

A NEW DAY FOR JUDGES AND THE SELF-REPRESENTED

Toward Best Practices in Complex Self-Represented Cases

By Richard Zorza

After the June 2011 Supreme Court case of *Turner v. Rogers*, the questions about judicial intervention in cases with self-represented parties have become: When must judges intervene and how most effectively can they do so? An article that appeared in the fall 2011 issue of *The Judges' Journal* (at page 16) described 29 best practices for relatively civil simple cases in which both parties are self-represented. This one offers approaches in more challenging civil case situations.

Best Practices for Cases Involving One Represented Party

When one party has counsel, the task of the judge remains to apply the techniques described in the earlier article while guarding against due process distortion from the presence of counsel for one party. A clear and consistent focus on the need to get appropriate information to the fact-finder best protects against error and will be given great respect in any appellate or ethics committee review. Moreover, attorneys generally welcome clear guidance from the judge.

1. At the start, reassure the attorney that procedures are designed to ensure that both sides are fully heard and that the attorney will be permitted to play the traditional role.

Attorneys are anxious about self-represented cases, in part fearing that the judge may take over the case, rendering them irrelevant (particularly in the eyes of the client), and in part fearing that the judge may “lean over the bench” to help the self-represented party.

It is helpful to explain what will happen, including that the attorney will play the traditional role, including that of presenting evidence and cross-examining, and the self-represented litigant’s right to be heard will be protected. It is rarely necessary to limit the attorney’s role unless the attorney has failed to follow the judge’s instructions.

Example: I want to tell you how I am going to make sure that I hear fully from both sides. As we move through the case, I will explain what is going on and am likely

to ask questions of both sides when I need more information. But I want you to know, Counsel, that you will absolutely be able to do your job of representing your client in this case. The case will proceed like this:

2. If necessary, control direct testimony to keep out inadmissible testimony or prevent its being given improper weight.

On direct, the judge normally may ask questions about the direct testimony presented by the party with counsel, treat testimony as objected to, and rule on these objections. This does not put the judge on the side of the self-represented litigant. Unless there has been formal objection to this direct testimony, the judge may evaluate the answers without formally ruling on the evidence. It is fairer to be explicit, however.

Example (where testimony might be subject to hearsay objection): I need more information about where this evidence comes from before I can decide what weight to give it. Counsel, can you have your witness explain how he/she heard that information? Or would you prefer me to ask the question directly?

3. Require greater specificity and explanation in objections and explain rulings where helpful.

Concise objections are likely to confuse the self-represented litigant. Judges can request greater specificity and explanation, ask additional questions about the evidence, explain the process and the ruling, and possibly indicate another way to make the point.

Example: Counsel, please explain your objection. . . . Mr. Litigant, Counsel reminds me that we need to know where you got that information. Did you see it directly or did you hear it from someone else?

4. If necessary, stop counsel from interrupting the self-represented litigant's story.

Sometimes attorneys disrupt the self-represented litigant's presentation with repeated objections. Initial objections should be treated respectfully. But if counsel appears to be making objections for tactical purposes, rather than to exclude

inappropriate evidence, permit a standing objection and warn counsel to limit the frequency of objections, stating the reason for this instruction. Giving the attorney an opportunity at the end of that phase of the proceeding to identify any particular harm that the modified proceeding has caused should then fully protect the record.

Example: Counsel, your objections are disrupting this testimony. Can you limit them to the exclusion of inadmissible testimony, remembering that I am capable of applying common sense to the weight of the testimony? Your standing objection is noted. There is no need for ongoing objections. (To the self-represented litigant) Let me explain what is going on here. I have found that counsel's objections are not proper. Mr. Lawyer has a right to get in the transcript his argument that I should not be stopping him. That will be taken down and might be considered by an appeals court.

5. Control cross-examination to prevent mistreatment of the nonrepresented party, and use escalating responses if necessary.

Counsel is entitled to be exploratory in cross-examination and to make helpful factual points, not to humiliate or deter a witness. Judges should put counsel on notice of the problems with their approach and escalate their interventions. The judge can request the basis of cross-examination or representations that the questions are based on a good-faith belief in the possibility of their leading to relevant testimony. (Similar techniques are appropriate with a self-represented party who is engaging in similar behavior.)

Example: Counsel, stop right there. How does the witness's family situation bear on whether he kept his contract for plumbing work? (After a general assertion about "credibility") I am going to need more detail about the relationship of your question to lack of credibility. (After lack of result and repeated dubious questions) I find that there is a pattern of cross-examination without sufficient foundation, and I am ordering that there be no more questions without a representation of foundation. (Later . . .) I have

asked you to stop those harassing questions. If they continue, I will have to consider sanctions. Let's take a 10-minute recess to allow counsel to consider his position.

6. To the extent that the judge is significantly modifying traditional processes, or the attorney is unhappy with the new procedure, explain the scope of judicial discretion and the reasons for the modification. Allow the attorney to be heard and to object on the record.

A clear, early explanation of what is being done will make it more likely that the attorney is not caught unawares and that he or she will go along without objection. Many attorneys do not initially understand that the rules and practices in most states give judges flexibility to modify procedure where appropriate. An explanation may well mollify the attorney. A record is critical to protect all parties.

Example: After you handle the direct testimony of your main witness, Ms. Attorney, because I see in the pleadings some matters that may need clarification, I will probably ask some questions myself rather than go immediately to cross-examination. Counsel, I understand that you are unhappy with my



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decision. But under the governing rules here, I have discretion over the order of evidence and questioning, provided the overall structure is neutral. I will ask questions of both sides if necessary to understand the whole case and get all the relevant and legally admissible facts. Do you feel prevented from making your client's case? You have the right to make a specific or general objection.

7. If the complexity of the facts or the law makes it impossible to provide a fair and accurate forum, consider whether due process may require the appointment of counsel or other forms of assistance.

The most compelling cases for civil Gideon, and those that will have the most impact on the policy debate, may be those in which the judge has tried to create a

Mentally or Emotionally Challenged Litigants

For those for whom all the world is a frightening place, the courtroom is even more so, with its rituals, power, and risk of sudden life-changing outcomes. The principles stated above apply even more forcefully to those whose mental status makes them more vulnerable and defenseless than most.

Seriously disturbed litigants may bring issues over which the court has no real-world jurisdiction, such as the assertion that the landlord is beaming radio waves into their teeth. In other situations, the litigant's mental health may make it hard for them to understand the limitations upon judicial power. In either situation, being explicit about what the court can

at possible reasons for nonpayment and what they might mean.

With a disturbed or challenged litigant, the risk of unintentional noncompliance after the court's decision may be greater. Judges have found it helpful to make sure that such litigants understand both what has happened and their obligations. It can be helpful to ask them to restate what they understand their obligations to be and to suggest the possibility of getting help from family or friends. There is a major risk that this population will run afoul of the law through inability to understand, recall, or comply. Appropriate referrals can help avoid such a disaster. While ideally the clerk's office or a self-help center will have performed this function, sometimes the authority of the judge is needed to achieve the diversion.

Angry Litigants

Maintaining a respectful environment in the face of a litigant's out-of-control, or nearly out-of-control, anger is, of course, much harder when the judge does not have the lawyer to rely on to restrain the litigant. Appealing to the litigant's sense of fairness may be of help. Similarly, expressing sympathy with the intensity of the emotion may reduce the litigant's alienation. Such statements may help the litigant feel less anger at the judge as a person, thus helping the litigant focus on the process as a whole.

A potent consideration for the litigant may be that the case cannot proceed at the expressed level of emotion. Generally, litigants want a decision and want to be able to move on. They do not want to be seen as obstructionist.

If none of this works, the judge can offer a brief "cooling off" period, like a child's "timeout," to let the litigant get a grip and then participate fully in the process. Some judges have also found that offering a talk with a staff member works well, if available staff (not necessarily senior) are particularly good at calming down such litigants.

More stringent measures include adjournment, which must, of course, not be allowed to prejudice the nonresponsible party, or a range of sanctions for

A calming understanding will help litigants get over their anxiety and focus on the substance.

neutral forum notwithstanding the fact that one side has counsel, and makes a finding that it is impossible to do so.

Example: The facts and the foundations needed for the evidence are so complicated in this case that I cannot both maintain my judicial neutrality and adequately protect the litigant's right to be heard. I would have to know too much about the case to remain fair and neutral. I am therefore adjourning this case to investigate solutions such as appointing counsel, provided the litigant can show indigency, or other services, including for referral to lawyer referral or discrete task services.

Best Practices for Cases Involving Atypical Self-Represented Litigants

This section explores certain difficult types of self-represented litigants, describing in narrative form some of the techniques that have worked best for dealing with them.

and cannot do, and being respectful of the litigant's emotions, may help at least to move forward. A calming understanding will help litigants get over their anxiety and focus on the substance.

Many such litigants are highly anxious. The more anxious the litigant, the more important is a case structure that is manageable and understandable for all. Breaking the case into small steps, explaining each one, while repeating where necessary, can be very helpful. The litigant is less likely to lose track of the issue at hand, and the other parties will be better able to understand and address the anxious litigant's position.

Example: I have decided that the eviction proceeding was properly started. Now we move to the next step. I must decide if the landlord is right that he has not been paid rent since May. Remember, even so that does not end the case because we then look

noncompliance, including the drawing of adverse inferences against the responsible party, particularly for behavior that threatens the integrity of the process and summary contempt. Some judges use a three-step process of explaining the concept of contempt, the sanctions authorized, and only then imposing the sanction (which can later be waived if the litigant then complies).

Determined Self-Represented Litigants

Some self-represented litigants embrace their self-represented status in ways that complicate case management. Appellate courts and judicial conduct bodies are sympathetic to the challenges faced by judges dealing with these cases and are highly deferential to their choices in such cases.

It may be helpful to be explicitly respectful of the litigant's right to self-represent and avoid any rush to judgment when a self-represented litigant appears to be making a choice based on perceptions of the profession or the system. It is appropriate to consider that the litigant may indeed have had a bad experience justifying his or her attitude. Bearing this in mind, reaffirming a commitment to neutrality and fairness, and not just focusing on cautions and problems, is more likely to lead to a mutually respectful relationship between judge and litigant, and therefore a smoothly running court. When litigants become dismayed because a judge does not follow their requests, it is usually helpful to explain that there are requests to which a court cannot accede if it is to remain neutral. It can be helpful to remind the litigant that the court cannot be a particular party's attorney. Litigants will normally be respectful of refusals when explained in terms to which the litigant can relate, such as the need for neutrality.

In some cases, determined self-representation is a consequence of failure to find appropriate counsel. It might make sense to inquire as to the reason for lack of counsel and to make an appropriate referral to a referral service.

Political Litigants

Perhaps the most difficult cases are those in which the litigant uses the case to

make a political point about the legal system and the Constitution. The judge has to maintain accessibility and the dignity of the courtroom and avoid abuse of the legal system. Limiting the focus of the proceedings to those appropriate to the particular court while maintaining a respectful and nonconfrontational attitude to the litigant is the best policy. Even

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after explaining that the court cannot grant the party's judgment as requested, it may be helpful to ask why the party seeks that relief or thinks as he/she does.

Suggestions for Complex Trials and Jury Trials

The management of complex and jury trials involving the self-represented has occasioned substantial discussion among judges and experts.

Complex Trials

Parental termination, guardianship, and other complex cases often include complex documentary evidence, multiple witnesses, more difficult questions of law, and sometimes multiple parties.

The suggestions below aim primarily to avoid surprise or confusion in the organization, presentation, and admission of evidence. First, a general approach.

1. *When it seems too complicated to sort out a situation with a self-represented litigant, develop a nonlawyer approach equivalent to how the problem would be resolved if there were lawyers on both sides.*

There are usually very good reasons for the procedural solutions developed for cases that involve counsel, and what the judge would be doing if there were reasonably competent and cooperative

counsel on both sides is the best guide for self-represented litigation as well.

2. *Use pretrial conferences.*

Pretrial conferences allow questions of admissibility, organization of evidence, and courtroom procedure to be resolved without the formality, pressure, and time of the courtroom. The conference can

resemble a "dress rehearsal" of the trial, going over the principal elements of testimony beforehand. It should be on the record, serving procedurally as comprehensive motions *in limine* deeming the self-represented litigant to be moving for a ruling on the admissibility of planned testimony. Discussion during the conference of the witnesses and expected testimony can help ensure the relevance and admissibility of testimony. Such conferences may also play a discovery role and help to simplify discovery proceedings. Federal court judges have been among the leaders in experimenting with this technique.¹

3. *Focus on documentary evidence and hearsay.*

Evidence that requires foundation—documents and hearsay—seems to produce the most time-wasting confusion in trials. A focus on the required foundations in a pretrial conference will improve trial efficiency.

Example: To decide about admitting the financial records you want to present, we must know where they came from and how they have been kept. Maybe we can agree here which will be entered?

4. *Encourage getting assistance from law libraries, self-help programs, and trustworthy online resources to identify the governing law and understand courtroom procedure.*

The more complicated the case, the more important it is that self-represented litigants understand the governing law and procedure. Increasingly, resources are available. Law librarians can assist the self-represented with research into the more complicated areas of law with which self-help center staff are not necessarily familiar.

Example: You are asking for damages, but you do not have a witness for the amount of damages. You should have a plan for getting testimony on this. The self-help center or law library might be able to give you information on this.

5. Suggest the use of pretrial forms to organize testimony. Such forms help judges identify and resolve problems in advance.

The form might ask for the points that the litigant intends to prove, a list of witnesses and what they would testify to, a list of the documentary evidence to be introduced and where it came from, and a list of problems that the self-represented party would like the judge to resolve.

6. Use court staff to screen pleadings so that technical requirements, like joining necessary parties, are properly dealt with.

Early screening saves courtroom time. In complex litigation, a technical failure in the pleadings can demolish the entire case and waste judicial resources.

Example: Clerks could screen for issues, such as failure to join necessary parties and give them to judges for immediate action, rather than waiting for the delay and complexities of adversarial back and forth.

7. Use pretrial conferences to make discovery less burdensome for both parties.

Discovery can be a major pitfall for the self-represented. Through discovery conferences and pretrial orders, courts can simplify and manage discovery, minimizing the requirements on both parties. They can also include an approach to the handling of sensitive information that might normally be restricted to the counsel, but in which the judge might have to play a more assertive role.

Example: Lawyers could review these documents but would have to keep them

confidential. Because there are no lawyers, just tell me what you are looking for, and I will look. I will also tell you generally what else is in the documents, so you can tell me if I may be missing something to which you are entitled.

Jury Trials

Because the judicial role is so different in jury trials, the management of a self-represented jury trial offers additional challenges to keep jury selection fair and ensure that only admissible evidence reaches the jury. Judges must take special

Example: We are going to go over the testimony in advance to make sure that if there is anything that either of you think the jury should not be hearing, I decide about it as soon as possible. When you tell me of something you want to show, that is called an "offer of proof." If during proceedings you think we are going to get into a dangerous area, please stand, and I will stop the proceedings. You both will come up to me so we can discuss it outside the jury's hearing.

2. Use chambers conferences at all stages for legal and procedural questions that might

Pretrial conferences allow questions of admissibility, organization of evidence, and courtroom procedure to be resolved without the formality, pressure, and time of the courtroom.

care that steps to control the courtroom and to ensure the appropriate receipt of evidence do not impact the jury.² When the law requires a greater burden of proof to be carried by a particular party in order to protect the opposing party, the judge may need even more caution to ensure fairness. Moreover, when the self-represented litigant has the extra burden, it may well be inappropriate for a judge to assist in carrying the burden.

1. Explain very early the general concepts of motions in limine and offers of proof, and establish clear procedures for resolving issues outside the presence of the jury, including the making and resolving of objections.

It is critical that the self-represented litigant understands and knows how to follow the procedures that ensure jury insulation. Those procedures should be as simple as possible. (Note: Most states have various forms of pattern jury instructions. It may well be the best practice to apply and/or adapt such approved language, where relevant, to the situations below.)

require discussion. Such conferences should obviously be on the record, or, if not possible, summarized later for the record without the jury present.

As in nonjury complex cases, the ongoing use of pretrial and chambers conferences provides an opportunity for almost a "dress rehearsal" of the trial, including full offers of proof. It removes most objections from the presence of the jury and minimizes the jury's exposure to inadmissible testimony.

Example: Okay, the next planned witness will say what? (Overhearing an argument between the neighbors about where the property line really was) How is that relevant to who is responsible for the damage caused by the falling tree?

3. Tell the jury pool of the party's self-represented status and the jurors' responsibilities not to draw inferences from it or from whatever might occur during jury selection.

It will be very hard for the jury not to develop prejudicial interpretations from the litigant's not having a lawyer.

Example: Ladies and gentlemen of the jury, one side in this case does not have a lawyer. That is their absolute right, so don't treat the parties in any way differently because of that.

4. Explain (possibly in writing, and as early as possible) the party's jury selection rights and procedure, and allow their full exercise.

Where the litigant merely suggests questions and makes challenges, this will be relatively simple. Where the litigant may ask questions directly, consider alternative procedures possible under governing law.

Example: You may now tell me if you don't want some of the jurors selected so far. If you think they will not be fair to you, tell me why, and, if I agree, I will exclude them from the jury and will not reduce the number of people you can exclude without reason.

5. In initial instructions to the selected jury, address the litigant's status and its consequences.

The jury should know that the litigant is entitled to this status as a matter of law, that the judge may intervene to make sure that the evidence provided is appropriate, and that the jury should not draw any inferences about the judge's views from that engagement. It must decide the case on the evidence.

Example: One party represents himself. That's his right, and why is not relevant to your decision. Please do not speculate about the reason. I will make sure that all parties get their evidence before you. At various times we may have to talk out of your presence, and sometimes I will have to talk about what is going on or stop the proceedings to make a ruling. Regardless of what I do and when I do it, you should not come to any conclusions as to what I am doing, or why, or what evidence or actions of the parties that I may be talking about.

6. Make sure that the self-represented party knows and understands the governing rules for opening and closing statements. It might be helpful to review in chambers planned statements for appropriateness.

Sometimes the self-represented get carried away and have difficulty limiting

themselves to what is to be or has been shown by the evidence. Chambers conferences may be useful to review the key points to be made, minimizing the risk of judicial interventions before the jury, which could be highly prejudicial.

Example: Let's go over both opening statements, if you want to make them. As I will tell the jury, the opening is not evidence. You may describe to the jury what you expect the evidence to prove, who they will hear from, and what they will say. You can tell the jury what you will be asking them to decide at the end of the case. If there is any problem, much better to resolve it here than for me to have to interrupt and correct either of you. That might confuse the jury.

7. When the judge does intervene, consider mentioning the prior reference to the likelihood of intervention and repeating the importance of lack of inference.

Example: Remember how, at the beginning of the trial, I told you that I might be telling you to ignore particular things that you might have heard. This is one of those moments. Please ignore what Mr. Smith might or might not have said, as well as the discussion about it at the bench.

8. Consider how best to protect the self-represented litigant's right to cross-examination.

There are those who believe that the protection of the right of effective cross-examination is, as a practical matter, the hardest thing to do in self-represented litigation. The core problem is that cross-examination has to be in the right form, but that any prior interaction as to form may reveal the content of the cross. In administrative proceedings, it has become relatively standard for the administrative law judge, when an unrepresented party is having difficulty in cross-examination, to ask the party what point they are trying to make, rephrasing the question to obtain that information, and then checking if that was the question they wanted asked. Such a discussion would have to be at the bench. The judge may want to explain to the jury that because the question is complicated, he or she is asking it, not endorsing it, and that the asking of the question should not be viewed as an expression of

sympathy. (Please note that this particular suggested solution may well be controversial in some quarters, particularly if it is considered as demonstrating to the jury that the judge has personal feeling about the case.³)

Example: Can counsel and Mr. Litigant approach the bench? You seem to be having difficulty with this. If you like, you can tell me what you are trying to find out, and I will ask the question in the right form. (After rephrasing) Is that what you wanted? Ladies and gentlemen of the jury, I want to ask some questions on behalf of Mr. Litigant. Because they are complicated, I ask them for him. These are his questions, not mine. What weight to give is for you and you alone.

9. Give self-represented litigants plenty of notice about their right to present requested jury instructions. Let them know of available pattern instructions.

Litigants may not realize that they have to request jury instructions, if that is the case. The assistance of a law library might be particularly important here.

10. After any verdict, make sure that the self-represented litigant is aware of procedural requirements to preserve and pursue appellate rights or to protect against loss of their victory on appeal.

Example: I should tell you that if you want to appeal, there is a rather complicated procedure that you have to follow. The first thing that you have to do is file a notice of appeal within 30 days (depending on governing law) of the verdict in the clerk's office and send a copy to the opposing attorney. There are lots of other steps you have to take, some with deadlines. You can get a booklet in the clerk's office and can get help in the law library.

Conclusion

These two articles are intended to show useful and helpful examples of how to deal with the core idea, strongly, if implicitly, supported by *Turner*, that while judges must indeed apply the same substantive and procedural rules, regardless of whether a person has a lawyer, they are absolutely not forbidden from taking—and may indeed in some cir-

cumstances be required to take—the representation status of the litigants into account in deciding how to exercise their discretion in applying those rules. ■

Endnotes

1. Special thanks to Hon. Laurie Zelon, of the California Court of Appeals, for pointing out the importance and practicality of this approach.

2. Interestingly, one of the very very few cases of reversal for excessive intervention in a self-represented case occurred in a jury case, *Edwards v. Le Duc*, 157 Wn. App. 455 (2010), in which the judge appears to have effectively taken over examination of expert witnesses in the face of cross-examination. Moreover, the litigant thanked the court *in front of the jury* for helping her, saying how difficult it was for a person with a brain injury to represent herself. Contrast generally the cases cited in the authorities listed in the endnotes to the prior article on this subject.

3. For discussion of the risks of exposing the jury to such a judicial role, see note 2, *supra*.