Summit on the Future of Self-Represented Litigation

Paper Five:

Changing the System So That Self-represented Litigants Receive Compliance with Judgments and Orders: Where We Are and Where We Should Be Going

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I. Introduction

This paper discusses developments designed to increase the enforcement of orders obtained by self-represented litigants. The paper starts with an outline of early efforts to provide such assistance and proposes ways of making the system as a whole more compliance friendly.

Compared with innovations in assistance to litigants in preparing for court and in the conduct and support of the courtroom itself, experimentation in compliance support is relatively new. With the exception of areas such as child support enforcement, and to a certain extent, domestic violence protection, self-represented litigants remain largely on their own once they have obtained a victory in the courtroom. For that reason, the suggestions in this paper may appear more controversial than those in other areas of self-help innovation.

II. Importance and History

It should be obvious that an order that is not complied with is useless at best.[1] Yet the relative absence of enforcement innovation is not a new phenomenon. The 1930s integration of law and equity and the almost nationwide adoption of the Federal Rules of Civil Procedure made essentially no changes in enforcement mechanisms. These mechanisms remained complex, difficult to navigate, expensive, and still largely reliant on a complex public-private mix of sheriffs, supplemental enforcement actions, and other tools incomprehensible to many lawyers, let alone to the lay person.[2]

The general perception within the system remains that enforcement, and indeed often the preparation of the order itself, remains the responsibility of the winning party, and that party alone.

[1] Indeed, it may be worse than nothing, since it undercuts the authority of the court, and sends the message that the law may be ignored.

[2] There is reason to believe that the writers of the federal rules were fearful that overly easy enforcement would unfairly benefit the creditor class as against those with less power. To the extent that this view of history is correct, it may well reflect a 1930's rather than a twenty first century perspective, given how few of those without power ended up in court as petitioners or plaintiffs 70 years ago.

III. Initial and First Step Innovations

The self-help movement, together with a national political focus on the needs of particular groups such as domestic violence victims and single parents, has produced a number of suggestive innovations and the beginnings of new thinking about the problem.

Support from Self-Help Programs

Some self-help office programs are developing materials and training staff to assist in compliance and enforcement. The types of help parallel those at pretrial, including preparation of standard documents and instructions, informational assistance in the completion of documents, and the provision of answers to appropriate informational questions.[3] Such assistance has probably been greatest in child support enforcement, given statutory authorization and national focus on this issue. It is only in this area of support that we have data on impact.

In-Court Actions

Some courts, notably in California and Florida, are experimenting with using slightly modified courtroom proceedings to facilitate subsequent compliance and enforcement.[4] Specifically, judges in small claims actions are obtaining from the losing party information that the winning party may be able to use to obtain enforcement, such as bank account and employer information. Others are tightening systems for obtaining early information from potential child support obligors.

There is a growing consensus that providing an immediate written order to the parties results in higher compliance.[5] Such orders can be printed out using special software with an online menu from which the clerk selects and edits the choice closest to the judge's decision. There is also evidence that judges who take time to explain orders in detail

[3] The California document attached as an Appendix demonstrates how such information can be given and what a complicated environment governs enforcement. It was developed by the San Francisco Superior Court ACCESS Self-Help Project. See also, *How to Enforce Your Order*, a California Court protective order document online at http://www.courtinfo.ca.gov/forms/documents/dv530.pdf.

[4] For example, Florida Rule of Civil Procedure 1.560 requires a judge to order, at the request of the prevailing party, a judgment debtor to complete under oath a fact information sheet that complies with the promulgated form and serve it on the judgment creditor within 45 days from the date of the judgment. The information sheet requires detailed information and documentation of the debtor's earnings, assets and debts. The judgment debtor must file with the court a notice of compliance with that requirement.

[5] In Stanislaus County, California, the orders are written up by a team of volunteers onto multi-part NCR paper. Similarly, the Vermont courts have developed templates for orders for Family Court using language that is clear and understandable; they can be used on the bench and produce documents in PDF format so that the information can be entered directly, printed, and distributed to the parties.

Some judges fear that issuing immediate orders will make it more difficult to maintain courtroom control. This may be true in a minority of cases. It would seem better practice to modify the protocol in cases that appear to fit such a profile, rather than to allow the minority to force the selection of the less useful method overall.

improve the compliance with those orders.[6] Judges are beginning to discuss what language is most effective in trying to assess whether a litigant has indeed understood the order, and how to remedy any lack of understanding.

These innovations represent an important change in attitude by courts, which are now beginning to explore how their own actions can lead to easier enforcement and beginning to take responsibility for the ultimate outcome, not just for producing the formal judicial order or judgment.

Child Support Enforcement

State courts, particularly those using IV-D money for their self-help programs, often now provide individualized help to litigants who have obtained support orders. This assistance includes help in completing forms, tracking the status of locator efforts, wage garnishment, and the like.[7]

These efforts have been triggered by a wide variety of statutory systems designed to foster high enforcement and compliance rates. These mechanisms include automatic wage garnishment, integration of collection systems with state and federal tax systems, and use of wage, tax and social security records to locate missing parents. State and federal legislation has also created a wide variety of penalizing collateral consequences for non-payment of child-support including loss of driving and other licenses.[8]

Notwithstanding the apparently almost draconian nature of some of these systems and consequences, the overall compliance rate is believed by many to be far from high.[9] While explanations vary, they suggest that governmental involvement alone is not enough, as least when government efforts run up against lack of debtor resources and profound social ambivalence about enforcement.

Support from Domestic Violence Advocates

The domestic violence story is somewhat similar. Court and program-based victim advocates provide extensive counseling and support to victims. Police are supposed to serve protective orders upon perpetrators and to protect victims from further victimization. Huge networks of computers transmit order details into national networks,

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[6] *Family Court Fairness Study*, 2004; Deborah A. Eckberg, Ph.D. and Marcy R. Podkopacz, Ph.D., Fourth Judicial District Research Division, State of Minnesota.

[7] In Minneapolis, for example, the county child support office pursues wage garnishment, license revocation, etc., but the Self-help Center assists litigants with the contempt actions, particularly when the arrearages are not high enough to trigger actions by the county office.

[8] When Minneapolis Family Court orders a child support obligor to look for a job, they order them to return to a "jobs calendar," at which they to report their job search status and activities.

[9] Recent statistics are that 59% of those who should be receiving ordered support are either receiving nothing, or are receiving less that the amount ordered, Timothy Grall, U.S. Census Bureau, Child Support for Custodial Mothers and Fathers 4 (Oct. 2000). There are many explanations for this statistic, including the low resources and sometimes marginal legal status of child support obligors.

and abusers also face collateral consequences, such as loss of firearms. However, despite billions of dollars in investment and clear social policies including criminalization of non-compliance with protective orders, the rate of full compliance remains lower than it might be.[10]

IV. New Ways of Thinking about Enforcement

Given how little we have achieved at ensuring enforcement for those without lawyers, and given the lack of effectiveness of those innovations that have been tried, we need a whole new way of thinking about the problem.

There is No Neutrality Bar to Judicial Engagement with Compliance and Enforcement

First, we must recognize that the required neutrality of the court is no bar to its involvement in compliance and enforcement. Of course, the court's processes in coming to its decision and rending its order must be fully neutral. But once that neutrally-reached order is rendered, it is not partial or biased for the court to be active in ensuring that its own orders are followed – provided that the court acts consistently with the court's ongoing obligations to protect the legal rights of debtors and to ensure that judgment creditors stay within the law. Rather, the court has a strong vested interest in seeing that litigants comply with its orders.

In other words, the court can be engaged in support of compliance, but only while making sure that all remain within the law, and while providing adversarial *avenues* to ensure that that is the case. Provided there are adequate appellate routes to challenge the court's decision, and provided the court is transparent in its processes, there is no violation of any code of judicial conduct[11] or of the spirit of judicial neutrality in the court taking an active role in enforcing its judgments.[12]

Compliance is Enhanced By Thinking About the System as a Whole

Courts should think about the whole court processes as a continuum from the front-end to a fair order or judgment, *which is actually enforced*, and indeed enforced with minimum judicial or court involvement. Just as we now ask what information a judge needs to obtain a just result, we should also be asking what information the court or winning party will need to enforce a judgment, how to structure the processes so that the parties will want to comply and will be able to comply or enforce compliance, and how to monitor

[10] We have been unable to locate aggregate national statistics on compliance with protective orders.

[11] Indeed, the Codes mandate that judges act to support respect for the rule of law. It should be noted that the National Center for State Court's Trial Court Performance Standard 3.5, Responsibility for Enforcement, reads: "The trial court takes appropriate responsibility for the enforcement of its orders." http://www.ncsconline.org/D_Research/TCPS/Standards/stan_3.5.htm.

[12] This process is discussed in more detail below. There is, of course, wisdom in providing for adversarial forums in which compliance or non-compliance can be asserted or tested and in ensuring that the processes are fully transparent. Moreover, early explanation by the court of the judicial role in enforcement, regardless of outcome, makes clear the essentially neutral nature of that role.

that compliance. We need to be thinking about what forms of order will assist enforcement, and indeed what orders will be consistent with justice, yet amenable to easy compliance and enforcement.

Compliance Itself Should Be Made Easier

Courts should think about how to manage the whole process so that those who lose will be more amenable to complying with the ultimate decision and order. This might include pre-hearing mediation, which would include exploring what forms of result would be most acceptable, as well as post-hearing mediation, which would allow the both parties to have input into the shaping of the least disruptive and most acceptable order.[13] Courts should also develop methods for making much clearer to the litigants exactly what they need to do to be in compliance with the order. Courts might achieve this by providing informational materials and by making sure that orders are detailed, clear, and fully self-explanatory. They might also include a self-help center number or help line which might give information that could better help the parties understand what is required of them.

Partner Agencies Must Play a Crucial Role

Enforcement is not a one-agency problem. Law enforcement, executive agencies, and the legislature must all be involved in deciding the optimum division of labor in establishing "whole system" solutions and must remain in communication so that problems and cases do not fall between the cracks.

The Ideal Goal – Self-enforcing Orders

One way may be to develop the concept of a self-enforcing order. That is to say, an ideal order is one which by its own terms achieves the ordered result, requiring the winning party to do nothing to obtain the benefits of the order. It might be, for example, that a winning child support order would automatically trigger cash transfer processes, requiring no additional forms or actions by the winning party and not susceptible to frustration by the losing party. It might be, using the thinking-backward process, that parties would have to file the information needed to facilitate the process with the court into a sealed record, before any judgment, as a condition of the litigation.[14] It might also be routine that losing parties would be required to report back to the court as to their compliance with orders, with enforcement activity triggered by non-reporting.[15] Once again, any such procedures must provide for neutrality in the court's activities and neutral adjudication of adversarial challenges to the judgment creditor's actions.

[13] Careful thought should be given to the relationship between the now relatively standard pre-hearing mediation, and post hearing mediation, with a view to making sure that resources are not wasted, and that post hearing mediation does not duplicate areas already covered. See note 18, discussing funding issues.

[14] The wise objection has been raised that this would provide a major disincentive to participation, and might result merely in a higher default judgment rate.

[15] This too raises dangers, and non-compliance consequences should be carefully managed and monitored.

There is evidence that courts are reluctant to take on this general responsibility without the funding to support it. This highlights the importance of system design modifications that simplify, rather than simply shift enforcement burdens from the parties to the courts.

Processes Must Be Transparent

Enforcement systems need to be fully transparent or they will be perceived as non-neutral. Indeed, many people already firmly regard child support enforcement as non-neutral. If possible, court enforcement functions should be separated from court decision-making functions. This is the model of well-structured drug and other boutique courts. Moreover, the need to report enforcement activity and to provide avenues to challenge judgments in an adversarial forum is a guarantee of transparency and greater legitimacy.

The Balance and Equity Dilemma

A core dilemma, however, is that the desire to make enforcement easier may disrupt the balance between classes of parties. If we make enforcing an eviction order easier, we change power in favor of landlords.[16] The balance of power should be carefully thought out in drafting the legislation and court rules, rather than relying on an assumption that parties will not be able to enforce orders. The only way to make the courts credible is to ensure that orders have meaning and are enforced.

The complete solution may well be to combine changes in enforcement at the back end of the system, in access before and during court, and at the front and middle of the system to ensure that the overall impact does not systematically favor any class of litigants. Courts should be actively engaged with legislatures informing them of the way disputes actually end up in the system and making sure that legislatures understand the real world access and balance implications of their decisions.

The Court Resource Dilemma

There has been some court resistance to attempts to impose additional compliance roles on courts.[17] Indeed, poorly designed or implemented band-aid interventions might well be expensive, disruptive, and not necessarily productive in terms of results.

[16] In many jurisdictions, there is a view that landlord-tenant law is in a state of competitive dysfunction. The law provides strong formal protections for tenants, but the process protects landlords since the only way to enforce the tenant-oriented rights is to have counsel, who are essentially unavailable. Lawyers are happy, tenants get evicted, and landlords are resentful of what they see as unrealistic laws. Minnesota, in contrast has instituted forms and processes that enable self-represented litigants to bring their own cases to enforce tenants rights.

[17] In Minnesota, for example, the courts opposed two different legislative initiatives proposed to affect enforcement. One would have required automatic parent visitation status hearings. Another placed the court in the position of submitting small claims judgments to the state for possible satisfaction through revenue recapture, including responsibility to transfer funds and holding hearings to resolve disputes over satisfaction of the judgment. The court opposition focused on the unfunded cost to the courts.

The moral appears to be that compliance enhancement should be considered as part of a whole package, including assistance to litigants, simplification and explanation of orders, opportunities to tailor the orders to make compliance easier, and addition of non-judicial enforcement resources. The goal should be to restructure the process in favor of compliance, and to maximize use of non-judicial resources, using the coercive power of the judge only when necessary.

V. Concrete Innovations for Experimentation and Research

This section offers a number of concrete possibilities for testing and evaluation, grounded in the experiments and general approaches described above with a particular focus on thinking about the system as a whole.

The Self-Help Enforcement Program

Courts could establish special self-help offices to focus on assisting winners through the enforcement process. Their tools would include software to manage the forms process, access to databases to obtain information needed for enforcement, and the usual training materials, clinics, and guides.

Enforcement-Oriented Mediation

Courts should consider experimenting with a system in which a judge first issues a general order followed by a mediation in which the losing party is asked what detailed terms would make compliance easier and the person who had won would be given the opportunity to make sure that the goal of the order was being met by the loser's suggestions. There may be parts of the order that favor the winner, but that the winner cares little about. Knowing this can help change the dynamics and "give" something to the loser they may not have asked for otherwise. In family cases, this might help turn a zero-sum situation into a non-zero sum opportunity. In monetary cases, the detailed terms might be structured, and the psychological impact of the involvement of the loser in shaping them, might facilitate greater compliance. For such a system to work, the judge's initial order must be clear, and the court must be careful to approve only those terms suggested by the losing party that are acceptable to the winning party, and not designed to undermine the order. Respect for the needs of the losing party should increase the chance of that person's complying.[18]

Collateral Compliance-Oriented Information

Courts might experiment with giving to those against whom orders run information that would assist them with collateral ways of meeting the obligations imposed by the court. For example, the self-help center might make sure that its information programs include resources to assist tenants with debts that are interfering with their rental obligations, with

[18] This idea raises complicated funding issues. Should the mediation be free? If so, who would pay? It not, would loser or both parties pay, and who would pay the costs for low-income litigants?

information about bankruptcy, as well as the full range of referrals to attorneys and community resources, including on on-line tools.[19]

Obtaining Early Consent to Compliance in Return for Access Assistance

Although potentially a risk to the access vision, courts might experiment with providing additional access flexibility in return for providing information that would assist enforcement of any order that emerged from the process.

Automated Enforcement

With appropriate, legal authorization where needed, software linked to banks, employers, and tax systems could facilitate automatic transfer for money following a decision. The path has already been pioneered in the child support context, because of the strong state interest in obtaining the money as offset against welfare payments. As technology advances, and as more and more transactions occur online, this kind of enforcement is likely to increase.

The U.S. Marshal Model

The federal court marshal model seems worthy of consideration for possible use in the state context. In the U.S. Marshal, the federal court has its own enforcement arm, one that was once needed to enforce controversial orders. A state court marshal could play a similar role in situations in which local law enforcement seems inadequately responsive. Indeed, many, but not all, feel that the institutional structures of police have proved generally weak at the prospective enforcement of court orders, particularly in custody and family violence situations. Notwithstanding enormous progress, police place notoriously low priority on service and enforcement of court enforcement warrants. Litigants need a court enforcement arm which has this as a primary responsibility and priority, where people can do "one stop shopping" to get their wage assignments and other levies served and processed.

Simplifying Contempt as an Enforcement Tool

In many procedural contexts, the only mechanism for enforcement available to winners is contempt. Yet contempt is a notoriously complicated procedure, particularly for a self-represented litigant. Indeed, in some states, depending on the availability of civil or criminal contempt, the effect of bringing a contempt proceeding is to trigger the appointment of counsel for the non-complaint party, thereby forcing the self-represented litigant who has already obtained a court order to win at the contempt stage against an opponent with counsel. In some states and substantive areas the prosecutor is required to prosecute the contempt.

[19] The Hennepin County Child support office notifies people who have missed payments that if they have a change in circumstances, they need to file a motion to get their support order changed. However Child Support believes that many people do not follow through with filing the motion. The Court is therefore exploring ways to refer people to the Self-Help Center to get the motion completed and filed, and investigating what the barriers to completion might be.

Thus, if contempt is to maintained, as it is in many environments, as the primary enforcement mechanism, it must be made much simpler procedurally, including, for example, having the clerk's computer general a partially completed petition for contempt with the initial order. In the event of non-compliance, all the party seeking enforcement would have to do would be complete a few areas, and then file the petition for contempt. While not the current model and raising cost issues, service of contempt papers might be made the responsibility of the court.

Another remedy might be fee shifting for contempt costs, in other words making the party against whom content had to be sought pay the attorney costs of the winning party. This would provide incentives for attorney participation.

Automatic Review Hearings

One model might be to schedule automatic review hearings for all of certain types of judgments, with the hearing cancelled if both parties inform the court of compliance.[20]

Enforcement Courts

One suggestion has been to follow the model of drug courts, and establish special courts that would take cases after decision, and focus only on the compliance phase.

Increase Compliance Incentives

Driving license suspension is reported to be highly effective at "smoking out" those who have avoided compliance for years. However, this system may be over-inclusive, penalizing or over-penalizing those without fault, and often removing from the labor force those in need of jobs to pay arrearages.[21] We need to identify which collateral sanctions are fair, closely tailored, and effective and focus only on those. It appears that different sanctions are effective in family disputes than in financial disputes.

Use Case Management to Increase Settlement and Compliance

There is increasing awareness that case management of self-represented litigation is different from case management of litigation involving attorneys. Given the compliance value of settlements over adjudicated decisions, we should look to using case management to maximize settlements in these cases, and thereby increase compliance.

VI. How to Move Forward

In order to move forward, we need to develop a number of focused research and evaluation strategies.

[20] This technique is used in Minneapolis when a landlord is ordered to make repairs.

[21] Part of the problem is the escalating penalties and consequences. Those who suffer a suspension may not be properly notified. Before they know it they are facing criminal charges for driving without a license, and then loss of job and family breakdown.

Study What Tools Winners Need to Enforce

We need research into what actually makes a difference in enforcement. We need to see who actually gets the benefits of their wins, and what information and institutional structures made the difference.

Whole Court Institutional Rethink

We need to spend more time thinking about the relationship of these needs to the overall structures and processes of the courts, including the integration of these perspectives into case management.

Concrete Experiments with Focused Interventions

Finally, we need courts to experiment on a very concrete basis with some of these ideas, to assess the consequences, and to develop information-sharing replication systems. We need the national systems to compare and share the results of this work.

VII. Conclusion

The range of suggestions and the relative paucity of existing models underline how early we are in the process to making enforcement real. Yet without progress in this area, much of our investment in changes in the front end of the system, and in improvements in the courtroom itself, will yield little return.

The good news is that much of the infrastructure is already being built. Self-help centers, increasing attorney involvement, and ongoing changes in courtroom processes can with relative ease be extended to impact the enforcement process.