A NEW DAY FOR JUDGES AND THE SELF-REPRESENTED

The Implications of *Turner v. Rogers*

By Richard Zorza

The Supreme Court's June 2011 decision in *Turner v. Rogers*[1] will greatly influence the judicial handling of civil self-represented litigation. Before *Turner*, it was not yet fully settled for all whether judges can appropriately intervene in such civil cases. After *Turner*, the issues are when must they do so, and how they can most effectively do so in the situations in which they are either required or choose to intervene. Lurking behind this changed judicial environment is the Court's effective endorsement of judicial engagement as helping ensure, and indeed sometimes required to ensure, fairness and accuracy, and to meet the requirements of due process.

In *Turner*, a custodial maternal grandparent asked the court to penalize the father for failure to pay child support. Neither party had counsel, nor was the state a party. The judge imposed a 12-month civil contempt order, upheld on appeal to the South Carolina Supreme Court. At the urging of the United States, as *amicus curiae*, Justice Stephen Breyer's majority opinion reversed on the ground that in the absence of counsel, the judge's failure to provide procedural safeguards *sua sponte* constituted a violation of the father's due process rights. The Court enumerated such safeguards as

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

In effect, the duty imposed on judges takes the place of the far more expensive and constitutionally complicated alternative of requiring counsel for the parties in all such proceedings.

The Foundations for the Post-*Turner* World

Ten or 15 years ago, *Turner* would have created a massive challenge for a judiciary still anxious about how to engage with the self-represented while maintaining neutrality. Today, there is far less cause for anxiety. Among the foundations already in place (all moving the debate in the direction of the clear appropriateness of judicial engagement):

The realization, based on extensive conversations among judges and academics, that judges have in fact long found it necessary to engage in questioning in order to get the information they need to decide self-represented cases appropriately.

- Research into judicial communication with the self-represented, conducted by the National Center for State Courts, leading to the identification of best practices for judges in handling such cases.[3]
- The development of a judicial education curriculum on handling self-represented litigants launched at Harvard Law School in the fall of 2007. The curriculum includes best practice videos.[4]
- Educational programs for judges in at least 30 states, building on the above work.[5]
- The ABA's 2007 addition of Comment 4 to Rule 2.2 of the Model Code of Judicial Conduct, permitting "a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[6]

Basic Best Practices

This decade of research and exploration into self-represented cases has shown that

- Judicial engagement and questioning are necessary,
- Judges have broad discretion in how they do this, and
- There are plenty of easy and tested techniques for doing so.

The best way to think about the breadth of judicial discretion in this area is to remember than when appellate courts correctly point out that those without lawyers are generally held to the same rules as those with lawyers, they are *not* saying that judges must behave identically in how they apply procedural rules, regardless of whether there is a lawyer. On the contrary, the procedural rules and appellate court decisions very much permit judges to take into account the representation status of the parties in deciding how the rules are to be applied. This is just what happened in *Turner,* in which extensive discussion of the lack of counsel on both sides shaped the Court's due process views as to the appropriate procedure.

The simple approaches include, but are not limited to, the notice and questioning that are the focus of *Turner.* Many of these approaches apply in almost all self-represented cases, especially those in which neither side has a lawyer.[7] The application of those approaches in more difficult situations, as where one party is represented or there is a jury, will be discussed in another paper.

One overriding principle informs many of these "best practices"—that is, the desirability of transparency. If judges explain what they are doing, and why they are doing it, litigants will generally give them the benefit of the doubt even when the judge rules against them. Litigants want to trust the process and the judge. Nothing enhances trust like transparency. Thus, explanation of questions, descriptions of procedure and of the law, and clarifications of what will happen next are all cherished by the self-represented.

Beginning the Case

How the case begins sets the tone of the hearing. It can help the judge maintain control and make it easier to intervene later by asking questions. Among the recommended techniques are:

1. Introduce the parties and explain the procedural context of the hearing.
Many judges do this when there are lawyers on the case. Here, doing so also saves time, focuses the parties, and reassures anxious litigants that the judge is on top of the case.

2. Make sure the parties understand what is to be decided at the current hearing.
This helps the self-represented stay focused; more importantly, it justifies later intervention if a litigant wanders. This may be particularly important if the self-represented litigant's submissions are somewhat unclear on the matter.[8]

Example: Today I have to decide if I am going to change Judge Smith's order for $400-a-week child support. That is all that I am going to decide. Is that what you both thought would be happening?

3. Outline the procedure to be followed at the hearing.
Many litigants have little understanding of legal proceedings and are terrified that they will never get the chance to tell their stories. It calms them if the judge is very explicit about the steps that are to be followed. Again, this lays the foundation for later intervention.

Example: I am going to swear you both in. Then I am going to hear from you, the father, first, because you are the one asking for a change. You can tell me why you think I should change the order, and I may ask you some questions. When we are done, I am going to ask you, madam, why you think the amount should not change. I may ask you some questions, too. I will give you each a

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chance to ask questions of each other and then to tell me anything you think would be helpful to me in making a decision.

4. Indicate the time available for the hearing.
As a general matter, the approaches outlined in this article will assist in using hearing time efficiently, although some may require an investment of time early in the hearing. If the judge, as part of the initial procedural introduction, makes clear any limits on time available for the hearing, that will make it easier to ensure that time is used most effectively, and will help litigants understand when the judge has to move the case along.

Example: There are a lot of things to decide today, and I should put on the table that we have only one hour for this whole hearing. I know you will understand if, at times, I have to keep us moving to ensure that we get to everything we need to and to hear properly from both of you.

5. Explain, if needed, the governing law.
The Supreme Court in *Turner* advocated telling the father that the legal issue to be decided was his ability to pay the arrearages, not just his overall liability.

From a practical point of view, when a judge lays out the law, it helps the litigant stay on point and shows that the judge can be relied on to keep matters appropriately focused.

Example: I have looked at the papers you both submitted, and I think you should know that I have to apply one very simple standard under our state law. I can only change the order if circumstances are unexpectedly and seriously different from when Judge Smith made the original order two years ago. So, a big change in earnings or a child's illness might be such a difference. But just wanting more money for a new car is not. If you are not sure if something is a change that makes a difference, just ask me, and we will talk it through. Does that make sense to you?

6. Use simple language and invite questions.
A public commitment to speak plainly and a request that litigants ask for clarification when they do not understand help ensure that litigants will understand what is going on, and therefore will be able to contribute fully.

7. Clarify that the judge's questions and interruptions have no purpose other than getting to the facts.
Both litigants and judges sometimes worry that the judge's questions or interventions may signal a prejudice, and this may even cause judges to refrain from helpful interventions. This clarification should substantially reduce that worry.

Example: If I ask a question or shape the discussion, it is not to cut you off or to help you. I am just trying to get to the facts we need to decide the issue before us. It doesn't mean anything about how I feel about the case. If you think I do not understand what you are trying to bring out, please do explain it to me, and I will reconsider it.

Managing Evidence

A number of techniques help ensure that the court receives as complete a range of evidence as possible. Techniques include:

1. Consider dividing the hearing into small blocks for an individual decision on the facts.
Sometimes cases are so complicated that breaking up the steps to the decision makes it easier for all. This also helps focus the litigants and clarifies the process.

Example: I am first going to hear from both of you about whether the landlord started this eviction properly. Let's begin with how the eviction started. Mr. Landlord, did you give the tenant a notice to quit . . .

2. Permit narrative testimony.
When there is no lawyer, the traditional question-and-answer format for testimony is not usually practical. It is, therefore, totally appropriate to let the party "tell what happened." Sometimes the judge may have to focus the narrative and either permit or limit the excessive detail that litigants often provide.

Example: Why don't each of you just tell me what happened about this plumbing job? Ms. Smith, you can start. What happened and why have you asked for damages? Then I will hear from Mr. Jones. I may want to ask either or both of you questions as you talk, or afterward.

3. Allow parties to adopt their pleadings as their sworn testimony.
Some litigants will have difficulty speaking cogently but may have done a better job in the pleadings (particularly if the forms are well designed and/or automated). In such situations, the judge could ask if the litigant wants to "adopt" the written statement as sworn testimony. Under most state laws, there is no need to summarize the statement, although better practice is to be explicit in describing the pleading, including whether it has been notarized, and its date.

Example: I think the simplest thing to do is for us to use the document you filed with the court as the basis of your testimony, if that is okay with you. We can just act as if you have read it. Is that okay? Good. So, for the record, is your testimony the "Plaintiff's Motion for Relief" dated and notarized on June 20, 2011? I remind you that you are under oath. Thanks. Now, is there any more information about what happened that you want to add?

4. Ask questions to get to evidence.
This may be the most important step of all, and is approved by *Turner*.[9] Judges often feel that they are left with only a vague picture of the case and remain uncertain of the key facts. *Turner*, by endorsing judicial questioning, is fully consistent with the practices of more experienced judges, and with research that shows that litigants understand and appreciate the fully neutral purposes of such questioning.

5. Ask questions to establish the foundation of evidence.
Often litigants don't know the hearsay or foundational rules of evidence. The judge can ask questions, perhaps detailed questions, to determine weight or admissibility, even if there has been no objection to the evidence offered.

Example: I see that you are offering a photograph. Can you tell me where the photograph came from, who took it, and what it shows? . . . Is that what the plumbing looked like after the repair job?

6. Probe for detail.

As the above show, it is often necessary to probe for more detail. The tone of the exploration is important. It is relatively easy to explore for detail without evincing skepticism or hostility, or indeed support.

Example: Can you help me understand what happened by telling me a bit more about that conversation? How did it start? What did he say? How did you respond?

7. Give verbal and nonverbal cues to encourage the giving of testimony.

Some judges believe that an unresponsive demeanor is required to convey neutrality. Research shows, however, that litigants understand that general verbal and nonverbal signals of encouragement are not conveying acceptance or rejection. Occasional nods, clear eye contact, and statements of general encouragement like "go on" are entirely appropriate.

8. Shift back from one side to the other during questioning.

Many experienced judges find that they are most comfortable shifting back and forth between the parties during testimony. This makes it possible to get full data from both sides on a particular issue or event, keeps the litigants focused on the topic at issue, and reassures them that they will be fully heard from.

Example: Let's focus just on that incident involving the car on that Friday. Tell me what the father said when he turned up at the house to pick up your daughter. . . . Sir, would you like to tell me your memory of what happened? . . . Ma'am, did you say that? Why? . . . Where was your daughter during this argument? . . . Did she hear?

9. Maintain control of the courtroom, including through use of body language, and help litigants stay focused on matters relevant to the judge's decision.

Judges can maintain control of the courtroom in many ways. They can interrupt testimony when it wanders, firmly stop interruptions, or simply use hand signals. As a general matter, refocusing on the issue that is being addressed is the most effective way to maintain control because it shows the litigants how to comply with the judge's needs. Most litigants appreciate such help, often because they are uncertain about what the judge needs to hear. Explaining the refocusing will make it easier for the litigant to stay on topic.

Example: Okay, just a moment, sir, please stop insulting your wife. That is not appropriate behavior for a courtroom and makes it harder for me to listen and to consider the points you are making. It is not helpful to me in deciding the case. Please just focus on what happened on that Friday between the two of you.

10. Help litigants stay focused on matters that are relevant to the judge's ultimate decision.

Most litigants appreciate assistance in focusing their testimony, often because of uncertainty about what the judge needs to hear. Explaining the refocusing will make it easier for the litigant to stay on topic.

Example: Sir, I think you may be telling me more than I need to know about this. Remember that I have to decide how much time your child should spend with each of you. Knowing the details of your work is not going to help me with that. I need to know when you can take care of your child and when you would like to do so. Can you please focus on that?

11. Clarify the relevance of testimony when it is uncertain.

If the relevance of testimony is unclear, a direct invitation to explain how it will help you decide the case may be the fairest and simplest approach. In some cases, it may then become necessary to hear the testimony or to explain the lack of legal relevance.

Example: Ma'am, why do you think the money of your husband's girlfriend will help me decide how much child support I should order? (After explanation by litigant that it is "not fair") Well, her spending has nothing to do with the state's formula for child support. Tell me, instead, about . . .

12. In assessing evidence, remember that judges can deem evidence objected to, can admit un-objected-to evidence for all purposes, and can give evidence the weight they see fit.

Many judges worry that because of lack of objection they are admitting and relying on incompetent or otherwise inadmissible testimony. Some are concerned that they will be subject to reversal for not excluding testimony and others that the testimony will skew the result of the case. But judges are protected by three well-known and near universal principles: (1) that un-objected-to testimony is deemed admitted for all purposes; (2) that judges can deem testimony objected to and rule to exclude it if they choose; and (3) that when judges are the fact finders, they can give testimony whatever weight they choose.

13. Consider telling litigants when they have failed to establish an important element, and then provide an opportunity to fill the gap.

Sometimes a litigant may have evidence available that they had not understood to be needed. The judge can explain that the testimony so far is weak on that element (including possibly why) and can invite the litigant to offer additional testimony.

Example: Sir, the only evidence that you have given that your wife has other income is that you saw her driving an expensive car. That is not itself very strong evidence. Do you have any other evidence about your wife's income?

14. Provide a final opportunity for litigants to add to the testimony.

Many judges find it helpful to give the parties a final opportunity to add to their testimony. This indicates that the parties are being fully heard, and may, on occasion, yield more information.

15. If you are unable to do what a litigant asks because of neutrality concerns, explain the reasons.

As a general matter, litigants want the judge to be neutral and fair, so couching explanations of what a judge can *not* do in these terms will usually be effective. It is also helpful to clarify what the judge *can* do to assist with the proceeding.

Example: I am sorry; I cannot conduct the cross examination for you. I would be acting like your lawyer, rather than a judge, and that wouldn't seem neutral and fair. You will have to do the best that you can—although I may be able to help make sure that particular questions are phrased properly.

Managing the Decision and Beyond

1. Consider discussing potential decisions to find the most practicable for the parties.

Compliance with a decision is more likely if the judge first learns what is most crucial for the litigants and what can be done to make the decision and order as unburdensome as possible. This is particularly the case in non-zero-sum situations, such as child custody and visitation. A good approach is to outline the general contours of the decision and then ask the litigants if there are any particular needs or concerns they have within this context. Contrary to some judges' fears, this will not make them appear tentative or cause them to lose control of the courtroom.

Example: Let me tell you where I am going. I plan to give the mother custody and extensive visitation to the father. (To the mother) Please tell me the best times for your child to be with the father. (Later, to the father) What times would not *work for you?*

2. Announce the decision, if possible, from the bench, taking the opportunity to encourage the litigants to explain any problems they might have complying.

It is usually better to announce the decision while parties are still in the courtroom. This provides the best opportunity to explain the decision, get a sense of whether it is understood, take whatever steps are needed to make sure that it is understood, and make any necessary modifications based on the parties' reactions. Sometimes the order is simply impracticable—it might, for example, order a visitation handover when a parent is not available. In such situations, it is much better to know it now, rather than to wait for noncompliance, frustration, anger, a contempt hearing, and an explanation of impossibility. Carefully phrasing the question will usually preempt the losing party from taking the opportunity to attempt to relitigate the whole case.

Example: I am awarding custody to the mother. However, I am going to let the child be with the father two out of three weekends. Is this workable for you? Are there any small changes or details that would make life simpler for all of you?

3. Explain the decision and consider acknowledging the positions and strengths of both sides.

When litigants understand the reasoning behind the decision, it is often easier for them to respect and comply with the decision. Moreover, explanation is respectful to the parties. A litigant whose position seems to have been fully considered, even if ultimately rejected, is more likely to respect that decision and find a way to comply with it.

Example: Let me explain my decision to you. I have taken into account all that you have both told me and thought above all what is best for Melanie. While I am not giving you both joint custody, I want you (father) to know that I very much appreciate your desire for maximum involvement with Melanie. I know you both love your children and want what is best for them. But given what will happen day to day, and Melanie's needs for the next few years, I think this approach provides her with the day-to-day attention that she will need while letting her father stay very involved, as he wishes.

4. Make sure that the litigants understand the decision and what is expected of them, while making sure that they know you expect compliance with the ultimate decision.

All too often litigants, anxious not to appear stupid, will mask a lack of understanding, leading to obvious problems down the line. Just asking if the parties understand may not be enough. One approach is to respectfully ask them their view of what is going to happen under the court order. Genuine concern with comprehension will generally remove any risk that the parties will feel insulted. Judges can dispel any impression that such considerateness indicates laxness by emphasizing the consequences of noncompliance and the court's unwillingness to listen to excuses or reward it.

Example: It is very important that you understand what I have just ordered. Can you tell me what is going to happen now about visitation? It is okay if you are not fully clear. It's my job to make sure that I am clear and that you understand. . . . Now let me emphasize that this order is not something for you to adjust on your own. I will not be happy to hear that the order is not being followed. There will be consequences, and I do not have to tell you that courts can severely punish people who do not follow orders.

5. Where relevant, inform the litigants of what will be happening next in the case and what is expected of them.

Many litigants leave the courthouse more than a little unclear about what is going to happen next and particularly what they need to do to keep the case moving. The result is that cases go into a black hole or that litigants are surprised when something unexpected occurs.

Example: Here's what will happen next. What I have just said will be the order of the court. It will stay in force unless changed. You can get it changed only if something important happens that makes a change advisable and fair. If you want to come back to court to request a change, the clerk/self-help center has forms and instructions.

6. Make sure that the decision is given in written or printed form to the litigants.

Courts have found dramatic reductions in returns to court when litigants are immediately given the order in printed or written form. Obviously, this increases the chance that the parties internalize the contents of the order, motivates them to seek assistance if they do not understand it, and allows for speedy correction of errors or confusion in the order.

Example: The clerk is going to give you a written/printed copy of the order in a few minutes. Please wait in the courtroom until you get it. Read it carefully while you're here. Ask the clerk for an interpreter if you need one. You can get more help later at the self-help center.

7. Thank the parties for their participation and acknowledge their efforts.

Example: I want to end by thanking you both. You have both done your best. Your help means that we have a good order, and I very much hope that there are no problems. Good luck.

Conclusion: Revisiting the Initial Questions

Turner holds that judicial intervention is appropriate and sometimes necessary to ensure due process in self-represented cases.

The best practices described here suggest the relative ease of making such interventions where the parties lack representation. These interventions clearly lie within the traditional discretionary power of a judge to manage the courtroom and the receipt of evidence.

Finally, it must not be forgotten that, under *Turner*, if a judge feels that the procedures that he or she can appropriately adopt are not sufficient to ensure fairness and accuracy in the protection of constitutionally protected interests, there may be a constitutional requirement for counsel.[10] ■

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Endnotes

1. No. 10-10, 564 U.S. ___ (June 20, 2011).
2. *Id.* at 14.
3. Greacen Assocs., Effectiveness of Courtroom Communication in Hearings Involving Two Self-Represented Litigants: An Exploratory Study (2008), http://www.selfhelpsupport.org/library/item.202482-Judicial_Communication_Materials_Effectiveness_of_Courtroom_Communication_i.
4. The entire curriculum package (with the exception of the video) is online at http://www.selfhelpsupport.org/library/folder.165143-Harvard_Judicial_Leadership_Conference_Nov_13_2007.
5. Self-Represented Litig. Network, Judicial Education Curriculum Project Report and Evaluation (2008), http://www.selfhelpsupport.org/library/item.259761-Judicial_Education_Curriculum_Project_Report_and_Evaluation.
6. ABA Model Code of Judicial Conduct R. 2.2 cmt. 4 (2007), http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html.
7. The cases on the judicial role in self-represented litigation are collected, cited, and discussed in detail in Cynthia Gray, Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants (2005), http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf; Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 Geo. J. Legal Ethics 423 (2004), http://findarticles.com/p/articles/mi_qa3975/is_200404/ai_n9401537/; Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough & Richard Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 Judges' J. 16 (Spring 2003). In addition to the resources listed above in this footnote and in the text, the following have been of particular use in the development of this attempted synthesis: Russell Engler, *The Toughest Nut: Handling Cases Pitting Unrepresented Litigants Against Represented Ones*, 62 Nat'l Couns. Juv. & Fam. Ct. Judges J. 10 (2011); Mark A. Juhas, Maureen McKnight, Laurie D. Zelon & Richard Zorza, *Self-Represented Cases: 15 Techniques for Saving Time in Tough Times*, 49:1 Judges' J. 18 (Winter 2010), http://www.zorza.net/21st-century.pdf; and Judicial Council of Cal., Handling Cases Involving Self-Represented Litigants: A Benchguide for Judicial Officers (2007), http://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf.
8. If it is unclear that the parties are in fact on notice as to what is to be decided, it is important that they be given the opportunity for a continuance in order to prepare. Such a request is rarely made by the self-represented.
9. The exact wording of *Turner* references the "*opportunity at the hearing for the defendant to respond to statements and questions*." Turner v. Rogers, No. 10-10, 564 U.S. ___, slip op. at 14 (June 20, 2011).
10. *Id.* at 15–16. See also *Lassiter v. Department of Social Services*, 452 U.S. 18–31 (1981), applying factors laid out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to the parental termination context and suggesting need, in some situations, for individualized determination as to necessity for counsel and appealabilty of any denial.