

Working With Pro-Se Litigants: A Guide for Family Court Bench Officers



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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

Every sitting family law judicial officer will acknowledge that self-represented litigants present both opportunities and challenges. Most courts do not keep statistics on how often litigants self-represent, or at what stage in the process they come to court without an attorney. However, our experience tells us that an ever-increasing number of litigants in family law court are self-represented.

The simple fact is that most litigants self-represent because they cannot afford legal services. The traditional, open-ended hourly billing model often requiring a fairly large retainer is daunting and beyond the financial wherewithal of many family law litigants. There are alternatives, such as limited-scope representation, also known as unbundling, and flat-fee representation, which might be more appealing to many litigants. Unfortunately, in many areas these alternative billing methods have not yet taken hold. Some family law matters are straightforward and do not require the assistance of an attorney. The vast majority of family law litigants, however, would benefit from legal counsel and the court can certainly encourage a self-represented litigant to seek legal assistance. To the extent that a litigant has taken advantage of a nontraditional billing arrangement, the court should encourage it.

Regardless of efforts to encourage the employment of counsel, scores of litigants will continue to represent themselves in family court matters. The purpose of this guide is to provide tools for the bench officer for conducting effective and productive hearings with self-represented litigants so that fair and proper results are reached in their cases.

ENSURE PROCEDURAL FAIRNESS

It goes without saying that family law is one of the most work-intensive assignments for judicial officers; the calendars can be large, with lengthy written filings. More often than not, bench officers are obligated to make important decisions about children and money based upon limited factual information. Further, self-represented litigants may not provide the bench with even minimal legal authority for their positions. Because of the high stakes in family law – including the safety and best interests of children – the court’s reputation for neutral, just, and well-reasoned decisions for all families is critical.

The importance of procedural fairness cannot be overstated. Lawyers and judges are trained to view the court’s fairness differently than do self-represented litigants. Attorneys look to a court for efficient procedures, reasonable outcomes, best practices, and productive calendar management. The litigant, on the other hand, puts great importance on receiving his or her day in court, being treated respectfully at all levels of the court, and having a neutral bench officer hear her case. This obligates the court to allow a self-represented litigant adequate time to tell her story before a respectful and fair bench officer. Study after study demonstrates that litigants are much less concerned with outcome favorability and much more concerned with procedural favorability. The desire for procedural fairness cuts across all gender, education, ethnic, and income lines.

A family law bench officer must constantly monitor her interactions with the litigants to ensure the litigants view the bench officer as fair and polite. If the process is both fair in substance and appearance, litigants are far more likely to understand and comply with court orders. After all, the parties come to court with a specific set of issues, seeking a specific set of resolutions. The court must provide a timely process for listening to the litigants and answering them in the form of an enforceable order. If either party feels that the process was unfair or biased, that party may resist the findings and rulings of the court, possibly to the detriment of the entire family.

Court employees, from counter clerks, self-help center workers, security staff, and more are almost always the first individuals that interface with any litigant. A judge must make sure that court employees interfacing with litigants treat them evenly and politely. This is especially true of courtroom staff. While a bench officer has the ability to leave the courtroom and physically move into chambers, court staff often remain in the courtroom answering litigants' questions and processing other requests. These questions can be lengthy and difficult. Even the most litigant-centered court staff can become frayed on a particularly difficult day. More often than not, self-represented litigants are out of their comfort zone and in an unfamiliar environment. Litigants often come to court worried and fearful about their children, their property, and how their life will be affected through the court process. This fear may manifest as anger, leaving court staff to address confused, unhappy, and occasionally difficult litigants. As a result, bench officers must provide their staff with breaks, allowing them down time to regroup from the workload of the family law courtroom.

Equally important is a judge's awareness of her own stress levels and decision-fatigue points. Making a series of decisions during the course of a day requires significant concentration; that concentration requires significant fuel. All of us, when tired, have a more difficult time making hard decisions. If we are tired, it is easy to take the decisional path of least resistance. Doing so may result in a sub-optimal outcome. Taking breaks, interacting with colleagues, and watching the emotional temperature of the courtroom all help a bench officer avoid a fatigue point that may negatively impact sound judicial decision-making.

ENHANCE POSITIVE COMMUNICATION

Communication between the bench and the self-represented litigant is key to a successful courtroom process. This communication is a two-way street: not only must the bench clearly communicate with the litigant, but the litigant must be permitted to communicate with the bench and feel that the judge is hearing and understanding him. In order to give the litigant confidence in the process, a bench officer must be engaged at all times in the hearing and actively listen to what the litigant is saying. Leaning forward, taking notes, and using open gestures all communicate to the litigant respect, neutrality, and interest in their matter. On the other hand, attending to other business at the bench – taking calls, permitting interruptions — clearly communicates to the self-represented litigant that the bench officer is not engaged in the hearing. The litigant may translate this lack of engagement to a lack of neutrality, perhaps even an affirmative bias for or against one party.

Active engagement and active listening in a hearing require a bench officer to ask questions and explore areas of proffered evidence. A bench officer should use open-ended questions to help

gather evidence in the hearing, such as, “Could you give me a little more information about...?” “Help me better understand...?” “Why is...important?” These questions not only allow a litigant to provide important and detailed information, but they further demonstrate the bench officer’s engagement and involvement in the hearing.

It is also helpful to reflect back what the litigant just said in a presentation. This demonstrates understanding and gives a bench officer the opportunity to inquire further into a set of circumstances. For example, a dialogue between the bench and a litigant establishing the bench officer’s understanding that the litigant works until 5:30pm engages the litigant, demonstrates the bench officer’s mastery of the facts at hand, and precludes an order requiring the litigant to retrieve the child from school at 5:00pm. Not only does this increase the litigant’s comfort in the court’s abilities, it also ensures the litigant will be able to comply with the court’s orders. This simple interaction between the court and the litigant prevents multiple trips to court and decreases conflict between the parties as they navigate parenting time issues outside the courthouse.

Bench officers should take care not to jump too quickly to judge pro-se litigants’ courtroom behaviors. We receive a significant amount of information through non-verbal cues; however, bench officers should be hesitant to put too much stock into interpreting these non-verbal cues. Regardless of what we believe to be true, a litigant who is slow in responding to questions may be deliberately and thoughtfully trying to provide an answer. The litigant’s first language may not be English and she may be attempting to choose the correct words to convey just the right meaning, or the litigant may be exceptionally nervous and somewhat overwhelmed by the process. Culturally, it may be disrespectful to respond too quickly to someone in authority. Any of these explanations are as valid as an initial thought that a less than rapid response is deceptive.

CONDUCT A FULL, FAIR, AND FORMAL HEARING

The bench officer must review each day’s files to become familiar with the details of each case before the hearing starts. This will help the judge frame the issues for the hearing. Denoting the issues the parties raised at the beginning of the case engenders confidence in the bench officer’s understanding of the case and limits unnecessary and off-topic evidence. The judge should also confirm with both parties their goals and positions before taking any evidence.

Additionally, the outset of a hearing is an opportunity for the bench officer to confirm and manage the parties’ expectations. If the parties are not read a general script at the start of the hearing describing the process, the bench officer should explain the process and how the hearing will be conducted. The judicial officer should clearly and plainly advise the litigants that the bench will ask questions. While it is inappropriate for a judge to essentially cross-examine witnesses or litigants, it is entirely appropriate to direct litigants and witnesses in their testimony in order to gather the information needed to make a well-reasoned decision.

While it may take a few extra moments in the hearing to frame the issues and explain the process, it will actually save time by making the litigants more comfortable with the court process and helping them focus and narrow the evidence they will present at the hearing.

As noted above, the bench and the litigants approach the hearing in fundamentally different ways. A bench officer must give each party a full opportunity to provide relevant information to the court. Even when it is apparent to the judge that one side will prevail and the court does not need much if any additional information from the other side, it is critically important from a fairness perspective that both sides have time to say their piece. If the court takes the time to listen to both parties, both parties will feel fully heard and respected in the process. This will result in a far better outcome for all.

Each bench officer develops her own bench style. While an informal style may work well for some bench officers, a more formal style will better serve others. There is a value to a more formal bench style with self-represented litigants. Formality provides structure to the court proceeding, whether a status, pre-trial proceeding, or a full hearing, making the hearing easier to conduct. Formality sets boundaries on civil behavior and exchanges at the bench. It also provides predictability in the court's process and functioning, de-escalating the potential for litigant anxiety and expressions of frustration.

In a family law courtroom, the rules of evidence often prove to be somewhat flexible. This is especially true with self-represented litigants. If one side is represented and the other side is self-represented, the rules of evidence can provide what appears to be a club for attorney and judges. Bench officers must take care to ensure that a proceeding is fair in fact and that it appears to be fair to both parties. For the most part, a bench officer can review evidence and give it the weight the bench officer believes it deserves. As a result, it is generally proper for a bench officer to inquire about the evidence the litigant is presenting, to clarify its meaning and reliability.

Much evidence is self-authenticating; for the most part, what appears to be a credit card statement or bank statement is what it purports to be. How that piece of evidence affects the outcome of the case may be something altogether different. A bench officer can and should explain to a self-represented litigant how evidence works, and how it can be admitted into court. In other words, a bench officer can advise a self-represented litigant how to lay the foundation for a document or how to subpoena a witness who can lay the proper foundation and testify to its relevance. Further, if a self-represented litigant is struggling with evidence and it appears that the evidence is authentic, it is appropriate for a bench officer to ask the litigant to lay the proper foundation for that evidence, explaining what the court needs to know before deciding whether or not the evidence will be admissible. At that point, the bench officer can place as much weight or as little weight on it as the evidence merits. At the end of the analysis, the meaning of evidence, and how reliable it is, is totally within the judge's purview. It is up to the judge to decide what evidence to consider and how much weight to put on it.

In order for a hearing to be both fair and perceived as fair, the procedure must be consistent with both due process and the rules of evidence. A bench officer should not create evidence or essentially become a self-represented litigant's attorney. It is much different for a bench officer to explain the somewhat convoluted and confusing rules of evidence to assure a hearing is full and complete than having a bench officer essentially create a case for a litigant.

A self-represented litigant is undoubtedly an expert in her own history, but it is unreasonable to assume even with the best self-help guide a self-represented litigant will essentially become a

legally trained individual, capable of organizing and presenting competent, relevant evidence. The bench therefore must liberally construe a self-represented litigant's pleadings, testimony and arguments. Self-represented litigants rarely understand the legal requirements, despite having extreme mastery of the facts. Because of this, they may not present their evidence neatly packaged to meet the statutory requirements. Therefore, a bench officer must synthesize their factual presentation and determine whether it meets the statutory requirements when viewed most broadly.

PROVIDE PROMPT AND CLEAR RULINGS IN OPEN COURT

It is critical at the end of a hearing to announce a decision from the bench, if possible. Obviously, some cases require further thought and research, but in the vast majority of cases the parties need a decision promptly and directly from the bench. This provides the parties with instantaneous guidance to govern their future actions.

Self-represented litigants provide a unique opportunity for courts to make more collaborative rulings, both during the hearing and at pronouncement of the orders. Asking the litigants if there is any other information they wish to impart before the ruling gives them an opportunity to feel they have been fully heard. Additionally, such a question may elicit final information that may be of critical importance to a ruling.

Announcing the ruling from the bench allows for clarification and assurance that the orders are understood and, more importantly, can be followed. For example, it may not have been clear during the hearing that father gets off work at 5:00pm and thus cannot comply with your ruling that he pick up Junior at 4:30pm from school. Clarification of these details prevents return trips to court and ensures better outcomes. Furthermore, announcing a ruling from the bench allows the court to comment upon evidence, explaining how the evidence fits within the law's structure. If the ruling is grounded in the law and the evidence, hopefully both litigants will leave the courtroom feeling the process was neutral and fair and they were fully heard.

Family law is unique in many respects. For the most part, litigants have an ongoing personal relationship perhaps stretching over years. Having an active judge who rules from the bench assures the litigants understand what the bench expects of them, now and in the future. It also allows the bench to advise the parties how they can change these orders in the future. This will assure better compliance with court orders and procedure.

To the extent possible, a self-represented litigant should leave the courtroom with a written order. Much like we do not rely on our memory, but a written prescription for medication dosage, we should not force litigants to rely on their memory of the outcome in court. Not only does a written order memorialize what occurred in court, it prevents confusion and interpretation disputes between the parties downstream. Orders in cases with two self-representing litigants should be written by the judge. It is virtually impossible to expect that a self-represented litigant will be able to draft a thorough and complete written order and submit it in a timely fashion to the court for review and execution.

MANAGE CHALLENGING LITIGANTS WITH UNDERSTANDING AND RESPECT

For the most part, self-represented litigants are not disruptive, nor do they intend to be difficult. However, from time to time there may be a litigant who presents significant difficulty in court. Disruptive litigants challenge the court's ability to maintain control while treating everyone equally and fairly in an attempt to gather the evidence needed to reach an appropriate order. Judicial demeanor and response to the litigant is critical in these situations.

If a litigant is difficult, but not abusive and disruptive to the remainder of the calendar, a court should consider allowing the litigant freedom to speak. It is appropriate to recognize and acknowledge the litigant's emotions without engaging them in a lengthy discussion, or attempting to diagnose their condition. Further, it is often helpful to direct these litigants to write their questions down or suggest that they take copious notes for use later in the hearing. Treating these litigants with respect and allowing them to maintain their dignity will go a long way towards courtroom control.

Coordinating with court staff before calling the calendar in these situations and "flagging" the case may prevent significant problems during the hearing. The bench officer, working with staff, must determine the level of potential disruption: is this a case where additional security is necessary, or would a firmer, less informal approach be required?

Finally, the bench officer must not unwittingly escalate the situation by reacting harshly, but instead maintain a calm demeanor. Always keep in mind your nonverbal cues, such as your facial expressions. Maintain eye contact and assure that your voice is firm but not harsh. Try not to unnecessarily increase the volume or pace of your voice.

COORDINATE LOCAL ASSISTANCE FOR SELF-REPRESENTED LITIGANTS

There are often significant resources available to bench officers in the community. Many courts have vibrant self-help centers. It is a good idea to sit down with the folks in your self-help center to determine their capabilities, coordinate referrals, and discuss expectations. It can be very frustrating for the litigants, the self-help center, court staff, and the bench if there is not a good understanding of what does and does not happen in the self-help center. It is never helpful to send a litigant to the self-help center to work on a task that they cannot or will not do. Enlisting the local bar to assist with settlement conferences and help self-represented litigants navigate various procedural requirements can be extremely helpful. Most bar associations are eager to assist the bench, as that helps alleviate overcrowded and stressful calendars. Finally, don't overlook local law and public libraries. These are useful resources staffed with individuals who have extensive experience assisting the public in researching various questions.

CONCLUSION

A calendar full of self-represented litigants can be rewarding and even provide an opportunity to practice family law at its best. A good bench officer must be an active participant in the hearing and provide opportunities for questions and feedback at all stages. The bench officer must be clear about legal standards, plainly explain procedures and key rules of behavior in the court, and

provide an opportunity for litigants to be heard in a respectful forum. Open and respectful communication between the bench and self-represented litigants will undoubtedly result in an improved court environment and, most importantly, more positive outcomes for self-represented litigants and their families, including decreased family conflict and decreased returns to the courthouse.