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FORUM

USE OF COUNSEL IN OKLAHOMA SMALL CLAIMS COURTS: JUDICIAL PERCEPTIONS, EMPIRICAL DATA, AND RECOMMENDED REFORMS†

Robert L. Spurrier, Jr.*

I. INTRODUCTION

A recurring issue in the small claims literature is the propriety of appearance of counsel in these supposedly simplified courts designed for the pro se litigant. Following the lead of California, some states have banned lawyers altogether from small claims proceedings, and

† This article is a sequel to Small Claims Are Big Business in Oklahoma, 14 TULSA L.J. 327 (1978), which provided the first empirical data on the operations of the Oklahoma small claims courts. In addition to further analysis of the 1,500 sample cases which formed the basis for the earlier article, a survey of judicial opinion of judges of small claims courts in Oklahoma is incorporated dealing with judges' opinions and perceptions concerning use of counsel in the state's small claims courts.

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See also the two studies cited note 13, infra, which in addition to discussing the effect of counsel in small claims litigation also provide drafts of model small claims statutes for adoption by legislatures; Yngansson & Hennessey, Small Claims, Complex Disputes: A Review of Small Claims Literature, 9 LAW & SOC. REV. 219 (1975).

2. States banning attorneys include California, CAL. CIV. PROC. CODE § 117g (West 1970);


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others have enacted legislation which bars counsel unless special leave of the court is granted.3 Oklahoma's statutory scheme for small claims adjudication, like that in a majority of the states, places no such restriction on the appearance of counsel.4 The purpose of this article is to examine the Oklahoma system in light of a survey of judicial perceptions5 and a random sample of small claims cases drawn from three Oklahoma counties6 to determine whether the legislature would be well advised to amend the Small Claims Procedure Act (the Act) so as to limit the appearance of counsel.7

District courts in Oklahoma have been dealing with small claims8 for over a decade under the current statute, yet this area of state judicial operations has received scant attention. While law journal articles

Hawaii, HAV. REV. STAT. § 633-28 (1976) (except in residential landlord-tenant cases involving security deposits); Idaho, IDAHO CODE § 1-2308 (1947); Kansas, KAN. STAT. § 20-1310 (1974); Michigan, MICH. COMP. LAWS § 600.8408 (1967); Montana, MONT. REV. CODES ANN. § 13-354 (1947) (unless both sides are represented); and Nebraska, NEB. REV. STAT. § 24-523 (1975).

5. The judicial survey was conducted in early 1979 by mailing a questionnaire to the small claims court clerk in each Oklahoma county requesting certain statistical information and requesting that it be given to the judge primarily responsible for disposition of small claims in the county. The response rate was 84.4%, an unusually high rate for such mailed surveys. The author would like to express his appreciation to the judges and clerks for their efforts in completing the survey questionnaire.
6. The counties were Tulsa, Oklahoma, and Payne. The data from these cases supported Spurrier, Small Claims are Big Business in Oklahoma, 14 TULSA L.J. 327 (1978).
7. This study employs cases, selected on a random basis in an effort to eliminate the possibility of sampling bias. The random sample of cases was drawn by dividing the total number of cases for the calendar year in each of the three Oklahoma judicial districts (information provided by the respective court clerks) by 500, the desired sample size. The resulting quotient provided the skip interval, which is the number of cases to skip before taking the next sample case. The location of the first case was determined by selecting a number at random within the skip interval for each district. This method of sampling is possible because all small claims cases are assigned a docket number according to a consecutive sequence for the entire calendar year.

In the event the docket book (Payne County) or docket sheets (Oklahoma and Tulsa Counties) did not provide complete information, the case file was examined to complete the data base for that particular case. Only when the case file was missing (which occurred in a few instances in which attorneys had checked out files or they were otherwise unavailable) was an alternate case used. The systematic method for selecting such alternate cases was to take the next case in order of docket sequence.

In some instances the docket records and case files did not provide information on every point covered in the sample survey. Those items were scored as "missing information" or "other" in the survey sheet for the case. Because in any survey of this type and size it is almost inevitable that some data will be missing, the absence of one or two items in a file did not necessitate rejecting that case in favor of an alternate case.
8. Under the Act, a small claim is a civil suit for an amount not exceeding $600 (amended from $400 in 1976) with the exception of libel and slander suits. OKLA. STAT. tit. 12, § 1751 (Supp. 1978).
have appeared noting the statutory provisions,\textsuperscript{9} it was not until 1978 that empirical findings reflecting actual operations of the small claims courts were published.\textsuperscript{10} That study indicated a surprisingly high rate of appearance of counsel\textsuperscript{11} and led to this inquiry. To form an empirical data base, a random sample of small claims cases from the 1977 dockets of the small claims courts of Oklahoma, Tulsa, and Payne counties\textsuperscript{12} was employed in conjunction with the results of a questionnaire sent to the judge primarily responsible for disposition of small claims litigation in each Oklahoma county. These two sources of information\textsuperscript{13} should aid in an appreciation of the effect of counsel in the Oklahoma small claims court.

II. Goals of Small Claims Acts and the Oklahoma Statutory Scheme

Both in original conception and actual usage small claims courts strive to facilitate the access of the unassisted individual to simple, inexpensive, and speedy justice. A model small claims court\textsuperscript{14} fashioned from the features commonly found in the literature and the statutes would be characterized by simplified procedures in comparison with ordinary litigation, minimum expenses, and an aim of speedy disposition of the cases. The results of this speedy justice would not depend on the legal training or experience of the litigants. All of these factors are essential to the small claims court if it is to meet the needs of the persons making most frequent use of it—\emph{pro se} litigants.

Oklahoma's statutory scheme for adjudicating small claims is for the most part consistent with the model outlined above. Filing a case involves only filling in a few blanks on a form provided by the court,\textsuperscript{15}


\textsuperscript{10} Spurrier, \textit{supra} note 6.

\textsuperscript{11} \textit{id.} at 336.

\textsuperscript{12} See note 7 \textit{supra}. The counties were selected because Tulsa and Oklahoma counties have the two largest dockets of small claims cases, and because of the convenience of Payne County to the author. The data were gathered in early 1978.

\textsuperscript{13} The judges survey included both questions of court clerks on office practice and statistics and questions of judges concerning actual handling of small claims litigation.


\textsuperscript{15} The blanks to be filled in require the name of plaintiff, name of defendant, mailing address of defendant, amount in controversy, and (in replevin and forcible entry and detainer cases)
and court clerks are directed to provide assistance in drafting the complaint. Pre-trial procedure is simple because the only other pleading permitted is a counterclaim. No responsive pleading is permitted, nor are pre-trial discovery devices allowed. At trial, the judge is given wide discretion to dispose of the case through simplified procedures. The Oklahoma statute imposes only minimal fees for small claims filing and service of process. Attorney’s fees are limited by statute under some circumstances. The only court costs assessed against the losing party are the cost of filing and service of process. In terms of speedy justice, the Act provides for trial within ten days and a maximum period between filing and trial of thirty days.

The goal of providing equal justice in small claims cases, regardless of the training or experience of the parties, is met in part by the provision for informal procedures. A pro se litigant is not placed at a fatal disadvantage simply because of lack of familiarity with courtroom procedure. Beyond this, however, the legislature specifically empowered the judge in small claims cases to call witnesses and order production of evidence on his own motion when justice requires. Thus, the judge himself may require additional evidence or question the witnesses to reach a just resolution of the case.

III. Collected Data on the Effect of Counsel

What is contemplated in a statute is not necessarily what goes on in the courtroom. In assessing whether the Oklahoma small claims courts are effectuating the goal of providing equal justice to all parties, regardless of legal training or experience, the judges survey is useful. Judges were asked whether it is their practice to “balance” the presentation of the case through questioning (while remaining neutral in the decision) when a pro se litigant is opposed by counsel. Sixty-one

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16. Id. § 1754. Court clerks responding to the state-wide survey indicated that such assistance is forthcoming. Only two of the sixty-five clerks responded that they did not provide such assistance.

17. Id. §§ 1758, 1760.

18. Id. § 1764.

19. The amount of attorney’s fees which may be awarded in a default judgment is limited to ten percent of the award. Id. § 1751.

20. Id. § 1756. This is the minimum time period, assuming that the defendant has at least seven days notice.

21. Id. § 1761. This period is necessarily exceeded if there is difficulty securing service of process on the defendant.

22. Id. § 1761.
(93.8%) of the judges responded that they do attempt to impose such a balance, while four (6.2%) indicated that they do not do so. 23 While a simple yes or no answer to such a question cannot be used to gauge the depth to which a judge is willing to probe or the point at which the obligations of decisional neutrality limit judicial questioning, we can at least infer that the great majority of Oklahoma small claims court judges attempt to protect the interests of the pro se litigant against the threat of a potentially unfair advantage to the party represented by counsel.

Another way to determine whether the interests of the pro se litigant are adequately protected in the Oklahoma small claims court is to examine the sample cases comparing the results achieved by represented plaintiffs with those of pro se plaintiffs. 24 In the model court in which all litigants receive precisely the same opportunity to make their case, we would assume that the presence or absence of counsel would be of no significance. The sample cases demonstrate this not to be so. Represented plaintiffs fare significantly better than their pro se counterparts, even in an atmosphere in which the judges report that they attempt to balance the scales of justice.

Perhaps the simplest way to illustrate the effect of counsel is to compare the results achieved by plaintiffs in cases which reached disposition in small claims courts. Table I gives this data for the resolved cases in the sample. 25

23. The question presented to the judges was: If one party is represented by counsel and the other is not, do you see it as your responsibility to "balance" the presentation of evidence by asking questions, etc., while remaining neutral in deciding the case?

24. The author hoped to be able to analyze the effect of having defense counsel present in small claims court. Very early in the research process, however, it became apparent that the court records were seriously deficient in recording defense counsel. Plaintiffs' counsel are regularly named in court records when the cases are filed either in the plaintiff's affidavit form or on the docket sheet, or both. Whether the defendant is represented by counsel, however, is not regularly brought to the attention of the court clerk by responsive pleadings and the like since these are prohibited by the Oklahoma Small Claims Procedure Act, and there is no apparent mechanism in any of the districts studied to record this information in a routine fashion. Even in cases observed by the author where defense counsel was present, there was no entry of that fact on the court records.

Given the obvious lack of reliable data on representation of the defendant in small claims litigation, it would be grossly misleading to make a statement on the basis of the few records which did for some reason indicate an attorney for the defense. Rather than do so in the text, the matter has been excluded from consideration because of the lack of accurate data. It was, of course, disappointing to find that these data were not available. Certainly the presence of defense counsel is a variable which influences the operations of Oklahoma's small claims court, although in terms of actual trial success the data on plaintiff's counsel suggest that the importance may be less than one would expect.

25. Pending cases are necessarily excluded; hence the number of cases decreases from that of the total sample.
By collapsing the categories in Table I into plaintiff-favorable (Columns A-C) and plaintiff- unfavorably (Columns D and E) results, a comparison may be made. Represented plaintiffs achieved favorable results in 304 cases while they received unfavorable decisions in 11 cases for a 96.5% victory rate. The pro se plaintiffs, however, could not claim so high an average. They prevailed in 630 dispositions and lost 91 cases, for a victory rate of 87.4%. While a winning percentage of over 87% is hardly low, even in small claims litigation, the represented plaintiffs still had an almost ten percent higher rate of victories.

When considering the cases by specific mode of disposition, additional points of interest appear. First, represented plaintiffs had a much greater percentage of suits won by default (63.5%) than did pro se plaintiffs (47.6%). Given the fact that these cases were never actually tried, the skill of counsel in presenting arguments or the inexperience of the defendant was of no import. Likewise, the judge is in no position to balance in a case which never goes to trial. The most likely explanation for the substantially greater victory by default rate for represented plaintiffs is that the defendant faced by such a plaintiff is more likely to assume that he is defeated before he starts than one faced by a pro se plaintiff, someone at least nominally his "equal" in terms of legal ability and courtroom experience. Rather than face what he assumes to...

26. Collapsing categories for this purpose is valid because, from the comments of judges and court clerks, it is relatively certain that most plaintiff dismissals result from receipt of satisfaction from the defendant prior to the trial date.

27. In one sense there is a trial in that Graves v. Walters, 534 P.2d 486, 487 (Okla. Ct. App. 1975), requires that the plaintiff submit evidence in a default case to justify his claim. Precisely how carefully this rule is adhered to is not determined by this study.

28. It is of course possible that an experienced pro se litigant might have an advantage over a first-time pro se defendant. Also, a defendant aware of the statutory limit on an award of attorney's fees in default cases might arguably reason that it would be better not to appear. It is, however, most unlikely that a significant number of small claims defendants would have such precise knowledge of the statute.
be nearly certain defeat at the hands of a lawyer in court or go to the expense of hiring an attorney of his own, the defendant simply fails to appear for trial and loses by default.\textsuperscript{29}

The presence of counsel for the plaintiff at trial does little to improve the percentage of cases actually won after contest (Column B). Represented plaintiffs prevailed in 16.8\% of the cases, while \textit{pro se} plaintiffs won in 17.0\%. Likewise, the percentages for cases lost to the defendant after contest are similar: 1.3\% for represented plaintiffs and 2.4\% for \textit{pro se} plaintiffs. If dismissal by the court is tantamount to defendant victory, however, the presence of an attorney for the plaintiff takes on increased importance in that the figure for represented plaintiffs losing in the courtroom (Columns D and E) is 3.5\% while the same figure for \textit{pro se} plaintiffs is 12.7\%.\textsuperscript{30} This may indicate that attorneys are playing a screening role in the small claims cases they handle through advising their clients not to pursue hopeless cases. The \textit{pro se} litigant, without such advice, proceeds and finds the case decided adversely.

According to the figures in Column C (plaintiff dismissals), which also represents results favorable to plaintiffs, \textit{pro se} plaintiffs fare somewhat better than represented plaintiffs (22.7\% to 16.2\%). If we assume that the overwhelming majority of these dismissals comes as the result of out-of-court resolution satisfactory to the plaintiff,\textsuperscript{31} it would appear that the two types of plaintiffs are able to secure remedies without trial in approximately the same ratio.

Lawyers in Oklahoma small claims litigation do significantly affect the outcome of the cases. This is not because of their courtroom skills but is the result of their apparent ability to deter the appearance of the defendant and produce a default judgment for their client, and to a perhaps lesser extent because of their prevention of the filing of hopeless cases.\textsuperscript{32}

Yet the data in Table I may mask important distinctions in terms of the outcome of the case. Perhaps attorneys are more likely to secure judgment for the entire amount of the claim than litigants who argue

\textsuperscript{29} The defendant would have no way to know, of course, that in cases which actually go to trial represented plaintiffs fare about the same as \textit{pro se} plaintiffs.

\textsuperscript{30} Columns D and E may be collapsed in this fashion because both concern a manner of giving victory to the defendant.

\textsuperscript{31} Both court clerks and judges interviewed so stated.

\textsuperscript{32} The prospective \textit{pro se} plaintiff may choose not to file a case after first consulting with an attorney, but there is no way to determine the instance of such happenings.
their own cause. Analysis of the data from this perspective may be made from Table II.

<table>
<thead>
<tr>
<th>TABLE II</th>
</tr>
</thead>
<tbody>
<tr>
<td>AWARD AMOUNT BY PLAINTIFF REPRESENTATION</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Represented Plaintiffs</td>
</tr>
<tr>
<td>Pro Se Plaintiffs</td>
</tr>
</tbody>
</table>

The data presented in Table II are taken from cases seeking money damages in which the plaintiff received a monetary award. In the aggregate the figures indicate that represented plaintiffs are more likely to secure complete monetary victory than are pro se plaintiffs. This conclusion, however, must be modified to accommodate the fact that in default judgments the plaintiff is likely to receive the full amount of his claim. The data indicate this to be true in approximately ninety percent of the cases, with no significant difference between the plaintiff types.³³ As represented plaintiffs have a significantly greater percentage of default victories, the figures from Table II must be corrected for the default rate. With only those cases which actually went to trial being included, the represented plaintiffs' position is markedly improved. Represented plaintiffs secured a full award in 78.4% of their cases (40 of 51), while pro se plaintiffs did so in 51.7% of theirs (59 of 114). Thus it appears that representation by a lawyer is advantageous to the plaintiff in terms of the size of award, though of lesser value in terms of the percentage of cases won which go to trial.

The data do not provide information to explain this occurrence. Lawyers may serve a screening function in terms of filing suit for only the amount legitimately due while pro se plaintiffs may inflate their damages in the claim. Another factor could be that in preparation for trial an attorney could be expected to gather together all relevant documentation while a pro se plaintiff might not be fully aware of the evidence necessary to support his claim in its entirety.

A third factor is the effort to enforce a judgment rendered in small

³³ This seems to indicate that judges do require proof even in default cases.
claims court. Are represented plaintiffs more likely to employ the judicial enforcement machinery of hearings on assets, garnishment, and attachment than pro se plaintiffs? The sample cases evince almost no difference in the enforcement rate: Represented plaintiffs sought enforcement in 22.1% of their victories (56 of 253, including defaults), and pro se plaintiffs did so in 21.9% of their favorably decided cases (102 of 466, including defaults). The presence or absence of counsel for the plaintiff apparently has no bearing on whether judicial enforcement beyond the initial judgment will be sought in small claims cases in the counties studied.

IV. THE COST OF COUNSEL

Presence or absence of counsel can greatly affect small claims litigation in terms of the expense to litigants. The Oklahoma legislature, clearly aware of this fact, limited the amount of attorney's fees which could be awarded as part of a default judgment in small claims court.\[^{34}\] In default cases, the attorney's fee awarded by the judge may not exceed ten percent of the judgment. The Act does not limit the award of attorney's fees in a contested case, nor does it impose any limitation on the amount the plaintiff's attorney may charge his client above and beyond the amount awarded by the court. This statutory arrangement has the ironic result of actually penalizing the defendant who appears for trial and loses his case. If he defaults, his greatest liability for attorney's fees will be ten percent of the judgment (never greater than $60 under the current $600 limitation on small claims jurisdiction in Oklahoma). If he appears for trial, presumably the obligation of the law-abiding citizen with respect for the judicial process, and loses even though he admits he owes most or all of the amount in question, he may be assessed attorney's fees exceeding the amount of damages awarded.\[^{35}\] Penalizing the defendant for appearing in court is an unfortunate result of the statute, although it was no doubt written with the view that counsel at trial earns more compensation than he does in a default case. In reality, however, the attorney must still appear to claim his default judgment; and given the relative brevity of small claims hearings, time expended by the lawyer for a trial is minimal.

\[^{34}\] OKLA. STAT. tit. 12, § 1751 (Supp. 1978).
\[^{35}\] At least one judge interviewed indicated that this had actually taken place, while another judge stated a strong disinclination to award fees in excess of 10% if the defendant admitted owing the amount in question.
There is no information readily available which would indicate whether plaintiff's counsel are regularly inclined to seek compensation from their clients in addition to the amount recovered from the defendant through a judicial award.\textsuperscript{36} If this is a common practice, it would seem to vitiate the objective of the model inexpensive small claims court.

\section*{V. The Judicial View}

In terms of speedy trial of small claims cases, critics of the use of counsel in small claims courts assert that lawyers tend to lengthen trials of small claims cases and obfuscate the issues. The questionnaire sent to judges asked whether the judges trying small claims cases in Oklahoma believed that the presence of counsel slowed the trial of cases. Slightly fewer than half of the judges (43.75\%) found that the presence of lawyers slowed the trials, while slightly more than half (56.25\%) reached the opposite conclusion.

At first glance, this response would seem to substantiate the critics' view that lawyers are detrimental to small claims litigation because they slow it. Slowing a trial, however, is not necessarily detrimental if it produces a more appropriate outcome. To investigate this aspect of the issue, the judges were asked whether lawyers in small claims litigation "aided materially" in the trial of small claims cases or whether they had a "detrimental impact" on such cases (two separate items on the questionnaire). Forty judges (62.5\%) responded that counsel aided materially in the trial of small claims cases while only seven (13.2\%) responded negatively.\textsuperscript{37} Clearly in the minds of Oklahoma small claims judges `slowing' a trial is not to be equated with having a detrimental effect upon it. Some judges indicate a desire for more information in deciding cases—information apparently easier to obtain from counsel-assisted plaintiffs.

Given the fact that states are experimenting with various plans for use of counsel in small claims courts, the judges were also asked to express preferences concerning the most acceptable plan for Oklahoma by ranking from most to least acceptable three options: a total ban on

\begin{itemize}
  \item The incidence of awarding of attorney's fees varies greatly among the counties in the sample cases. In the cases actually involving use of plaintiff's counsel, fees were awarded in the following percentage of cases: Tulsa County—73\%; Oklahoma County—59\%; Payne County—31\%.
  \item The percentages here are based on the number of valid responses and omit the no-response questionnaires.
\end{itemize}
counsel, counsel only by leave of the court, and no restrictions on counsel. Each item was to be ranked individually, most to least, on a preference scale. Unfortunately, the rate of valid responses to this set of questions was substantially below that for the rest of the questionnaire, but the results are still valuable for assessing judicial opinion on the matter. 38 They are presented in Table III.

### TABLE III

**JUDICIAL PREFERENCE FOR COUNSEL SYSTEM**

<table>
<thead>
<tr>
<th>Most Favorable</th>
<th>Neutral</th>
<th>Least Favorable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counsel Permitted in All Cases</td>
<td>45</td>
<td>3</td>
</tr>
<tr>
<td>Counsel Permitted by Leave of Court</td>
<td>2</td>
<td>33</td>
</tr>
<tr>
<td>Counsel Barred from All Cases</td>
<td>14</td>
<td>3</td>
</tr>
</tbody>
</table>

From the responses it seems clear that judges are predominantly disposed to retain the current system of permitting counsel in all cases. The alternative of permitting counsel only by leave of the court received the least support as "first" choice, and the total ban of counsel received the strongest opposition by "least favorable" ratings.

Finally, it is important to consider the number of cases in which attorneys appear. The data from the sample cases reported in the earlier article 39 indicated a wide disparity among the three counties, so the judges were asked to estimate the percentage of cases filed in which counsel were employed. The responses are reported in Table IV.

### TABLE IV

**COUNSEL IN SMALL CLAIMS**

<table>
<thead>
<tr>
<th>Under 10%</th>
<th>10-25%</th>
<th>26-50%</th>
<th>Over 50%</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges Responding</td>
<td>49</td>
<td>10</td>
<td>4</td>
<td>2</td>
</tr>
</tbody>
</table>

The estimates by judges would indicate that the effect of counsel in small claims courts may be somewhat limited in many counties because

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38. When a judge responded by marking an "X" instead of "M" (for most favorable) or "L" (for least favorable), the "X" was treated as being a most favorable response. 39. Spurrier, supra note 6.
in only a small proportion of cases are plaintiffs represented. The data in Table IV, however, are not equally weighted in terms of caseload by county. The sample cases from Tulsa County showed that counsel were used at a rate of almost fifty percent; and because that county has the highest small claims caseload, it would increase the statewide percentage far more than would other counties. Still, in many counties of Oklahoma the effect of counsel is limited to a relatively small percentage of cases filed.

The findings from the data, then, indicate that Oklahoma’s statute basically complies with the norms of a model small claims court in that it affords a simplified procedure, minimal expense, speedy resolution of cases, and the opportunity for judicial balancing between represented and pro se plaintiffs. Represented plaintiffs do fare better in small claims litigation than their pro se counterparts, particularly in the areas of total victory percentage, default judgment percentage, and percentage of cases involving an award of damages equal to the amount claimed. About half of the judges report that lawyers slow the trial of small claims cases, but this does not translate into a belief that they are detrimental to the adjudication of small claims. Finally, judges prefer retaining the present system to adopting one which would ban counsel altogether or permit counsel only by leave of the court.

V. Recommended Reforms

The findings of this study point out two serious shortcomings in the construction and operation of the Oklahoma Small Claims Procedure Act. First, so long as the small claims court aims to serve pro se litigants, the demonstrated advantages for represented plaintiffs conflict with the goal of equality of represented and pro se litigants. Second, the provisions for attorney’s fees penalize litigants who appear in court and lose rather than those who elect to avoid appearance and lose by default judgment.

To remedy these shortcomings, the legislature should amend the Act. Most preferable would be an amendment permitting counsel in small claims cases only by special leave of the court. This would preserve the intended pro se nature of the court while allowing for counsel in the unusual case in which the judge deems assistance vital. This could mean more work for the judge in one sense. If judges are subjected to numerous petitions for leave to represent in small claims cases, they would simply have that many more issues to decide. Still,
by letting it be known that these petitions would be denied in all but highly unusual cases—and by adhering firmly to such a rule—the incidence of such attempts could be held to a manageable and consistent level.

One exception to the rule barring counsel except by leave of the court should be made for an attorney who is the plaintiff or defendant in a small claims case. In this event, the attorney should be given the same right to present his own case as any other individual.\textsuperscript{40} It would be appropriate in such cases for the judge to allow the defendant to have counsel. This type of amendment to the Act would also prevent a potential avoidance of the statutory ban on access to small claims courts by a collection agent or agency or an assignee.\textsuperscript{41} The Desk Manual of the Oklahoma Bar Association suggests that this ban may be skirted by the appearance of counsel rather than the \textit{pro se} plaintiff.\textsuperscript{42} While the Desk Manual notes that there are no cases on this point, the legislation suggested would render the point moot.

The judicial response to such proposed reforms was not favorable. Arguably, however, the judges' responses were based on their own experiences in trying cases involving represented parties against \textit{pro se} parties. The data show that judges believe themselves capable of correcting potential imbalances in the trial of a small claims case. The problem, however, is that counsel have their greatest effect on small claims cases which do not go to trial. It is in these situations that the presence of counsel for the plaintiff apparently significantly deters a defendant from appearing in court. The judges polled were unlikely to have been aware of this element of the equation because it heretofore has not been mentioned in the literature on Oklahoma courts.\textsuperscript{43}

Amending legislation should also revise the forms used. A defendant in a small claims case should be notified that neither party to the case will be allowed to have an attorney without special permission by the court. Having this sort of notification on the affidavit filed should prevent out-of-court actions by attorneys from deterring the defendant

\textsuperscript{40} In the case of fee collection, it might well be more economical for an attorney to send a secretary or bookkeeper in the same fashion that a business might send its accounts clerk.

\textsuperscript{41} These parties are denied access to small claims court by the Act. \textit{Okla. Stat. tit. 12, § 1751} (Supp. 1978).


\textsuperscript{43} Interestingly enough, judges in states which prohibit appearance of counsel are overwhelmingly in favor of the system. \textit{National Center for State Courts, supra} note 1, at 24-31. Judges from states which permitted counsel, similar to those surveyed in Oklahoma, were divided on the point.
from appearing. For example, if a lawyer writes the defendant on behalf of the plaintiff before instigation of the small claims action, the defendant may well believe that the attorney will pursue the case in the courtroom. Thus the deterrent effect already discussed would still be likely.

Another matter for legislative reform is the amount of attorney’s fees allowed in small claims litigation. If attorney’s fees are not limited in contested cases, they can exceed the amount in controversy and render the small claims process a very expensive one, thereby frustrating the goal of the model court. There are similar results where an attorney charges his client fees beyond those awarded by the court in a default judgment or after contest. A statutory limit of ten percent of the judgment as the maximum attorney’s fee in all types of small claims cases would be far better. This would include the allowable charge to a client in a small claims case as well as the amount which could be awarded by the court. The advantages of such a limitation are obvious in terms of keeping small claims cases inexpensive for the litigants. In addition, the defendant who appears will no longer be penalized in comparison with his defaulting counterpart.

What of the effect of these proposals on the legal profession and litigants who strongly desire counsel? First, nothing prevents the litigant from consulting his attorney before proceeding pro se in the small claims court. This would no doubt be a wise course of action for a novice to learn what must be proved and what types of evidence will be necessary. Second, the litigant always retains the option to proceed in district court with an attorney’s aid rather than to make use of small claims court.

From the standpoint of the legal profession, the proposals would not necessarily be detrimental. The judges interviewed indicated that many attorneys appear in small claims court as a favor to clients with other, more important business. Rather than offend an important client, a lawyer will often go to court on a small claims matter. The judges indicated that many attorneys found this a somewhat onerous, but necessary part of their practice. Judges in the three counties whose courts were observed customarily allow counsel to try their cases first so that they may leave the court without waiting through the pro se cases, apparently in recognition that the attorneys’ time is more valuable elsewhere. If the legislature were to bar counsel from all but exceptional small claims cases, these attorneys would no longer be forced into the
position of having to choose between offending a client or spending unwarranted time in small claims court.

The responses to the survey of judges reveal that such statutory changes would not have a dramatic effect on the bar. As only a small percentage of cases involve represented parties, a significant effect on the practice of many attorneys is highly unlikely. Given the small amounts involved, and the relatively few cases, the gain for the system of small claims adjudication in terms of fairness of treatment of litigants from reform would surely outweigh the minimal financial cost to a relatively few lawyers. From the preceding paragraph it is even possible to argue that the financial effect could be a positive one if the attorneys affected were to spend their time on more lucrative cases instead.

These recommendations are generally consistent with the conclusions of the American Bar Association Report on the National Conference on Minor Disputes Resolution, which states, “It is usually not practical to utilize attorneys in their traditional adversary role” in small claims courts. The recommendation of the National Center for State Courts for improved assistance to pro se litigants is to “make attorneys unnecessary at trial in the great majority of small claims cases.” It should be noted that the ABA Report suggests other roles which attorneys could assume in the small claims resolution process, such as volunteer dispute resolvers. Also, both reports recognize that there may be occasional cases which will require the assistance of counsel for the parties.

Should the legislature adopt either, or both, of these two proposed reforms, limitation on appearance of counsel and limitation on fees, it will thereby move closer to the goal of a small claims court which is truly responsive to the needs of the pro se litigant and of an inexpensive forum for a speedy resolution of the case without the likelihood of the adverse effects of a represented opponent. Until now, empirical data were not available to indicate the effect of counsel on the Oklahoma small claims courts; but given the findings of this study, there is reason for the legislature to give careful attention to amending the Oklahoma Small Claims Procedure Act to further the goals of a model small claims act.

44. A.B.A. Report, supra note 1, at 8.
45. National Center for State Courts, supra note 1, at 194.