant and other witnesses.”<sup>290</sup> Such a duty to develop a full and complete record is “greatest . . . when a claimant is unrepresented. Under such circumstances, ‘a duty devolves on the hearing examiner to scrupulously and conscientiously probe into, inquire of, and explore for all of the relevant facts.’”<sup>291</sup>

In order to facilitate the appointment of a representative, SSA requires its ALJs to notify self-represented claimants of their right to representation through both a written letter and during the ALJ’s opening statement at the hearing.<sup>292</sup> SSA also “maintain[s] a representation referral list of legal referral services [and] legal services organizations.”<sup>293</sup>

If a claimant proceeds without representation, SSA’s regulations provide for additional safeguards. For example, self-represented claimants can request a change of the time or place of a hearing based on their representation status because they could not “respond to the notice of hearing because of any physical, mental, educational, or linguistic limitations.”<sup>294</sup>

### 3. Resources Available to Self-Represented Parties

#### a. Structural and Procedural Benefits

As is discussed above, SSA hearings are non-adversarial.<sup>295</sup> Hearings before ALJs may be conducted in person, via video teleconferencing, or by telephone in extreme circumstances.<sup>296</sup> When setting the time and place of a hearing, SSA takes into consideration the circumstances of the claimant and the claimant’s ability to appear at a hearing.<sup>297</sup> Finally, as is discussed above, ALJs have an affirmative duty to develop the record.<sup>298</sup>

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<sup>290</sup> FRANK BLOCH, *BLOCH ON SOCIAL SECURITY* § 5:6 (2016).

<sup>291</sup> *Id.* (citing *Reefer v. Barnhart*, 326 F.3d 376, 3801); *accord* 20 C.F.R. §§ 404.1512(d), 416.912(d), 404.1520b, 416.920b).

<sup>292</sup> *See Representation of Claimants*, *supra* note 287 (laying out the procedure for informing claimants about their right to representation); 1 SOCIAL SECURITY ADMINISTRATION, *General Subjects*, in *HEARINGS, APPEALS, AND LITIGATION LAW MANUAL* §§ I-1-0-1, I-1-1-3 (2011), [https://ssa.gov/OP\\_Home/hallex/I-01/I-1-1-3.html](https://ssa.gov/OP_Home/hallex/I-01/I-1-1-3.html); 1 SOCIAL SECURITY ADMINISTRATION, *Administrative Law Judge Hearings*, in *HEARINGS, APPEALS, AND LITIGATION LAW MANUAL* §§ I-2-0-1, I-2-0-92 (2015), [https://www.ssa.gov/OP\\_Home/hallex/I-02/I-2-0-92.html](https://www.ssa.gov/OP_Home/hallex/I-02/I-2-0-92.html); *id.* § I-2-6-52, [https://ssa.gov/OP\\_Home/hallex/I-02/I-2-6-52.html](https://ssa.gov/OP_Home/hallex/I-02/I-2-6-52.html).

<sup>293</sup> *Advising Claimants Regarding Right to Representation*, SOC. SEC. ADMIN., <https://secure.ssa.gov/poms.nsf/lnx/0203910030> (last updated Sept. 30, 2011).

<sup>294</sup> 20 C.F.R. §§ 404.936(f)(2)(vi), 416.1436(f)(2)(vi); see also 42 U.S.C. § 1009(a)(1)(2012).

<sup>295</sup> *See supra* note 281 and accompanying text.

<sup>296</sup> 20 C.F.R. §§ 404.929, 416.1429.

<sup>297</sup> *See* 20 C.F.R. §§ 404.936.

<sup>298</sup> *See supra* note 282 and accompanying text.

b. Programmatic Assistance

SSA has over 160 hearing offices around the country where claimants can receive in-person assistance in filing an appeal with ODAR.<sup>299</sup> Field office employees can provide basic information and guidance on the appeals process,<sup>300</sup> and claimants can obtain a number of brochures that explain the hearing process, their right to appeal, and related issues.<sup>301</sup> SSA also provides a 1-800 number that claimants can call to obtain information while working on their appeals.<sup>302</sup> Once a claimant files an appeal, he or she receives a notice from the hearing office with additional detail about the appeals process.<sup>303</sup>

c. Forms and Electronic Assistance

SSA allows claimants to file appeals with ODAR electronically, and a substantial number of claimants make use of this resource: in 2015, 534,000 appeals were filed online.<sup>304</sup> Of those filings, the majority (435,000) were filed by representatives, with beneficiaries filing an additional 69,000 (13 percent).<sup>305</sup> The online application can be accessed by computer or mobile device and walks claimants through the process in a step-by-step fashion.<sup>306</sup> Before beginning, claimants can view and print a checklist of the information that will be asked of them during the application.<sup>307</sup> Claimants must provide personal information; medical information, including changes in their condition and history of treatment; and any other supporting documents.<sup>308</sup> If claimants do not have access to particular records at the time they submit the application, they can submit a cover sheet explaining the missing information.<sup>309</sup> The online application system has reduced the amount of paperwork in benefits appeals, and has created a faster, more efficient filing process when compared to paper applications.<sup>310</sup> Representatives can currently access

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<sup>299</sup> Interview with Soc. Sec. Admin. Representatives, *supra* note 397.

<sup>300</sup> *Id.*

<sup>301</sup> *See, e.g.*, SOC. SEC. ADMIN., PUB. NO. 05-10041, THE APPEALS PROCESS (2015), <https://www.ssa.gov/pubs/EN-05-10041.pdf>; SOC. SEC. ADMIN., PUB. NO. 05-10058, YOUR RIGHT TO QUESTION THE DECISION MADE ON YOUR CLAIM (2015), <https://www.ssa.gov/pubs/EN-05-10058.pdf>; SOC. SEC. ADMIN., PUB. NO. 05-10075, YOUR RIGHT TO REPRESENTATION (2015), <https://www.ssa.gov/pubs/EN-05-10075.pdf>; SOC. SEC. ADMIN., PUB. NO. 05-10090, YOUR RIGHT TO QUESTION THE DECISION TO STOP YOUR DISABILITY BENEFITS (2016), <https://www.ssa.gov/pubs/EN-05-10090.pdf>; SOC. SEC. ADMIN., PUB. NO. 70-10281, YOUR RIGHT TO AN ADMINISTRATIVE LAW JUDGE HEARING AND APPEALS COUNCIL REVIEW OF YOUR SOCIAL SECURITY CASE (2015), [https://www.ssa.gov/appeals/odar\\_pubs/70-10281.pdf](https://www.ssa.gov/appeals/odar_pubs/70-10281.pdf); SOC. SEC. ADMIN., PUB. NO. 05-11008, YOUR RIGHT TO QUESTION A DECISION MADE ON YOUR SUPPLEMENTAL SECURITY INCOME (SSI) CLAIM (2016), <https://www.ssa.gov/pubs/EN-05-11008.pdf>.

<sup>302</sup> Interview with Soc. Sec. Admin. Representatives, *supra* note .

<sup>303</sup> *Id.*

<sup>304</sup> Teleconference Website Demonstration with Social Security Administration Representatives (July 26, 2016).

<sup>305</sup> *Id.*

<sup>306</sup> *Disability Appeal: Getting Ready*, SOC. SEC. ADMIN., <https://secure.ssa.gov/iApplsRe/start> (last visited July 29, 2016).

<sup>307</sup> *Information You Need to Complete Your Disability Appeal*, SOC. SEC. ADMIN., <https://www.ssa.gov/hlp/iappeals/info-u-need.htm> (last modified Mar. 24, 2015).

<sup>308</sup> Website Demonstration with Social Security Administration Representatives, *supra* note 304.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

information about an appeal's status online, but claimants cannot yet do so. In the fall of 2016 SSA hopes to expand this service to allow claimants to check the status online as well.<sup>311</sup>

SSA provides a number of additional resources to claimants on its website. For instance, SSA makes many of its disability forms available online, including the application for disability insurance benefits, appointment of representative form, and forms related to medical treatment.<sup>312</sup> SSA also provides a number of pamphlets to claimants that explain the disability benefits application and appeal process.<sup>313</sup> These pamphlets explain different aspects of the hearing process in plain language, and also provide direct links to relevant forms. The pamphlets use short sentences, pronouns to speak directly to readers, and simple vocabulary.<sup>314</sup> SSA has made many of its resources available in plain language, and the agency views it as an ongoing effort to continue to improve the simplicity of its brochures, forms, and website.<sup>315</sup>

#### d. Judicial Training

SSA also provides significant training for its ALJs: a new ALJ receives three weeks of orientation at his or her hearing office, followed by four weeks of training at SSA's headquarters.<sup>316</sup> Learning how to handle hearings with self-represented parties is an important component of the training, and ALJs practice hearings with different scenarios involving self-represented parties. New ALJs attend supplemental training after one year, and more experienced ALJs attend three days of in-person training approximately every three to five years. ALJs also receive mandatory quarterly training on substance and procedure.<sup>317</sup>

#### e. Future Developments

The agency is in the process of introducing a pre-hearing conference pilot program which, among other things, will better assist self-represented parties.<sup>318</sup> The program began last year in five hearing offices and has been expanded to include about thirty offices. Senior attorneys in these hearing offices offer a pre-hearing conference for claimants, which is geared toward unrepresented parties. The goals of the conferences are to explain the hearing process and right to representation, obtain updated records information in preparation of the hearing, and to stress to the claimants the importance of remaining in contact and providing complete medical information to the agency. It is too early for concrete evidence as to the efficacy of the pre-hearing conferences, but the anecdotal evidence suggests that they have been received positively. The largest drawback to this pilot program is that it is resource intensive.<sup>319</sup>

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<sup>311</sup> *Id.*

<sup>312</sup> *Forms*, SOC. SEC. ADMIN., [www.ssa.gov/forms](http://www.ssa.gov/forms) (last visited July 29, 2016).

<sup>313</sup> *See supra* note 301.

<sup>314</sup> *See supra* note 301

<sup>315</sup> Interview with Soc. Sec. Admin. Representatives, *supra* note 397.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*



#### 4. Recommendations for the Future

SSA is clearly taking steps to aid self-represented parties. Between its heightened duties on hearing officers to provide assistance to self-represented parties and its online appeals process, self-represented parties receive significant assistance from SSA. However, several changes to its online resources – including better organization of existing resources for self-represented claimants, revision of online forms, and creation of a “portal” for claimants to use to access their appeals – would provide additional assistance to self-represented claimants in SSA proceedings. Additional details can be found in Appendix A.

#### ***D. United States Department of Agriculture National Appeals Division***

The United States Department of Agriculture’s National Appeals Division (NAD) is an independent organization within USDA,<sup>320</sup> and the Director of NAD reports directly to the Secretary of Agriculture.<sup>321</sup> NAD handles appeals from adverse decisions issued by the Farm Service Agency, Natural Resources Conservation Service, Risk Management Agency, and the three Rural Development agencies.<sup>322</sup> Cases heard by NAD include appeals of rejection of farm loans, acceleration of mortgages, or denial of program payments or assistance.<sup>323</sup>

NAD heard a total of about 7,400 cases between October 2011 and June 2016.<sup>324</sup> Just over half the cases came from Rural Development, and another quarter from the Farm Service Agency.<sup>325</sup> NAD does not track whether appellants in those cases were self-represented. However, Jim Murray, Deputy Director of NAD, estimated that about 75% of appellants were either represented themselves or were represented by a family member or friend without legal experience. About 15% of claimants were represented by professional non-lawyer representatives, and the remaining 10% by lawyers.<sup>326</sup>

#### 1. Hearing Overview

The appeal process begins when a participant receives an adverse determination by an agency within the USDA.<sup>327</sup> With the adverse decision, parties receive notice informing them of their right to appeal.<sup>328</sup> NAD works with many of the major agencies within its jurisdiction to standardize the notice provided to parties.<sup>329</sup> A party wishing to appeal can either fill out the form provided online and then mail it to one of NAD’s regional offices, or can use an online e-

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<sup>320</sup> 7 C.F.R. § 11.1 (2016).

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> NAT’L APPEALS DIV., U.S. DEP’T OF AGRIC., FACE TO FACE FAIRNESS (2003), [https://www.nad.usda.gov/NAD\\_Flyer.pdf](https://www.nad.usda.gov/NAD_Flyer.pdf).

<sup>324</sup> NAT’L APPEALS DIV., U.S. DEP’T OF AGRIC., FAVORABLE OUTCOME RATE BY AGENCY (2016).

<sup>325</sup> *Id.*

<sup>326</sup> Telephone Interview with Jim Murray, Deputy Dir, Nat’l Appeals Div., U.S. Dep’t of Agric. (July 27, 2016).

<sup>327</sup> Gary Condra & Merinda Condra, *The Basics of the USDA National Appeals Division*, 73 TEX. B.J. 396, 396 (2010).

<sup>328</sup> Interview with Jim Murray, *supra* note 326.

<sup>329</sup> *Id.*

filing system.<sup>330</sup> Prior to the hearing there is a pre-hearing conference, typically held by telephone,<sup>331</sup> in which parties may clarify issues, define the dispute, stipulate to facts or expected testimony, and handle other related issues.<sup>332</sup> The appellant can choose the form of the hearing – hearings can be held in person or by telephone, or they can be based on a review of the agency record and party submissions.<sup>333</sup> If the hearing is in person, the appellant has the right to have the hearing in his or her state of residence or at a location convenient to both the appellant and NAD.<sup>334</sup>

NAD hearing procedures are relatively informal. Although parties must submit briefs to NAD prior to the hearing, there is no required format for the briefs.<sup>335</sup> The Federal Rules of Evidence do not apply to NAD hearings, and Administrative Judges have discretion in determining what evidence to consider.<sup>336</sup> Although the Administrative Judge cannot act as an advocate for the appellant, Administrative Judges are tasked with “obtaining all facts relevant and material to the matters at issue.”<sup>337</sup> Administrative Judges very rarely exclude evidence,<sup>338</sup> and can choose to admit evidence broadly and evaluate relevancy at a later point in time.<sup>339</sup> NAD encourages its Administrative Judges to actively question self-represented parties to ensure all relevant evidence has been identified.<sup>340</sup>

## 2. Statutory and Regulatory Framework

NAD’s statutory mandate provides relatively few details about hearing procedure.<sup>341</sup> Congress directs that an appellant has the right to a NAD hearing within 45 days after a hearing is requested.<sup>342</sup> Hearings are in person, unless the appellant agrees to either a telephone hearing or review of the case record.<sup>343</sup> NAD’s Director and hearing officers, called Administrative Judges, are given explicit subpoena authority to require the attendance of witnesses and the production of evidence, and are given the power to administer oaths and affirmations.<sup>344</sup> Administrative Judges are not bound by findings of fact made by the agency.<sup>345</sup> The appellant bears the burden of proving that the adverse agency decision being appealed is erroneous,<sup>346</sup> but

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<sup>330</sup> Nat’l Appeals Div., *File an Appeal*, U.S. DEP’T OF AGRIC., [http://www.nad.usda.gov/app\\_appeal.html](http://www.nad.usda.gov/app_appeal.html) (last modified Jan. 24, 2013).

<sup>331</sup> Condra & Condra, *supra* note 327, at 397.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> THE NATIONAL APPEALS DIVISION GUIDE, *supra* note 394, at 16.

<sup>336</sup> Condra & Condra, *supra* note 327 at 397.

<sup>337</sup> THE NATIONAL APPEALS DIVISION GUIDE, *supra* note 394, at 36.

<sup>338</sup> Condra & Condra, *supra* note 327, at 397.

<sup>339</sup> THE NATIONAL APPEALS DIVISION GUIDE, *supra* note 394, at 36.

<sup>340</sup> *Id.* at 40.

<sup>341</sup> 7 U.S.C. § 6991–7002 (2012).

<sup>342</sup> *Id.* § 6997(b).

<sup>343</sup> *Id.* § 6997(c)(2).

<sup>344</sup> *Id.* § 6997(a)(2).

<sup>345</sup> *Id.* § 6997(c)(2).

<sup>346</sup> *Id.* § 6997(c)(4).

the burden itself is not specified. Once the appellant receives a determination from the Administrative Judge, he or she has 30 days to submit a request to NAD’s Director for review.<sup>347</sup> The Director conducts a record review, and can remand all or a portion of the decision to the Administrative Judge.<sup>348</sup> Final decisions issued by NAD are reviewable in district court.<sup>349</sup>

NAD’s regulations provide additional hearing instructions, and procedures for both hearings and record review are described in 7 C.F.R. § 11.8. The regulations give Administrative Judges the authority to request that the appellant submit a statement describing why the agency’s decision was incorrect, a copy of any document not in the agency record that the appellant plans to introduce at the hearing, and a list of expected witnesses.<sup>350</sup> NAD must provide at least fourteen days’ notice of the hearing to the appellant, the appellant’s representative (if any), and the agency.<sup>351</sup> Ex parte contacts are prohibited.<sup>352</sup> Administrative Judges “shall” hold a pre-hearing conference when appropriate to attempt to resolve the dispute or narrow the relevant issues.<sup>353</sup> If the appellant fails to appear at the hearing, the Administrative Judge may treat the appeal as a record review or dismiss the appeal.<sup>354</sup> The appellant has the burden of proving that the agency made an erroneous decision by a preponderance of the evidence.<sup>355</sup> The appellant can be represented by an attorney or non-attorney, and the representative must file a declaration with NAD identifying the representation relationship.<sup>356</sup>

### 3. Resources Available to Self-Represented Parties

#### a. Pre-Hearing and Hearing Assistance

NAD directs its Administrative Judges to provide assistance to self-represented parties during both hearings and pre-hearing conferences

Appellants gain most of their information about the NAD hearing process during the pre-hearing conferences,<sup>357</sup> which are significantly tailored toward self-represented parties. During pre-hearing conferences, Administrative Judges explain the process and inform appellants about NAD’s status as an independent adjudicatory body.<sup>358</sup> Administrative Judges are instructed to

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<sup>347</sup> *Id.* § 6998 (a)(1).

<sup>348</sup> *Id.* § 6998(b).

<sup>349</sup> *Id.* § 6999.

<sup>350</sup> 7 C.F.R. § 11.8(c)(2) (2016).

<sup>351</sup> *Id.* § 11.8(a)(2)

<sup>352</sup> *Id.* § 11.7(a)(1); *see also* Alan R. Malasky & William E. Penn, *USDA Reorganization – Fact or Fiction?*, 25 U. MEM. L. REV. 1161, 1185 (1995) (“This provision is extremely important and makes unlawful what has been, at least in perception, one of the major problems associated with the existing NAD appeals system—that the decisionmaker, after learning the appellant’s position in the administrative hearing, would go back to officials in the agency to counter any evidence presented by the appellant that tended to exculpate the appellant without allowing the appellant an opportunity to refute the additional information that the decisionmaker gathered from the agency.”).

<sup>353</sup> 7 C.F.R. § 11.8(c)(4).

<sup>354</sup> *Id.* § 11.8(c)(6)

<sup>355</sup> *Id.* § 11.8(e).

<sup>356</sup> *Id.* § 11.1, 11.6(c).

<sup>357</sup> Interview with Jim Murray, *supra* note 326.

<sup>358</sup> *Id.*

explain their role in the case, define the burdens of proof on the agency and the appellant, and explain the available hearing options.<sup>359</sup> Administrative Judges are also directed to respond to the parties' needs and statements, demonstrate active listening techniques, use non-technical and understandable vocabulary, foster a comfort level with the appellant that will carry over to the hearing, and treat all parties with courtesy and respect.<sup>360</sup> In general, Administrative Judges are instructed to use techniques that “reflect an Appellant-driven point of view.”<sup>361</sup>

Hearings are similarly accommodating of self-represented parties. NAD provides extensive training to its Administrative Judges on how to interact with self-represented parties.<sup>362</sup> NAD's guidance for its Administrative Judges can be found in a training packet entitled “Essential Administrative Adjudication Skills for the USDA.”<sup>363</sup> The packet cites ABA Model Judicial Code Rule 2.2 and its associated Comment 4, which stand for the proposition that – although judges should decide cases with “impartiality and fairness”<sup>364</sup> – they may make “reasonable accommodations” to ensure self-represented parties are fairly heard.<sup>365</sup> Although the packet does not clearly endorse the Model Rule and Comment, it does cite them as good practice for Administrative Judges. The packet covers several issues relating to self-represented parties: among other things, it aims to ensure that Administrative Judges allow latitude to self-represented parties in both procedural and evidentiary matters<sup>366</sup> and understand how best to communicate with self-represented parties.<sup>367</sup>

#### b. Forms and Electronic Assistance

NAD's website provides a range of options for potential appellants. The website is available in English and Spanish,<sup>368</sup> and provides an email address and phone number for appellants to use to contact NAD about their appeal.<sup>369</sup> The website provides a link to NAD's “Appeal Request Form,” and provides instruction for both e-filing and paper filing.<sup>370</sup> It also

<sup>359</sup> NAT'L APPEALS DIV., U.S. DEP'T OF AGRIC., PRE-HEARING GUIDE 3 (2007).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> Interview with Jim Murray, *supra* note 326.

<sup>363</sup> NAT'L APPEALS DIV., U.S. DEP'T OF AGRIC., ESSENTIAL ADMINISTRATIVE ADJUDICATION SKILLS FOR THE USDA 1 (2016) [hereinafter ADJUDICATION SKILLS].

<sup>364</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.2 (AM. BAR. ASS'N 2010).

<sup>365</sup> *Id.* r. 2.2 cmt. 4.

<sup>366</sup> ADJUDICATION SKILLS, *supra* note 363, at 13.

<sup>367</sup> ADJUDICATION SKILLS, *supra* note 363, at 17 (“Be aware of your use of legal jargon; avoid when possible.” “Explain legal terms when their use is necessary.”).

<sup>368</sup> *File an Appeal*, *supra* note 330 (see the link at the top of the form for the Spanish translation) (last visited July 29, 2016).

<sup>369</sup> *Id.* (scroll to the middle of the page and it says: “If you have a question about the NAD Efile process, send an email to nadinfo@usda.gov or contact Tracey LaBarge at (703) 305-1151,” right before it gets to the Spanish section of the page).

<sup>370</sup> *Id.*

offers an “e-Guide Tutorial,” for download, which provides basic information on NAD, instruction on how and where to file an appeal, and provides multiple ways to contact NAD.<sup>371</sup>

Although NAD provides few resources specifically for self-represented parties,<sup>372</sup> they have published a pamphlet, entitled “Face to Face Fairness,” that is given to interested parties at outreach events.<sup>373</sup> The pamphlet describes the process of filing an appeal and instructs parties as to where to find more information about NAD.<sup>374</sup>

Many of NAD’s materials are written in plain language. The “Appeal Request Form” meets many common plain-language guidelines. For instance, it uses pronouns to speak directly to readers, uses short and simple words, and avoids jargon.<sup>375</sup> The website conforms to certain plain language standards as well,<sup>376</sup> and uses pronouns and simple vocabulary.<sup>377</sup> However, the website does not meet other plain language recommendations for web content, in that NAD’s website does not display content in short paragraphs, or use an “inverted pyramid” style or bulleted lists to display information.<sup>378</sup> Other documents provided by NAD, including the “e-Guide Tutorial” and the “Face to Face Fairness” pamphlet, conform to plain language standards as well.<sup>379</sup>

#### 4. Recommendations for the Future

In many ways, NAD’s hearings are well-suited to self-represented parties. Hearings are relatively simple procedurally, much of NAD’s material is written in plain language, and Administrative Judges are directed to develop all potential issues in the case and provide other guidance that assists self-represented parties. However, NAD could make several changes that would provide additional assistance to self-represented parties. Specifically, NAD should ensure all existing resources for self-represented parties are available on its website and consider creating additional resources to walk self-represented parties through NAD’s hearing process. Additional details can be found in Appendix A.

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<sup>371</sup> NAT’L APPEALS DIV., *E-Guide Tutorial*, USDA, [http://www.nad.usda.gov/app\\_appeal.html](http://www.nad.usda.gov/app_appeal.html) (last modified Jan. 24, 2013) (on the right hand side there is a box that says “I Want To . . .”; then inside that box there is a link that says “e-Guide Tutorial (Word)”; click this and the document will download automatically).

<sup>372</sup> Email from Jim Murray, Deputy Director, Nat’l Appeals Div., U.S. Dep’t of Agric., to Connie Vogelmann, Attorney Advisor, Admin. Conference of the U.S. (June 23, 2016, 9:59 AM) (on file with recipient).

<sup>373</sup> *Id.*

<sup>374</sup> FACE TO FACE FAIRNESS, *supra* note 323.

<sup>375</sup> See NAT’L APPEALS DIV., U.S. DEP’T OF AGRIC., APPEAL REQUEST FORM (n.d.), <http://www.nad.usda.gov/Forms/Appeal%20Request%20Form.pdf>; see also PLAINLANGUAGE.GOV, FEDERAL PLAIN LANGUAGE GUIDELINES 46 (2001)

<http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/FederalPLGuidelines.pdf>.

<sup>376</sup> See *File an Appeal*, *supra* note 330.

<sup>377</sup> See *File an Appeal*, *supra* note 330; see also FEDERAL PLAIN LANGUAGE GUIDELINES, *supra* note 375, at 28.

<sup>378</sup> FEDERAL PLAIN LANGUAGE GUIDELINES, *supra* note 375, at 90-94.

<sup>379</sup> *E-Guide Tutorial*, *supra* note 371; FACE TO FACE FAIRNESS, *supra* note 323.

#### IV. Recommendations

As is described in the previous section, many administrative agencies have made significant efforts to assist self-represented parties in administrative hearings. However, there is room for improvement. Although each agency has individual statutory and regulatory requirements to meet, there are a number of generalizations that can be drawn from the experiences of the case study agencies. Furthermore, agencies could learn from the experiences of the courts in dealing with self-represented parties; as explored in Part II of this report, the courts have significant experience with self-represented parties, and can provide much insight in how to accommodate them.

The following recommendations seek to highlight several best practices identified throughout this report, and are drawn from both the court and administrative contexts. These recommendations are not intended to be one-size-fits-all, and not every recommendation will be appropriate for every administrative agency. These recommendations are intended to be modest, and to the extent that these recommendations require additional expenditure of resources by agencies they are likely to pay dividends in increased efficiency in the long term. The goal of these recommendations is to improve both the ease with which cases involving self-represented parties are processed and the consistency of the outcomes reached in those cases.

*Recommendation 1: Agencies should consider investigating and implementing triage and diagnostic tools to direct self-represented parties to the appropriate resources based on both the complexity of their case and their individual level of need. These tools can be used by self-represented parties themselves for self-diagnosis, or can be used by agency staff to improve consistency and accuracy of information provided.*

In many cases, although a party may realize that he or she has a problem in need of agency resolution, the party may not understand the steps needed to handle the claim. The party may be overwhelmed and confused about the proceeding, be unfamiliar with important terminology, and have a difficult time identifying and organizing the steps that are needed to file the claim. Diagnostic and triage tools can be used to help break a party's problem down into manageable steps, and can be useful in deciding the type and level of assistance that is needed by each party. Making these tools available on the "front end" prevents confusion and misunderstanding on the part of the self-represented party, and consequently can save significant agency time and resources over the course of the claim.

Triage and diagnostic tools may be quite simple and can be used directly by parties. For instance, a natural language questionnaire on an agency's website can help parties identify what type of claim they have, as well as identify which forms and other resources will provide them with assistance. As another example, checklists provided online or in person can guide a party through the steps needed to successfully file a claim or an appeal.

These tools can also reduce burdens on agency personnel. Questionnaires or checklists can be used by agency staff at regional offices or call centers and serve as a simple method for agency staff to provide standardized guidance. In particular, such standardized guidance can

reduce burdens on newer or less experienced staff members, ensuring that the information provided to parties is correct and consistent across claims.

*Recommendation 2: Agencies should strive to develop a continuum of services for self-represented parties, allowing parties to obtain assistance by different methods depending on need. In particular, agencies should (1) strive to make relevant information available on their websites, improve website functionality, and expand e-filing opportunities; (2) continue efforts to make forms and other important materials accessible to self-represented parties by making them available in plain language and in other languages as needed; and (3) provide a method for self-represented parties to communicate in “real-time” with agency staff.*

Self-represented parties come to the agency process with differing experiences and abilities, and with varying complexity of their underlying claim. To the extent that these factors and others vary widely, so too will the extent of guidance needed by any given party. Some parties need very little assistance and may be satisfied with information provided on a web-page or in a pamphlet; others may need a small amount of guidance from a call-center or in-person assistance; and still others may need extensive guidance in filing their claim.

In developing resources for self-represented parties, agencies should be cognizant of these issues, identify the most common services requested and used by self-represented parties, and seek to make those services available and improve them over time. Agencies should strive to make resources available in different formats and geared toward different levels of need. In the long run, both agencies and parties will benefit from the availability of a range of tools. Providing only as much assistance as is needed by a party – and no more – is an efficient use of resources for the agency, and saves time for the party as well.

In particular, agencies should strive to establish or improve several specific services for self-represented parties:

First, agencies should ensure that they have a clear and easy-to-use website providing guidance for self-represented parties. Information for self-represented parties should be clearly linked on the agency’s home-page, especially for agencies that hold large numbers of hearings or have a significant proportion of self-represented parties in their hearings. Agencies should consider creating a “portal” for self-represented parties. The “portal” should contain all information that is relevant for self-represented parties, and should contain only that information: documents primarily written with a different target audience should be placed elsewhere on the website to avoid confusion. Agencies should also strive to make e-filing available where possible, allowing parties to fill out and submit forms online, reducing time burdens for parties and paperwork burdens for agency personnel. Making information more readily available for parties will reduce the number of questions received by agency personnel and reduce the length of time needed by the party during each interaction.

Second, agencies should ensure that forms and other documents are written in a way that parties can easily understand, and agencies should make revisions to these documents on an ongoing basis. This recommendation does not contemplate use of different forms for self-represented parties, but instead encourages form instructions and text to be written in a way that

self-represented parties can understand. Documents should be drafted, and periodically reviewed, to ensure that they are of a length, reading level, and directness that can be understood by a self-represented party with a relatively low reading level or limited English proficiency. Similarly, agencies should ensure that important materials are translated into common languages, and that other translation services are available as necessary. Periodic review of “plain language” documents is essential. Documents that may seem clear when they are drafted may in fact prove to be confusing to self-represented parties and may need to be edited periodically to address common questions or sources of confusion. In making these edits, agencies should be cognizant of feedback from both self-represented parties and “front-line” employees. Agencies should ensure they receive input from those unfamiliar with the agency’s procedures: documents that make sense to people familiar with agency terms and phraseology may nonetheless be difficult to interpret for outsiders.

Finally, agencies should strive to make “real-time” communication available to self-represented parties. For agencies with significant numbers of branch offices, this communication could be in-person assistance; other agencies should consider making use of call-lines or chat services. The form of the assistance is less important than the availability of some type of real-time communication; although one-directional services such as web resources or pamphlets are necessary, real-time assistance is a key “second step” for self-represented parties to navigate administrative proceedings. Many parties can handle their cases with just a little extra guidance, but may be confused by a particular phrase or step, or may have a difficult time interpreting a checklist or guidance document without assistance. Providing this assistance upfront can address or clarify problems before they become compounded over time, providing significant time savings throughout the hearing process. While it is acknowledged that real-time communication can be expensive, agencies should consider making use of relatively low cost chat programs to communicate with self-represented parties. Chat programs themselves can be fairly cheap to establish, and an online chat system allows each agency staff member to field several inquiries simultaneously, reducing the overall number of staff needed for such a program.

*Recommendation 3: Agencies should provide training for adjudicators for dealing with self-represented parties, and provide explicit guidance for how judges should interact with self-represented parties in administrative hearings. Specifically, training should address how to deal with self-represented parties in very common, or especially problematic, situations.*

Adjudicators often struggle in dealing with self-represented parties and are often unclear on what information and advice they can share. Walking the line between providing enough assistance to give a self-represented party a fair hearing and maintaining both impartiality and the appearance of impartiality can prove challenging, and adjudicators should be given specific guidance in how to interact with self-represented parties. In particular, adjudicators may struggle in situations where an unrepresented party faces a trained government advocate, as well as in cases involving a party who is intellectually disabled, or one who is especially emotional or angry.

Each agency should work within its own statutory and regulatory framework to issue clear guidance to its adjudicators about what types of advice and information they can, and



cannot, provide to self-represented parties during hearings. This includes what type of follow-up questions judges may ask and how much guidance judges can provide to parties when telling them how to continue their claim. Where feasible based upon an agency's statutes and regulations, agencies should encourage adjudicators to engage more actively with self-represented parties during administrative hearings – this concept has gained increased traction in recent years, and seen success in both the court and agency contexts.

Such guidance will help improve consistency across hearings, and may provide significant gains in efficiency and consistency of outcome. Additional engagement and involvement by hearing officers may improve outcomes for self-represented parties by helping them better manage and proceed with their claims. Furthermore, by providing self-represented parties with a better understanding of what is expected of them during and after an administrative hearing, the hearing process may progress more smoothly and with greater efficiency.

*Recommendation 4: Agencies should seek to collect data on their services for self-represented parties, and continually evaluate and revise these services based on feedback from both self-represented parties and from agency personnel. Agencies should use these data to review and revise services for self-represented parties over time.*

Currently, statistics and data collection vary significantly from one agency to another, and not all agencies collect statistics about party representation. Agencies that do collect data struggle with defining “self-representation” and may categorize parties who gain or lose representation part-way through the hearing process differently.

Each agency should collect data on self-represented parties, and efforts should be made to standardize data collection across agencies. In particular, agencies should work together to create a standardized definition of a “self-represented party,” and collect data consistently using that definition. In developing a standardized definition and coordinating with other agencies, representatives should consider working in consultation with the Department of Justice's Office for Access to Justice. Agencies should consider collecting information on the number and percentage of self-represented parties in their hearings, collecting information on the reasons parties represent themselves, and evaluate outcomes for self-represented parties when compared with represented parties. Agencies should also collect information on which of their services and documents for self-represented parties are most frequently used, and identify common questions or sources of confusion with these services. Agencies should use this information to modify, add to, or remove resources for self-represented parties.

Gathering data is a crucial first step in creating a system that can be responsive to feedback and continually improved over time. As the Administrative Conference has recommended in the context of agency regulations, review of existing procedures is crucial to making improvement, and review can be best completed when a framework for assessing impact is established upfront.

*Recommendation 5: Agencies should strive to keep open lines of communication with other agencies and with courts, recognizing that in spite of differences in hearing procedures, other adjudicators have important and transferable insights in working with self-represented parties.*

*In doing so, agencies must be mindful of meeting the requirements of the Paperwork Reduction Act.*

Despite the fact that procedures for dealing with self-represented parties vary across agencies and between administrative hearings and court procedures, agencies face many of the same problems when dealing with self-represented parties, as do other adjudicators. Agencies can gain significant insight about self-represented parties by learning about the experiences of other agencies and courts, and sharing their own experiences in return. Sharing information and insight across adjudication systems can save agencies significant time and effort in developing resources to assist self-represented parties, and can help them avoid common problems and pitfalls. In this context as well, agencies should coordinate their efforts with those of the Department of Justice's Office for Access to Justice in order to identify and promote best practices.

In communicating with other entities, agencies must be mindful of meeting the requirements of the Paperwork Reduction Act.<sup>380</sup> The Paperwork Reduction Act seeks to minimize the burdens of federal agency information collection efforts on private parties, and gives the Office of Management and Budget (OMB) authority to oversee agency information collection when agencies seek to obtain information from parties outside the federal government. In many cases, agencies looking to collect information from private parties must go through a lengthy review process by OMB, though they can avoid PRA requirements by seeking information from nine or fewer respondents.<sup>381</sup> In communicating with outside entities, agencies must ensure they either comply with OMB review requirements, or that the communications in question fall outside the scope of the PRA.

*Recommendation 6: In the long term, agencies should strive to re-evaluate hearing procedures with an eye toward accommodating self-represented parties. Hearing procedures are often designed to accommodate attorneys and other trained professionals, and agencies should evaluate the feasibility of navigating their system as an outsider, and make changes – as allowed by their statutes and regulations – to simplify their process accordingly. Although creation of simplified procedures would benefit all parties, they would be expected to provide particular assistance to self-represented parties.*

It is acknowledged that this recommendation asks agencies to undertake significant effort in evaluating and analyzing their current procedures, as well as make changes that would cause significant short-term costs. However, in many cases, systemic changes may provide significant cost savings in the long run, and significantly improve outcomes for self-represented parties.

Many administrative systems, including pro-claimant systems implemented by federal agencies, were largely inspired by adjudication systems that can be navigated only by trained attorneys and other professionals. Systems that may seem straightforward to understand and

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<sup>380</sup> 44 U.S.C. § 3501-21 (2012).

<sup>381</sup> See Stuart Shapiro, *The Paperwork Reduction Act: Research on Current Practices and Recommendations for Reform*, ADMIN. CONFERENCE OF THE UNITED STATES, <https://www.acus.gov/sites/default/files/documents/Draft-PRA-Report-2-15-12.pdf>.

navigate by experienced agency representatives – who have become accustomed to their agency’s procedures – may prove extremely challenging for the uninitiated to interpret. Furthermore, agencies should keep in mind the limitations under which many self-represented parties are operating: many self-represented parties have mental or physical disabilities, limited English proficiency, and/or limited literacy. Furthermore, even the most well-educated and capable self-represented party may be under significant emotional strain throughout the hearing process, decreasing how much that individual can realistically be expected to understand or act upon.

The importance of creating an extremely simple system was emphasized repeatedly throughout the research for this report. Although cases may be factually or emotionally complicated for the party, only a small number are legally complicated, and most cases could be handled through extremely simplified procedures. Agencies should take note of courts’ efforts to implement simplified procedures in certain circumstances, and consider adopting an “opt-in” or “opt-out” system, in which most parties, both represented and unrepresented, would proceed with their case through a more simplified, informal procedure. Parties with particularly complicated cases, or with the financial resources for attorney representation, could choose to have their case heard through the more formal procedures. In designing simplified procedures, agencies should look to common practices in settlement proceedings or Alternative Dispute Resolution, including negotiation and dispute resolution techniques and, to the extent administrative procedures are adversarial, consider de-emphasizing the adversarial nature of hearings. Although creating simplified procedures would have high upfront costs, once established they would be likely to save the agency significant amounts of time and resources on a per hearing basis, as well as eliminate much of the cost associated with the delay and confusion that self-represented parties often experience.

## **Appendix A**

This appendix contains recommendations specifically tailored toward each case study agency discussed in Section III of this report. These recommendations are distinct from the broader recommendations highlighted the “Recommendations” section above, and are intended primarily for consideration by each agency on an individual basis. These recommendations have been sent to each agency for consideration, and are included here in case they may prove useful to other agencies by providing examples of specific changes agencies could make to provide assistance to self-represented parties.

These recommendations are mild in nature, and are intended to impose minimal burdens on the agency while at the same time providing significant benefit to self-represented parties. Although many of these recommendations may impose upfront costs on the agencies, they may nevertheless save the agencies time and money in the long term by creating a more efficient process and reducing confusion among the parties that seek agency assistance.

### ***A. Board of Veterans’ Appeals***

BVA should continue its current efforts to make veterans’ case information easily accessible, both by phone and on BVA’s website. Making information on case status easier for veterans to access will aid all claimants, but provide particular assistance to self-represented parties by allowing them to more easily track and manage their case. While developing such a system comes with significant upfront costs, making such information readily available – particularly through the website – may come with significant downstream savings. Such a system would allow parties to obtain case information with less burden to the agency on a per-case basis, and may help reduce confusion among parties that could lead to significant system-wide inefficiencies.

BVA should also work to publish additional printed material specifically tailored toward assisting self-represented parties. BVA should work with VSOs in creating these materials, and may want to request that these organizations draft the documents.<sup>382</sup> Such materials should be made readily available on BVA’s website.

BVA may also want to consider a number of revisions to its website. Although the website currently contains information that is useful for self-representation, the information may be difficult to find. First, on BVA’s website there are a number links to documents pertinent to self-representation that are inactive or broken.<sup>383</sup> BVA should periodically review its outward facing website and correct or remove such links. Second, many of the documents that would aid self-represented parties are hard to find, and navigating the website could be made more intuitive. Important documents on BVA’s homepage (including “Your Right to Appeal our

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<sup>382</sup> VSOs view it as their duty to interpret and translate BVA procedures for claimants. Interview with James Ridgway, *supra* note 205.

<sup>383</sup> The link at the bottom of the main BVA website that should link to Form 4107 begins with “vaww” instead of “www” and is therefore ineffective. Also, the link for “Appeals” under the “For Veterans” menu’s “Claims” tab on the BVA main website is inactive.

Decision,” and “Veterans Appeals Process Briefing”) require scrolling to find, and are located beneath a long description of BVA filled with statutory citations and acronyms. Furthermore, resources for self-represented parties are spread across several different portions of the site – for instance, relevant documents for self-representation can be found under both the “For Veterans” tab on the left-hand side of the page and the “Resources” tab on the right hand side. Not all documents that are important for self-represented parties can be found in both places, which may lead to self-represented parties failing to find important documents. Different documents in the “Resources” tab are intended for different audiences (e.g. “Frequently Asked Questions” versus “Chairman’s Annual Reports to Congress”), but the target audience is not specified and could lead claimants astray. BVA should also consider renaming some relevant links to be more intuitive for veterans to find. For instance, the “How Do I Appeal” Booklet provides an excellent guide for veterans, but is buried under a link entitled “Pamphlets: Appeals Process.” Resources that are likely to be particularly useful should be made as obvious as possible, and titled in such a way that veterans know instantly what resources they provide.

To deal with these issues, BVA might want to create an online “portal” for self-represented parties or for veterans interested in learning more about the appeals process. Such a portal should contain only documents intended for self-represented parties written in plain language; documents with a different target audience should be located elsewhere, so as not to be confusing for parties. Such a portal should also aim to compile all documents and resources that might be useful into one place – for instance, the portal should link to other VA-sponsored websites and blogs that might be useful for self-represented parties, like VA’s Vantage Point blog.<sup>384</sup>

### ***B. Executive Office for Immigration Review***

EOIR should consider creating an organized “portal” for self-represented parties, linked prominently on EOIR’s homepage and available in English and Spanish. Although EOIR has a “Self-Help Materials” page, the page cannot currently be easily accessed from EOIR’s homepage. Furthermore, the web-page as currently structured is not optimized for self-represented parties. The “Self-Help Materials” page has a list of materials along the right-hand side of the page, including the “Action Center,” “OCIJ Practice Manual,” “BIA Practice Manual,” “Immigration Judge Benchbook,” and “Virtual Law Library.” Although some of these resources are appropriate for self-represented parties (including the links provided in the “Action Center”), other resources are not. For instance, the Immigration Judge Benchbook states that it is a “tool for immigration judges,”<sup>385</sup> and contains scripts and template opinions for judges to use.<sup>386</sup> EOIR

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<sup>384</sup> See generally *Vantage Point*, U.S. DEP’T OF VETERAN AFFAIRS, [www.blogs.va.gov/VAntage/](http://www.blogs.va.gov/VAntage/) (last visited Aug. 18, 2016).

<sup>385</sup> Exec. Office for Immigration Rev., *Immigration Judge Benchbook*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/immigration-judge-benchbook> (last updated Mar. 3 2016).

<sup>386</sup> *Id.*

should make sure that resources for representatives and immigration judges are placed elsewhere on the website, so as to avoid causing confusion.

In addition, EOIR should consider revising its online forms. Although online forms can be a useful resource for self-represented parties, as currently presented EOIR's forms may prove challenging for self-represented parties to use. Parties may struggle to identify the appropriate forms, as forms are currently organized based on EOIR form number instead of by purpose or stage of the proceeding,<sup>387</sup> and many of the available forms are designed for use by attorneys or outside organizations (e.g. Form EOIR-56, "Request to be Included on the List of Pro Bono Legal Service Providers for Individuals in Immigration Proceedings"). Furthermore, once identified, the forms themselves may be difficult for self-represented parties to understand: although they were written with plain language principles in mind, forms provide a high density of information, and important information contains legal jargon, statutory and regulatory citations, acronyms, and other features that may prove problematic for self-represented parties.<sup>388</sup>

EOIR should also make it easier for self-represented parties to contact someone at the agency to request basic legal information about forms or other basic steps in filing a claim. Currently, although there is a "Contact Us" box linked on EOIR's Self-Help Materials page, it is not clear where respondents should go with basic questions. The first number in the "Contact" box is for the "Office of Communications and Legislative Affairs," which does not seem to be an appropriate contact for self-represented parties. Having one call-in number for self-represented parties – with a live person able to direct calls to the appropriate place – may provide significant assistance to self-represented parties and make the adjudication of cases more streamlined and efficient. EOIR should also consider making it possible for respondents to contact the agency via computer or mobile technology – this could be as simple as providing a contact email address or as complex as implementing a chat program to answer questions.

EOIR should also consider publishing a short but complete guide for self-represented parties. Information for self-represented parties is currently scattered across documents, and a significant amount of information is not in plain language. As a policy matter, EOIR does not draft guidance documents for respondents; however, EOIR does work with a number of third-party organizations to draft and publish such documents.<sup>389</sup> EOIR should work with these third party organizations to publish a comprehensive, plain-language guide for self-represented parties that has the approval of the agency. Such a guide could inform self-represented parties about court procedure, remedies, and rights afforded to them. With any such document, EOIR should

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<sup>387</sup> *List of Downloadable Forms*, *supra* note 257.

<sup>388</sup> *See, e.g.*, BD. OF IMMIGRATION APPEALS, U.S. DEP'T OF JUSTICE, FORM EOIR-26: NOTICE OF APPEAL FROM A DECISION OF AN IMMIGRATION JUDGE 3 (2015), <https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir26.pdf>. This page presents important explanatory material, but information is presented at a density and reading level that is likely to prove challenging for self-represented parties. In particular, the "Summary Dismissal of Appeal" box may be confusing for self-represented parties.

<sup>389</sup> Interview with Bernardo Rodriguez, *supra* note 216.

be mindful of the plain language and translation requirements of self-represented parties in immigration hearings.

EOIR may also want to consider making two changes to its hearings. First, EOIR may want to clarify or alter the guidance it gives to immigration judges concerning self-represented parties.<sup>390</sup> Immigration judges have received guidance instructing them to make special accommodations for unaccompanied alien children in immigration hearings,<sup>391</sup> and EOIR may want to consider making similar accommodations for self-represented parties. There is precedent for such accommodation: hearing officers in other administrative agencies have been directed – through Congressional direction (SSA),<sup>392</sup> agency regulation (SSA, BVA)<sup>393</sup> or informal agency guidance (NAD)<sup>394</sup> to provide special accommodations to self-represented parties, and the ABA has adopted guidance telling judges that similar accommodations in the court context are appropriate.<sup>395</sup>

Second, EOIR may want to revisit the issue of holding pre-hearing conferences. Pre-hearing conferences could be used to clarify issues that will be discussed at the hearing, ensure appropriate language and translation resources are available, and ensure the self-represented party knows what information he or she should provide and which burdens of proof will be placed on him or her. EOIR has tried pre-hearing pilots in the past, but such programs are no longer in use.<sup>396</sup> Given recent successes seen by other agencies in implementing pre-hearing conferences,<sup>397</sup> EOIR may want to revisit pre-hearing conferences, particularly in the context of self-represented parties. In doing so, EOIR may want to consider consulting with other agencies to learn more about existing successful practices in holding pre-hearing conferences. Although pre-hearing conferences have relatively high upfront costs, evidence from other agencies indicates that they may be an efficient and effective tool for providing assistance to self-represented parties. EOIR may want to consider establishing a pilot program to see whether downstream gains in efficiency would make such a program cost-effective.

### *C. Social Security Administration*

SSA should take steps to organize its resources for self-represented claimants into one location, and make that information as easy to access as possible. Information is currently scattered across documents, and existing resources available on SSA's website might prove confusing for claimants who find them. For instance, claimants could be confused upon finding

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<sup>390</sup> See *supra* note 224 and accompanying text.

<sup>391</sup> Memorandum from David Neal, *supra* note 223.

<sup>392</sup> 42 U.S.C. § 423(d)(5)(B) (2012).

<sup>393</sup> 30 C.F.R. § 20.700 (2016); 20 C.F.R. § 404.1512(d) (2016).

<sup>394</sup> NAT'L APPEALS DIV., U.S. DEP'T OF AGRIC., THE NATIONAL APPEALS DIVISION GUIDE 40 (2008).

<sup>395</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.2 cmt. 4 (AM. BAR ASS'N 2010).

<sup>396</sup> Interview with Bernardo Rodriguez, *supra* note 216.

<sup>397</sup> BVA has had significant success in offering pre-hearing conferences for claimants in its hearings and SSA has implemented a pilot program at several of its hearing offices. Interview with Steve Reiss, *supra* note 161. While SSA's pilot program is too new for analysis, early reports indicate success and the program is being expanded. Interview by Connie Vogelmann with Representatives from Social Security Administration (July 18, 2016).

the HALLEX and POMS;<sup>398</sup> these documents are available on SSA’s website, and provide detailed and lengthy guidance for SSA staff in SSA’s appeals process. SSA currently has no single guide that explains every step of the appeals process – including how to file the appeal, which forms are required for each level of appeal, and when the appeal must be filed – that is written with a lay audience in mind. Significant information is currently included in six brochures that explain the appeals process, but the brochures contain overlapping information and are not clearly distinct from each other.<sup>399</sup> One comprehensive guide, or a smaller number of documents that are more clearly distinct from each other, would provide significant clarity to self-represented claimants. A guide such as this should be located in a place that is easy for claimants to find.

Second, SSA could take steps to organize and identify forms for easier access by self-represented parties. SSA provides a list of 137 forms on its website, but the forms are not organized in a way a lay audience can interpret.<sup>400</sup> Nothing on the website indicates which forms to file for a particular benefit, or in which order they must be filed.<sup>401</sup> The forms also do a relatively poor job of explaining the process themselves – although they follow some plain language requirements,<sup>402</sup> they also contain verbatim information from laws like the Privacy Act and the Paperwork Reduction Act.<sup>403</sup> SSA might want to consider using “decision tree” software, utilizing plain language questions and answer choices to guide claimants toward the correct forms.

Finally, SSA should consider creating a “portal” for claimants to manage their appeals. Such a portal should contain only information written for self-represented parties and other claimants, and allow claimants to access and manage their appeals online. The portal could be modeled after the existing *my Social Security* portal, which allows individuals to manage their existing benefits,<sup>404</sup> and could either allow claimants to view status information on their appeals, or allow greater functionality, such as access to records. It would also be valuable for SSA to integrate these two portals – many claimants filing appeals will already be familiar with *my Social Security*, and much of their information is likely to already be in the online system. Creating a link between these two systems would create significant efficiencies for claimants, and subsequently for the agency.

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<sup>398</sup> HALLEX stands for the “Hearings, Appeals, and Litigation Law Manual,” and POMS stands for the “Program Operations Manual System.”

<sup>399</sup> *See supra* note 301.

<sup>400</sup> *See Forms*, *supra* note 312.

<sup>401</sup> *Id.*

<sup>402</sup> SOC. SEC. ADMIN., FORM SSA-3441-BK, DISABILITY REPORT – APPEAL (2015), <https://www.ssa.gov/forms/ssa-3441.pdf>.

<sup>403</sup> *See id.*; OFFICE OF DISABILITY ADJUDICATION, SOC. SEC. ADMIN., FORM HA-501-U5, REQUEST FOR HEARING BY ADMINISTRATIVE LAW JUDGE 2 (2015) available at <https://www.ssa.gov/forms/ha-501.pdf>.

<sup>404</sup> *My Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/myaccount> (last visited Aug. 1, 2016).



***D. United States Department of Agriculture National Appeals Division***

NAD should ensure that all existing resources for self-represented parties be made available on its website. For instance, parties may benefit from being able to access NAD's "Face to Face Fairness" pamphlet, which cannot currently be found online. NAD should also evaluate whether some of its resources with different target audiences might be useful for self-represented parties, and, if so, make them available on the website. For instance, the National Appeals Division Pre-Hearing Guide is not directed toward self-represented parties, but is easy to read and contains information that may nonetheless be useful for them.<sup>405</sup>

NAD should also evaluate whether it could generate or make available additional resources to benefit self-represented parties. For instance, NAD should consider drafting and posting example briefs online for self-represented parties: especially since there is no required format for briefs, self-represented parties may benefit from this additional guidance. NAD should also consider drafting and posting subpoena guidance online: parties in NAD hearings are allowed to subpoena witnesses for testimony and evidence, but may have no experience with the process.

Finally, NAD should consider publishing a guide written specifically for self-represented parties. Although many of NAD's documents are helpful to self-represented parties, there is no comprehensive resource to guide them through the appeals process. Self-represented parties would benefit from having a single document – available on NAD's "File an Appeal" webpage – that would guide them through the appeals process in a step-by-step fashion. Although much of this information is currently provided during the Pre-Hearing conferences, such a guide could reduce the burden placed on Administrative Judges to explain the process, and a written guide would serve as a useful reference for appellants throughout the appeals process.

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<sup>405</sup> See generally THE NATIONAL APPEALS DIVISION PRE-HEARING GUIDE, *supra* note 359.