

A Practical Guide for Attorneys Opposing Self-Represented Litigants in Family Court

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A PRACTICAL GUIDE FOR ATTORNEYS OPPOSING SELF-REPRESENTED LITIGANTS IN FAMILY COURT

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This Guide is one in a series developed by the AFCC Access to Family Court Services Task Force. For additional information and resources, go to the Center for Excellence in Family Court Practice in the online AFCC Resource Center at www.afccnet.org

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INTRODUCTION

In most jurisdictions, self-represented parties make up the majority of family court litigants. It is not unusual for a family court case to not involve any attorneys at all. Likewise, a significant percentage of cases include a lawyer representing one side and a self-represented person on the other side. This guide is designed to assist the attorney who is opposing a self-represented person in a family law case.

The non-represented person is often referred to as the “pro per,” shorthand for *in propria persona*, meaning, “in one’s own person.” “Pro se” also means “representing one’s self.” The self-represented person is as likely to be male as female.

A Google search for the phrase “self-represented litigants family court” turn up numerous family court websites created to help the self-represented person navigate family court systems. Maricopa County (Phoenix), Arizona has been a leader in self-represented assistance since the creation of its Self-Service Center in the 1980’s. Long before the internet was widely available, the Maricopa County courthouse provided self-represented parties with packets of forms and instructions for many family court actions. Those forms allowed a litigant to prepare initial filings, motions, and responses and included instructions about how to file documents and pleadings at the courthouse.

Recently, jurisdictions across the country have dramatically expanded resources for self-represented parties. Increased use of the internet has provided family court forms via links and PDFs, enhancing self-represented litigants’ access to the courts. Court systems recognized long ago that the number of self-represented parties in family court was growing and systems had to be created to serve them. The attorney who finds himself opposing a self-represented party in a family law case similarly must develop skills and systems to help him work not only with his own client, but also with an opposing self-represented litigant.

The American Bar Association’s Model Rules of Professional Conduct Rule 4.3 addresses ethical obligations for lawyers who work with self-represented parties. Presumably, most attorneys already know, without the aid of the ABA, that one should not give legal advice to the opposing party, and one should advise a self-represented party that seeking independent legal advice is a good course of action:

Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Practical advice can expand on the ABA’s limited guidance. The attorney who finds himself dealing with a self-represented party can take certain actions to make the experience more efficient and congenial for everyone.

RECOGNIZE THAT THE SELF-REPRESENTED LITIGANT MAY HAVE THOUGHT THINGS WERE GOING TO BE EASIER

The attorney should recognize that self-represented parties have possibly gotten in over their heads, and as a consequence will react to your attempts to communicate or help by expressing fear or anger. The SRL’s anger, rage, failure to communicate, or refusal to speak with the attorney may come from a position of despair after learning how difficult the court process is to navigate. Remembering this may help the attorney deal more effectively with the problem.

The sheer volume of online help for SRLs, in the form of blogs, websites, forums, list-serves, self-help centers and links, may have initially misled a party into thinking that it is easy to self-represent. Your SRL opponent may have been quickly overwhelmed by the time and effort that is actually required to properly file and conduct a court case. The forms, rules, and procedures that attorneys take for granted can look like a foreign language to someone who is not well-versed in family court proceedings. Gaining a comprehensive understanding of the law governing the family court is even more difficult.

Many judges impose the same requirements on SRLs in the courtroom as on an attorney. This approach is supported by the law. In *In re Marriage of Williams*, 219 Ariz. 546, 200 P.3d 1043 (Ariz. Ct. App. 2008), a self-represented Wife proceeded to trial on the issue of spousal maintenance and payment of community debts. Her claims were rejected by the trial court. Evidence was submitted showing that Wife had been supplied with relevant law about spousal maintenance, community property, and debts, by Husband’s counsel. Wife admitted that she lacked a legal basis for her claims but stated she went to trial based on what she personally felt was fair, as opposed to the law. At trial, Husband requested that he be awarded attorneys’ fees based on Wife’s unreasonable positions, but the trial court denied Husband’s request, stating that her positions were reasonable to someone “untrained in the law.”

Husband appealed the trial court’s denial of an attorneys’ fees award based on the trial court applying a different standard of reasonableness to a person who was self-represented. On appeal, the Arizona Court of Appeals found that a court’s evaluation of “reasonableness” for purposes of an attorneys’ fees award must be an objective standard rather than a subjective standard based on the intent of a self-represented person.

“The trial court also erred when it considered [Wife’s] lack of legal knowledge or comprehension in denying [Husband’s] request for attorney fees. Parties who chose to represent themselves ‘are entitled to no more consideration than if they had been represented by counsel’ and are held to the same standards as attorneys with respect to ‘familiarity with required procedures and . . . notice of statutes and local rules.’ . . . A party’s ignorance of the law is not an excuse for failing to comply with it.” 219 Ariz. 546, 200 P.3d 1043 at 1046 (Ariz. Ct. App. 2008).

Language such as that above is routinely cited by courts in holding SRLs to the same standards as attorneys when it comes to knowledge of the law or of court procedures. Few self-represented parties will know this going into the case, and very few will actually have that level of knowledge.

EXERCISE CAUTION IN SETTLEMENT NEGOTIATIONS WITH THE SELF-REPRESENTED LITIGANT

The ABA’s commentary to Model Ethics Rule 4.3 (shown above), notes that in a situation where the lawyer must deal with an unrepresented person whose interests may be averse to the interests of the lawyer’s client (which is almost always the case in a family law case), “the possibility that the lawyer will compromise the unrepresented person’s interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel.” How, then, does the lawyer negotiate and settle a case with the SRL, and get the final documents signed? The Comment further notes: “Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.” Comment 2, Model Ethics Rule 4.3

Rule 4.3 does *not*, however, prohibit a lawyer from:

“...negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and *explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.*” Comment 2, Model Ethics Rule 4.3 (emphasis added).

This means the family law lawyer must walk a careful path in finalizing the agreement, stating his “own view of the meaning of” the settlement documents and his own “view of the underlying legal obligations,” while not giving legal advice.

ENCOURAGE MEDIATION AND OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION

The attorney can consider providing the SRL with certain factual information, for example, articles and court documentation showing the efficacy of mediation and dispute resolution processes. It is often helpful for a person who is self-representing to hear, from as many sources as possible, how important settlement discussions are to a family case. If only opposing counsel is promoting mediation, the SRL may mistakenly believe that promotion of mediation means the attorney feels her own case is weak. Those who spend substantial time in the family court systems know that neither litigant is likely to be happy with the result of a family court trial, but the SRL often doesn’t know this. Explore what services, if any, your jurisdiction provides in order to assist with settlement in cases where one or both parties are self-representing, and

provide that information to the SRL.¹ The court system may offer legal clinics or free, limited-time attorney consultations which will allow the SRL to have a few simple questions answered. Similarly, it can be pointed out to the SRL that online services, such as forms on the court website, are available to everyone, included represented parties. If a settlement offer can be made on a Decree form that is provided by the court system, the SRL may trust that the document is less one-sided than a document prepared by the opposing party's attorney.²

FIND HIGHLY QUALIFIED MEDIATORS WHO WILL SCRUPULOUSLY MAINTAIN NEUTRALITY

Having promoted mediation and hopefully gotten the SRL to agree to mediation, choose the best mediator you can find who is skilled in working with self-represented persons. If you as the attorney believe your case is strong and the SRL's positions are not strong (or are unreasonable), then your opposing party needs to hear this from a skilled, neutral third party. Not all, but many mediators are willing to take on this role. Ask your opposing party to research and suggest several mediators, and do your best to try and agree to someone that he has suggested. The self-represented person must be permitted to do his own research to alleviate his fears, sometimes justified, that the mediator and opposing attorney are friends or too well acquainted. If your opposing party has difficulty or is unwilling to suggest mediators, a status conference with the court can be a way to have mediators suggested from the bench. This may give the SRL more confidence in the neutrality of the mediator. If your court provides a roster of mediators for family cases, ask that the SRL provide several suggestions from the court lists. When a mediator is ultimately chosen, maintain strict attention to formal demeanor and boundaries. All communication with the mediator should be in writing, with no use of first names, even if you are acquainted with the person. The waiting room at mediation is not the place to chat and be friendly with the mediator. Informal comments to your own client about how well you know the mediator (or judge) may get back to the SRL and cause more difficulty in dealing with the case itself. Attention to professional protocols is never more important than when a self-represented opposing party is involved.

TREAT THE SELF-REPRESENTED PERSON WITH DIGNITY AND RESPECT

At all times, treat your self-represented opposing party with the same professionalism and respect you would give your own client. Respectfulness to the SRL is not only appropriate, but strategic — it will pay off during your case, and after. Mutual respect in the case is good for your client and your client's finances, and preserving a cooperative relationship between the parties is crucial if they are parents together. If you find yourself being less than respectful to a self-represented opposing party, try to understand the reason your professional standards have eroded in this case and why you are unable to provide the appropriate level of respect. Remember, every communication you have with the SRL will be subject to review by a court and possibly by your

¹ Bench Books often include mediation scripts for use by judges when speaking with self-represented persons in all cases, not just family cases. One example is included in the Bench Book "Meeting the Challenges of Self-Represented Litigants," Tennessee Supreme Court Access to Justice Commission, May 2013, pages 10-11.

² As one example, a court form Parenting Plan is provided in Maricopa County Superior Court at http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter/Forms/FamilyCourt/fc_dr7.asp (last visited 8/10/2015).

bar association. Try to be certain that you are proud of your communication and can justify the way you have treated the SRL in the case. As the sole professional in the case, you may eventually be held to a higher standard for keeping communications appropriate and respectful.

Attorneys who successfully navigate SRL cases have reported that they get later referrals from former opposing parties because of the respect they showed to that party during the case. Although it can be both challenging and rewarding to show a great deal of respect to someone who is being difficult, rude, or condescending, professional conduct at all times is essential.

PROTECT YOUR CLIENT THROUGH FORMAL AND TIMELY DISCLOSURE AND DISCOVERY

When dealing with opposing counsel, attorneys frequently make agreements (formal and informal) to delay disclosure deadlines or do informal discovery. This should not be done when the opposing party is self-represented. Scrupulously follow your jurisdiction's discovery and disclosure rules and file appropriate discovery early in the case. Point out to the opposing party if your client is going to answer (and produce) the same information as the self-represented party, and that disclosure requirements work both ways. Explain to the SRL that your client is going to timely fulfill her duties of disclosure, and he is expected to fulfill his duties as well. You may also provide factual information about what sanctions the court has the authority to issue for a failure to provide discovery and disclosure, while taking care not to make threatening statements or give legal advice. Propose in writing to the SRL that you have a personal meeting to exchange documents and information on a specific date.

If the SRL in your case turns out to be uncooperative, you need to show your client's absolution in attempting to accomplish disclosure without court intervention. By sending your compliance and discovery out early, you leave yourself time to request that the court compel disclosure and issues sanctions against the non-complying party well in advance of trial.

SEND THE SELF-REPRESENTED LITIGANT A LETTER OF INTRODUCTION WITH A GENERAL EXPLANATION OF THE PROCESS

As a way to start the process with the SRL, counsel should construct a basic outline establishing how the parties can exchange information, get each other's questions answered, define how property and other issues will be addressed, and establish the time parameters expected of each party. Both the SRL and your own client will appreciate this overview of the process. If your jurisdiction has specific disclosure statutes or rules, or forms that must be filled out and filed in every family case, enclose copies of the rules and forms. Your letter should give your opposing party the links to your jurisdiction's self-help or online forms website. Reference to an official website, as opposed to what will be perceived as demands by the attorney, is more likely to get the SRL's attention and compliance.

Upon receiving this information, the self-represented party will either (a) realize that he is expected by law to provide certain information, or (b) ignore your requests. If he chooses the latter, you will have documentation to file with the court later to show your reasonableness in trying to obtain information and move the case forward without court intervention. An

explanation of the process and some relevant case law regarding the issues can go a long way in establishing your client's entitlement to a fee award, as discussed in the Williams case above. As always, be careful not to cross the line from providing information and explaining your client's position to giving legal advice.

PUT EVERYTHING IN WRITING

To protect your client and yourself, and to remain entirely accurate with the self-represented person, put everything in writing. This will also ensure accuracy if there is later an allegation that you unethically gave the SRL legal advice or somehow led him astray. If the SRL becomes problematic, set written guidelines for your communications with him. You can establish in writing, for example, how many of his emails you will respond to in a week and in what time frame you will respond, and when and how you agree to exchange information.

There are self-represented parties who will focus on trying to increase their spouse's legal fees through unreasonable and frequent communications with the spouse's attorney. You, as the attorney, have the right to set boundaries for your communications and the responsibility to be proactive to prevent unreasonable use of your client's funds. When all else fails, you can ask the court to intervene with specific parameters or restrictions on the opposing party. If court intervention is going to be necessary, it is more important than ever that your communication with the opposing party be clear, concise, respectful, and written.

While you are reviewing your own communication with the opposing party for reasonableness, be sure and speak with your client about how he or she communicates with the other party. Your client is emotionally involved with the other litigant in your case, which can make party-to-party communication more complex. If you are advising your client not to speak with the other party directly, or advising any limitations on their communications, you should tell the SRL of those limitations and how he or she may manage communication through you.

Advising your client not to speak at all with the other spouse can be problematic when there are children, so you will need to set up parameters for necessary communication about the children. Consider one of the specialized internet programs available for parent communication focusing on child-related issues. The use of independent, parent-focused websites can have the added benefit of helping the self-represented person feel more on equal footing with your client, as attorneys typically are not directly copied on those communications.

AVOID LEGAL JARGON WHENEVER POSSIBLE

Try to use normal, layperson's language whenever possible. If a delay can be stated as "postponing the date" instead of the legal term of "continuance," try to use the non-legal language. Calling someone a "pro per" may sound derogatory, if not elitist, so refer to the opposing party as "representing yourself." If a disclosure statement or settlement letter cites the law, include a copy of the statute. Asking the SRL to "provide disclosure in accordance with Rule XYZ of the Court Rules" can be better stated as "We need to exchange bank statements and other information so you each have the other's information." Your court system (self-service center or website) may provide lists of documents to be exchanged in family cases, and

providing a court-generated document or list may look more official and less arbitrary than the attorney's letter demanding (or even politely requesting) the same documents.³

SEEK THE ASSISTANCE OF THE JUDGE EARLY IN THE CASE

As soon as your court procedures allow, ask the judge to set a management or status conference in your case. Use this personal court appearance to ask your judge for straightforward instructions about the exchange of information and how the case will proceed. This is also an opportunity to have the court discuss the benefits of mediation or other alternative dispute resolution processes. Family court judges are accustomed to having self-represented litigants in court and will appreciate that your case includes an attorney who is conscientious and respectful. Use the initial status conference experience to enhance the self-represented party's opinion of attorneys and the court system.

CONCLUSION

Attorneys need to hone a particular set of skills and establish specific procedures to interact with self-represented persons. Rather than treating SRL cases as annoyances, attorneys must learn and utilize these special skills and procedures. Doing so best serves our clients and the courts, and improves family law practice for all involved.

³ One example is Maricopa County, Arizona's "Affidavit of Financial Information" which provides extensive income information for child support and spousal maintenance purposes and which can be found at <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter/Forms/alphaList.asp#fam> (last visited 8/10/2015).