

Self Represented Litigants and Procedural Fairness

A Look In The Rearview Mirror as We
Navigate the Road Ahead

MJA Fall 2012 Conference
Bozeman, MT

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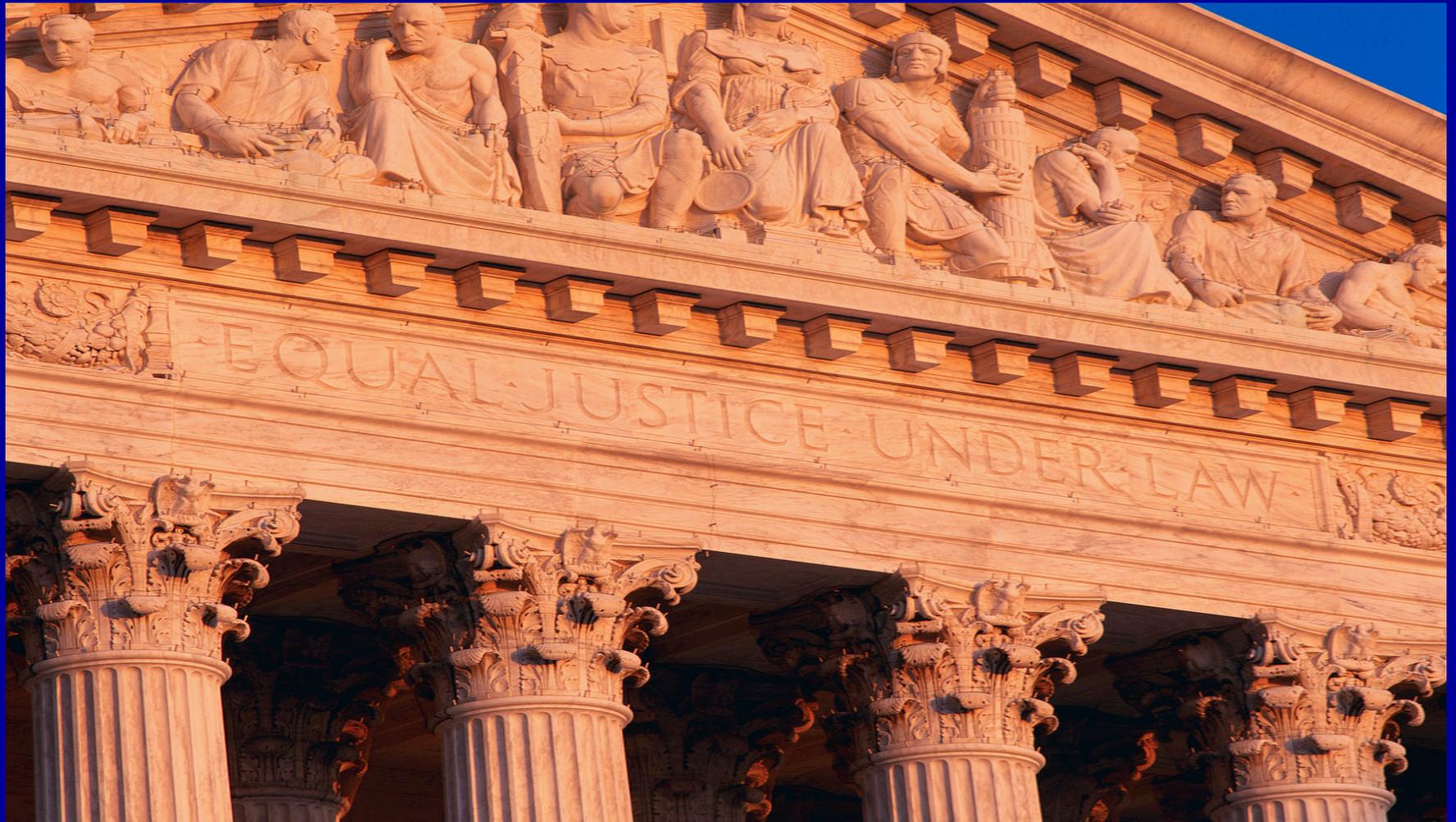
Please Not Another Lecture on SRLs and How To Handle Them!!

- Not a “how to” or “you should” pitch
- The goal is to reflect on where we have been, honestly assess how we have done, and prepare for the journey before us.
- Challenge is to look at our collective and individual performance as we do the work of a trial court judge.
- What does the future hold?

Why Me?

- Midwest Scandinavian who graduated from a mid west law school associated with a Methodist college
- 17 years in private practice- 11 in Montana
- 2000 appointed to Justice's Court
 - Presided until 2011
 - Commission on Courts of Limited Jurisdiction
 - 2005 became actively involved in SRL issues and related judicial education
 - 2008 realization that our “system” needed to change.

What Does It Mean?



Have We Provided Access to Justice or Just The Courthouse?

- Is there a difference?
- Whose definition?
- Does it matter?
- Is it our job?
- The “ethics” of it all?

Defining Equal Access To Justice For The Self Represented Litigant In The 21st Century

The Duty of All Judges to Ensure
Meaningful Access To Justice and
Procedural Fairness
For All Litigants

Why Are We Talking About This?

- Public trust and confidence in American institutions continues to decrease and the courts are no exception.
- The collapse of the economy has placed pressure, the likes of which we have not seen in our lifetime, on a system already overloaded.
- Previous court efforts focused on process and rarely on the quality of outcomes from the litigant's perspective.

Institution: Amount of Trust/Confidence Great Deal Some Only a Little None

Medical Profession	45.4%	42.2%	9.7%	2.7%
Local Police	42.6%	39.0%	12.3%	6.1%
U.S. Supreme Court	31.8%	44.7%	17.1%	6.4%
Office of the Governor	30.4%	46.5%	15.5%	7.6%
Public Schools	26.0%	49.4%	19.5%	5.0%
Courts in Your Community	23.2%	52.2%	16.9%	7.7%
State's Legislature	17.5%	58.3%	17.4%	6.9%
Media	10.4%	39.8%	31.1%	18.6%

Looking Back at the “problem”

- 2000 Montana Supreme Court establishes Commission on Self Represented Litigants and Equal Justice Task Force.
- 2005 Funding and establishment of Court Help Program: Self Help Centers and Pro Bono. efforts- followed by limited scope representation.
- Collaboration of commissions, bar, State Law Library, to develop broad range of resources.
- 2012 Supreme Court establishes Access to Justice Commission to consolidate efforts.

Education Followed

- Why “they” are here:
 - Poverty at various levels and definitions
 - Lack or loss of trust in lawyers
 - Lack of other resources (legal aid etc.)
 - Growing “do it yourself culture”
 - Expansion of information available online
 - A growing recognition of a “right” to access

The Judicial Response

- Development of written resources
 - Forms and “how to” manuals
 - Websites dedicated to resources
- Establishment of clinics and centers
 - Explanation of process only
- Pro Bono efforts by bar
 - Family and consumer law clinics
 - Fulfillment of hours by assisting poverty stricken

Judicial response continued

- Told to provide access to justice
- **Best practices** for dealing with the associated problems
 - Effective listening techniques
 - Patience required
 - Treat with dignity and respect
 - Do not be biased or prejudiced toward them because they don't have a lawyer.

The Unexpected

- In the mid 2000's the economy began to soften and in 2008 THE BOTTOM FELL OUT.
- **Poverty acquired a new face** and the number of SRL dramatically increased and has never stopped growing!!
- Expanded dramatically from COLJ to general jurisdiction and appellate courts, including the United States Supreme Court.

The System Reacts

- More forms in expanded areas
- More clinics and methods of delivery
- Increased pro bono efforts by the bar
- Broader qualification standards for available services
- Scope of training expanded across the board including entry level providers and clerks of court.
- Limited scope representation embraced

So Why Do “We” Still Struggle?

- We have provided, or enabled others to provide, “access” to information and the process.
- We have provided access to the courthouse and the courtroom.
- We have patiently listened and been respectful while giving the SLR his or her day in court.

What We Now Know

- Perceptions of satisfaction, equity, and fairness are formed more by the sense of procedural fairness than the outcome.
- The “system” has two “publics” and both are instrumental in overall perception and confidence in the entire institution:
 - Those with a direct experience (50%)
 - Those who form their opinion on outside information, the users, or from the media.

The Basis For Dissatisfaction

- The “institution” has focused on internal process, structure, and cost effectiveness.
- The “using public” remains focused on the quality of their experience and interaction with judges and providers to gauge their level of satisfaction.
- “Distributive justice” (winning or losing) is valued by judges more than procedural satisfaction.



The Issues We Face

- Self represented litigant cases account for an increasing number of the docket- particularly in family law matters (>65%).
- Yesterday's "trend" is today's reality.
- The public has embraced **the right** to access the system as SRL's.
- Future confidence and trust in the courts require access **AND** procedural fairness!

The Obstacles We Face

- Judicial culture is resistant to change.
- Our model of access is founded on ideas and principles that no longer reflect the reality of the 21st Century.
 - Basic premise that both sides would be represented by an attorney.
 - Procedural and evidentiary rules reflect preference for representation.

Obstacles continued

- SLR's don't "fit" into the system as we know it.
- Institutional reluctance to embrace meaningful access through innovation.
- Uncertainty in balancing judicial duties and role in ensuring meaningful access.
- Procedural rules serve as obstacles to access rather than resolution on merits.
- **The dynamics of change-** fear & apathy



The Horizon of a New Day

- *Turner v. Rogers*, 06-2011 Supreme Court recognizes the duty of courts to ensure procedural safeguards in the absence of counsel and SRL assistance.
- Council of Chief Justices adopts resolution for amendment of Rule 2.2 to allow ‘reasonable efforts’ to ensure SRL are fairly heard. July 25, 2012.
- “Access to justice” defined to include the right to “procedural fairness.”

The Horizon continued

- Growing recognition that the problem isn't them but **US**.
- Judicial training aimed at changing the institutional culture which impedes access and justice for the SRL.
- Initiatives aimed at community education about the courts and transparency in government to increase respect and confidence in judicial branch.

The Opportunity Before Us

- We are at a great moment in time for the judiciary- this is **our** OPPORTUNITY.
- The court system of 2032 will not look like the one we now serve in.
- The lessons of the past must be retained and passed on to the judges of tomorrow who will administer justice in a manner we cannot completely comprehend.

Opportunities continued

- Judges at all levels can fulfill their role as leaders of the legal system and inspire others to do the same.
- Rather maintain the system we inherited we have the opportunity, **and duty**, to improve it so as to meet the needs of our customers and leave it better than when we took our oaths.

Public trust and confidence in the rule of law and our system of justice requires that we lead the way and take action!

As the leader of your court what will you do to ensure access to justice?

What Is Your SRL Frame of Mind?

- Have you changed the message you convey to those who follow you?
- Have you changed your practice on and off the bench?
- Are you a part of the problem or the solution?
- **Do you talk the talk AND walk the walk?**

What You Can And Should Do

- Walk through the front door once in awhile
- Embrace procedural fairness
- Reject assumptions and bias
- Respect their dignity, time, and concerns
- Adopt a “customer service” approach
- Insist on the above from the top down everyday in all matters before the court.

Procedural Fairness- What Is It?

- The mechanisms which lead to outcomes that are perceived as fair.
- An **institutional culture** which recognizes the critical importance of procedural and substantive fairness in establishing public confidence and trust in the courts
- A **judicial mindset** that “public” perception, trust and confidence is at least, if not more, important than getting it right.

The Essential Elements

- **Voice:** The ability to participate in the case by expressing one's view in a meaningful manner and having it heard;
- **Neutrality:** Consistently applied legal principles, impartial and unbiased decision makers, and transparency at levels;
- **Respectful treatment:** “customers” are treated with dignity from top to bottom;
- **Trustworthy Authorities:**

“Trustworthy Authorities”

- Judges who are ethical, benevolent, caring, and sincere in their efforts and service to the public;
- Administrative staff who foster a “customer service” approach to process which reflects the judicial values;
- A unified effort “to talk the talk and walk the walk.”

Effective Techniques

- Make sure your instructions and forms are plain language and not legalese.
- Utilize pretrial conferences to explain procedure and your expectations.
- Begin every trial with an explanation and a road map.
- Obtain needed/missing information.
- Anticipate issues and resolve beforehand.

- Be flexible in the order and admissibility of evidence as warranted by the case.
- Explain your evidentiary rulings.
- Be patient- this is a BIG CASE to them.
- Be an advocate for procedural fairness without compromising your neutrality.
- Treat every litigant and lawyer as you would want to be treated and insist they do the same.

The Bottom Line

- It is **judges** who have in the past, and will in the future, define what “Equal Justice” means and how access to justice is ensured.
- Judges, **as leaders** within the justice system, must embrace changes inherent in a modern world to ensure **meaningful access and procedural fairness.**

A Word About Change

- It is difficult for all of us.
- We fear the unknown and the unfamiliar
- As judges we are agents of change and people will look to you for vision on how your court will look. Share that vision.
- Change is inevitable! Take charge of it and manage it. Talk about it relentlessly and “walk the walk.”

Acknowledgements and Resources

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 - <http://aja.ncsc.dni.us/pdfs/AJAWhitePaper9-26-07.pdf>
- A special thanks to Honorable John Broderick, NH Supreme Court, Honorable Ed Lynch, District Judge, Hennepin County, Minneapolis, MN, and Dr. Yvonne Stedham, University of Nevada-Reno, for the material, vision, and inspiration to walk the walk.