



## **Administrative Conference Recommendation 2016-6**

### **Self-Represented Parties in Administrative Proceedings**

**Adopted December 14, 2016**

Federal agencies conduct millions of proceedings each year, making decisions that affect such important matters as disability or veterans' benefits, immigration status, and 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 proceedings can create challenges for both administrative agencies and for the parties seeking agency assistance. Further, the presence of self-represented parties raises a number of concerns relating to the consistency of 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 proceedings, and the Conference agreed. The working group, which operates under the umbrella of the Legal Aid Interagency Roundtable (LAIR), has been meeting since that time.<sup>2</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

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<sup>1</sup> 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 recommendation's use of the term "self-represented." Administrative agencies generally use the term "self-represented," in contrast to courts' use of the term *pro se*. Because this recommendation focuses on agency adjudication, it uses the term "self-represented," while acknowledging that the two terms are effectively synonymous.

<sup>2</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>.



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(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 proceedings 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. This recommendation, and its accompanying report,<sup>3</sup> arose in response to those concerns.<sup>4</sup>

While civil courts have long recognized and worked to address the challenges introduced by the presence of self-represented parties, agencies have increasingly begun to focus on issues relating to self-representation only in recent years. Agencies are undertaking numerous efforts to accommodate self-represented parties in their adjudication processes.<sup>5</sup> Yet quantitative information on self-representation in the administrative context is comparatively scarce, and there is much insight to be gained from the civil courts in identifying problems and solutions pertaining to self-representation. Although there are important differences between procedures in administrative proceedings and those in civil courts, available information indicates that the two contexts share many of the same problems—and solutions—when dealing with self-represented parties.

Challenges related to self-represented parties in administrative proceedings can be broken down into two main categories: those pertaining to the efficiency of the administrative proceeding and those relating to the outcome of the procedure.

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<sup>3</sup> Connie Vogelmann, *Self-Represented Parties in Administrative Hearings* (Sept. 7, 2016), <https://www.acus.gov/sites/default/files/documents/Self-Represented-Parties-Administrative-Hearings-Draft-Report.pdf>.

<sup>4</sup> This recommendation primarily targets the subset of administrative agencies that conduct their own administrative hearings. Components of a number of federal agencies—including HUD, HHS, and USDA—do not conduct hearings directly, and instead delegate adjudication responsibilities to state or local entities. Because the challenges facing these components are quite distinct, they are not addressed in this recommendation.

<sup>5</sup> *Id.* at 28–50.



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From an efficiency standpoint, self-represented parties' lack of familiarity with agency procedures and administrative processes can cause delay both in individual cases and on a systemic level. Delays in individual cases may arise when self-represented parties fail to appear for scheduled hearings, file paperwork incorrectly or incompletely, do not provide all relevant evidence, or make incoherent or legally irrelevant arguments before an adjudicator. In the aggregate, self-represented parties also may require significant assistance from agency staff in filing their claims and appeals, which can be challenging given agencies' significant resource constraints. Finally, self-represented parties may create challenges for adjudicators, who may struggle to provide appropriate assistance to them while maintaining impartiality and the appearance of impartiality. These problems are exacerbated by the fact that many agencies hear significant numbers of cases by self-represented parties each year.

Self-represented parties also may face suboptimal outcomes in administrative proceedings compared to their represented counterparts, raising issues of fairness. Even administrative procedures that are designed to be handled without trained representation can be challenging for inexperienced parties to navigate, particularly in the face of disability or language or literacy barriers. Furthermore, missed deadlines or hearings may result in a self-represented party's case being dismissed, despite its merits. Self-represented parties often struggle to effectively present their cases and, despite adjudicators' best efforts, may receive worse results than parties with representation.

Civil courts face many of these same efficiency and consistency concerns, and in response have implemented wide-ranging innovations to assist self-represented parties. These new approaches have included in-person self-service centers; workshops explaining the process or helping parties complete paperwork; and virtual services such as helplines accessible via phone, email, text, and chat. Courts have also invested in efforts to make processes more accessible to self-represented parties from the outset, through the development of web resources, e-filing and document assembly programs, and plain language and translation services for forms and other documents. Finally, courts have also used judicial resources and training to support



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judges and court personnel in their efforts to effectively and impartially support self-represented parties.

These innovations have received extremely positive feedback from parties, and early reports indicate that they improve court efficiency and can yield significant cost savings for the judiciary.<sup>6</sup> Administrative agencies have also implemented, or are in the process of implementing, many similar innovations.<sup>7</sup> For instance, some agencies make use of pre-hearing conferences to reduce both the necessity and the complexity of subsequent hearings.<sup>8</sup>

This recommendation builds on the successes of both civil courts and administrative agencies in dealing with self-represented parties and makes suggestions for further improvement. In making this recommendation, the Conference makes no normative judgment on the presence of self-represented parties in administrative proceedings. This recommendation assumes that there will be circumstances in which parties will choose to represent themselves, and seeks to improve the resources available to those parties and the fairness and efficiency of the overall administrative process.

The recommendation is not intended to be one-size-fits-all, and not every recommendation will be appropriate for every administrative agency. To the extent that this recommendation requires additional expenditure of resources by agencies, innovations are likely to pay dividends in increased efficiency and consistency of outcome in the long term.<sup>9</sup> The goals of this recommendation are to improve both the ease with which cases involving self-represented parties are processed and the consistency of the outcomes reached in those cases.

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<sup>6</sup> Richard Zorza, *Trends in Self-Represented Litigation Innovation*, in *FUTURE TRENDS IN STATE COURTS* 85 (Carol R. Flango et al. eds., 2006). See generally JOHN GREACEN, *THE BENEFITS AND COSTS OF PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS* (2009).

<sup>7</sup> Vogelmann, *supra* note 3, at 28–50.

<sup>8</sup> *Id.* at 32-33.

<sup>9</sup> See generally GREACEN, *supra* note 6.



## RECOMMENDATION

### Agency Resources

1. Agencies should consider investigating and implementing triage and diagnostic tools to direct self-represented parties to 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 the consistency and accuracy of information provided.
2. Agencies should strive to develop a continuum of services for self-represented parties, from self-help to one-on-one guidance, that will allow parties to obtain assistance by different methods depending on need. In particular, and depending on the availability of resources, agencies should:
  - a. Use websites to make relevant information available to the public, including self-represented parties and entities that assist them, to access and expand e-filing opportunities;
  - b. Continue efforts to make forms and other important materials accessible to self-represented parties by providing them at the earliest possible stage in the proceeding in plain language, in both English and in other languages as needed, and by providing effective assistance for persons with special needs; and
  - c. Provide a method for self-represented parties to communicate in “real-time” with agency staff or agency partners, as appropriate.
3. Subject to the availability of resources and as permitted by agency statutes and regulations, agencies should provide training for adjudicators for dealing with self-represented parties, including providing guidance for how they should interact with self-represented parties during administrative proceedings. Specifically, training should address interacting with self-represented parties in situations of limited literacy or English proficiency or mental or physical disability.



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### **Data Collection and Agency Coordination**

4. Agencies should strive to collect the following information, subject to the availability of resources, and keeping in mind relevant statutes including the Paperwork Reduction Act, where applicable. Agencies should use the information collected to continually evaluate and revise their services for self-represented parties. In particular, agencies should:
  - a. Seek to collect data on the number of self-represented parties in agency proceedings. In addition, agencies should collect data on their services for self-represented parties and request program feedback from agency personnel.
  - b. Seek to collect data from self-represented parties about their experiences during the proceeding and on their use of self-help resources.
  - c. Strive to keep open lines of communication with other agencies and with civil courts, recognizing that in spite of differences in procedures, other adjudicators have important and transferable insights in working with self-represented parties.

### **Considerations for the Future**

5. In the long term, agencies should strive to re-evaluate procedures with an eye toward accommodating self-represented parties. Proceedings are often designed to accommodate attorneys and other trained professionals. Agencies should evaluate the feasibility of navigating their system for an outsider, and make changes—as allowed by their organic statutes and regulations—to simplify their processes accordingly. Although creation of simplified procedures would benefit all parties, they would be expected to provide particular assistance to self-represented parties.