

Judicial Officers and Self-Represented Litigants

Tools for Working Together

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This past year has been extremely difficult for people—physically, emotionally, and financially. Many have lost their jobs due to the pandemic, making them vulnerable to loan defaults, bankruptcy, and eviction. Divorce and separation filings are up. And incarcerated individuals in the federal court system, who often have limited access to legal resources, have faced a host of new challenges. Compounding the issues, many of these individuals will be representing themselves in court.¹

Unfortunately, self-representation is not a trend that we can expect to taper off as the pandemic's burdens lessen. And while self-represented litigants face many challenges trying to navigate their cases, judicial officers likewise face significant challenges in determining how to achieve fairness while remaining impartial. Judicial officers must find a way to ensure procedural fairness and afford self-represented litigants an opportunity to be heard without running afoul of the Colorado Code of Judicial Conduct.

To help judicial officers balance these interests, the Institute for the Advancement of the American Legal System (IAALS) has created a guide for trial judges that outlines effective practices for resolving cases involving self-represented litigants.² These best practices

were derived from the latest research as well as feedback from six experienced judicial officers. This article highlights a few best practices covered in the guide.

Ensuring Procedural Fairness

To achieve procedural fairness, “the law must produce a consistent outcome for all litigants, regardless of their legal representation, based on the law and facts of their case.”³ In its most basic sense, “procedural fairness” is a legal principle that ensures fair decision-making. But self-represented litigants and judicial officers have different views about whether procedural fairness has been achieved. For most self-represented litigants, the outcome itself is not as important as the fairness of the process that produces the outcome.

Judicial officers play a critical role in providing procedural fairness to self-represented litigants, and when both parties are self-represented, the judicial officer has additional responsibilities and obligations to keep proceedings balanced and fair.⁴ Judicial officers must take seriously the fact that self-represented litigants have important issues to resolve and understand that litigants feel a tremendous sense of nervousness in approaching the court to resolve their issues. As one of the few contacts that parties have with the court system, judicial

officers are responsible for making it accessible and providing finality when possible. Judicial officers can create a productive environment for hearings by demonstrating and requiring respectful and peaceful communication. Calm proceedings with clear structure feel fairer to the parties involved.

At the outset of a hearing, the more detailed, plain language information that the parties are provided, the more effective and efficient the hearing will likely be. Litigants appreciate information about how long their hearing will last, how the time is divided between them, how time will be kept, and how the judicial officer expects them to present their evidence (e.g., informal statements versus formal testimony). The judicial officer's role is to provide this information clearly and concisely before starting the hearing and to allow a moment for questions about procedure.

Pursuant to Colorado Rule of Evidence (CRE) 611, judicial officers can conduct proceedings in the manner they deem most appropriate. A corollary to CRE 611, Fed. R. Civ. P. 1 likewise directs judicial officers to interpret and administer the rules to secure a just, speedy, and inexpensive determination of every action and proceeding. With this in mind, when two self-represented litigants appear, the judicial officer must more actively conduct the proceedings. When emotional issues like family matters are involved, judicial officers must think carefully about how such proceedings will be structured. Will the judicial officer require parties to operate formally by calling witnesses and allowing cross-examination of the parties, or will a more informal presentation of testimony and evidence be allowed? And how will the judicial officer preside over the hearing? When self-represented litigants fail to present information directly related to the statutory factors required for the judicial officer to make a decision, the judicial officer can overcome this obstacle by taking the role of questioner. CRE 611 provides this authority, but it must be exercised with care. Judicial officers in the role of questioner must provide litigants with clear verbal guidance and reasoned responses so they know why the judicial officer is asking the questions.

In federal court, the self-represented litigant is often also incarcerated. And unlike in the criminal justice system, there is no constitutional right to an attorney in a civil action. The federal court relies on a network of dedicated professionals—from its Pro Se Clinic to volunteer attorneys—to provide pro bono counsel in certain cases. But because the demand far outstrips the supply, self-represented parties often lack access to information due to factors outside of their control. And in the case of the self-represented incarcerated party, while judicial officers cannot act as advocates, they must be mindful of the unspoken dynamics so the litigation experience does not add to an individual’s sense of marginalization.

Ensuring the Right to Be Heard

Rule 2.6 of the Colorado Code of Judicial Conduct sets forth the rules that judicial officers follow to ensure a party’s right to be heard in court. Specifically, Rule 2.6(A) states that “[a] judge shall accord to every person who has a legal interest in a proceeding, or the person’s lawyer, the right to be heard according to law.” Comment 2 of Rule 2.6(A) outlines steps a judicial officer can take to ensure a self-represented litigant’s right to be heard, which include:

- liberally construing pleadings;
- providing brief information about the proceedings and evidentiary and foun-

dational requirements;

- modifying the traditional order of taking evidence;
- attempting to make legal concepts understandable;
- explaining the basis for a ruling; and
- making referrals to any resources available to assist the litigant in preparing the case.

In the case of federal courts, the expectation of liberal construction is built into the case law.⁵

Liberal construing pleadings and arguments is essential when working with self-represented litigants, many of whom file handwritten motions on improper forms or on notebook paper, and in some circumstances on the backside of an envelope. Often these motions do not use common legal terminology or state the specific rule or case that supports their request for relief. For example, a self-represented litigant might seek a continuance by simply stating that they are “not ready” or “did not have enough time.” A judicial officer is well within the Code of Judicial Conduct in interpreting these words as a motion to continue.

Judicial officers may also provide self-represented litigants a more meaningful opportunity to understand the process and be heard by referring them to a resource or to counsel. This could include referring the litigant to court self-help centers, mediation services, Colorado Legal Services, the Federal Pro Se

BEST PRACTICES FOR JUDICIAL OFFICERS

Judicial officers can help parties—whether self-represented or not—have confidence in the court and feel that justice has been achieved by:

1. laying out the procedures at the beginning of the hearing
2. taking the time to ask questions that are vital to answer
3. granting leniency on motions and forms, and allowing for continuances when warranted
4. balancing the needs of self-represented litigants with the needs of counsel.

More recommendations for successfully managing cases involving self-represented litigants can be found in *Ensuring the Right to Be Heard: Guidance for Trial Judges in Cases Involving Self-Represented Litigants*, available at <https://iaals.du.edu/publications/ensuring-right-be-heard>.

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Clinic, or local social services agencies. Such referrals allow self-represented litigants to better understand the judicial process and possible options, which empowers them to better prepare and present their issues. This in turn benefits the court and all parties to the case. While referring a self-represented litigant to a resource or to counsel may necessitate a delay or continuance of the proceedings, such interruption has benefits that far outweigh any negatives.

In fact, granting a continuance or a delay in the proceedings is another tool a judicial officer can use to ensure a self-represented litigant is given a meaningful opportunity to be heard. A continuance, short delay, or even a brief recess of the proceedings may afford that party the opportunity to meet with a self-help center representative, counsel, or other resource. It may also give them a chance to learn

more about the process, research an issue, or obtain the proper form or document. In a busy courtroom, a judicial officer may simply pass a case involving a self-represented litigant and call another case that is ready, giving the litigant more time to prepare the case.

These are just a few of the tools a judicial officer can use to ensure self-represented litigants are given a meaningful opportunity to be heard. Just as Rule 2.6 does not contain an exhaustive list of tools a judicial officer may use, neither does this article.

When One Party is Represented by Counsel

Unique challenges and considerations may arise when one party is self-represented and the other party is not. First and foremost, while all parties are vested in the outcome of the litigation, the emotions of a self-represented litigant are often

more openly displayed because they are not filtered through a third-party legal representative (although we are all aware of cases where the attorneys appear equally, personally vested). This is true even when the self-represented litigant has some legal training.

Second, in most cases the self-represented litigant does not have any legal training and may have fewer resources than the opposing party. This imbalance can lead to a perception of inequity for the self-represented litigant, grappling with an intimidating process and unfamiliar rules, and the represented party, reacting to a judicial officer who is affording the self-represented litigant a liberal construction of their filings and perhaps extensions of time to complete various tasks.

Third, the dynamics of a courtroom necessarily change, such as the language the judicial officer and the parties use, the pace at which the hearing proceeds, and the levels of preparation that the judicial officer can expect from the parties. Indeed, given these dynamics, it is often most effective for judicial officers to consider and treat both sides as self-represented as they attempt to balance the various competing interests to ensure fair and efficient adjudication.

Opportunity for Creativity

In navigating this tightrope, a judicial officer may be presented with opportunities to use creative approaches to resolve the underlying conflict. The ability to use more creative approaches to resolution depends on truly listening to the parties' perspectives, acknowledging and addressing any judicial officer biases, and stepping back from the day-to-day procedures to consider the parties' respective goals more holistically.

Of course, the approach may change depending on the stage of a case and the personalities before the judicial officer. For instance, from the start of the case judicial officers can set expectations regarding how the parties will communicate with each other and how often that communication should occur, which helps stem frustration arising from perceived disrespect or unresponsiveness. In discovery, judicial officers can offer spaces within the courthouse to facilitate viewing sensitive documents or

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particularly contentious depositions so there is an additional assurance that applicable rules will be honored while providing access to discovery. And when judicial officers act as mediators, they can propose different settlement approaches, in addition to the traditional settlement conference, to deescalate the conflict and minimize misinterpretation.

Conclusion

In cases involving self-represented litigants, it can be helpful to focus on this quote from Albert Einstein: “Out of clutter, find simplicity. From discord, find harmony. In the middle of difficulty lies opportunity.” In doing so, judicial officers should frame self-represented litigant challenges as opportunities to promote access to justice and confidence in courts and the judicial system. ^{Cl}



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NOTES

1. Nat'l Ctr. for State Courts, *The Landscape of Domestic Relations Cases in State Courts at ii* (2018), <https://iaals.du.edu/publications/landscape-domestic-relations-cases-state-courts> (finding that 72% of domestic relations cases involved at least one self-represented party); Nat'l Ctr. for State Courts, *The Landscape of Civil Litigation in State Courts at iv* (2015), https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf (finding that 76% of civil cases involved at least one self-represented party).

2. Greacen and Houlberg, *Ensuring the Right to Be Heard: Guidance for Trial Judges in Cases Involving Self-Represented Litigants*, IAALS (Nov. 2019), <https://iaals.du.edu/publications/ensuring-right-be-heard>.
3. *Id.* at 11.
4. Colorado Code of Judicial Conduct Rule 2.2, cmt. 4, and Rule 2.6.
5. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).



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