Accused Right to Self-Representation in Criminal Proceedings

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JUDICIAL TECHNIQUES FOR CASES INVOLVING SELF-REPRESENTED LITIGANTS

This article is an attempt to stimulate a national dialogue about how judges can best structure and manage their courtrooms to accommodate the needs of self-represented **litigants**. The four authors of this article have worked with and written extensively about the judiciary's response to self-represented **litigants**—persons choosing to appear in court without a lawyer.[1] The numbers of such persons have increased significantly during the past decade. In most states the majority of family law matters now include at least one unrepresented party. Although the situation in Maricopa County, Arizona (where one of us presides), may be extreme, it is instructive: in recent years, roughly 60 percent of all domestic relations cases involve two unrepresented parties, 30 percent of the cases have a lawyer representing one side, and only 10 percent of the cases have lawyers on both sides.

Some laypersons are able to prepare court documents and present their positions effectively in court, but many others are not. Their lack of knowledge of the law and its rules imposes burdens on the judges and court staff. Courts throughout the country have responded by providing assistance such as easy-to-use forms; simplified instructions; printed and online information about substantive and procedural law; and direct assistance from court staff, often referred to as courthouse or family law facilitators. Much has been written about these programs, and many of them have been evaluated and found to be valuable to both **litigants** and the courts.[2]

However, one issue of particular concern to trial court judges, and about which little has yet been written, stands out: how a judge can deal with self-represented **litigants** in the courtroom without departing from the judicial role as a neutral, impartial decision maker. When a party is unable to present its case to the court, how can the judge facilitate the resolution of the matter without in effect becoming the party's lawyer? When there is an imbalance of knowledge in the courtroom, particularly if one party is represented by counsel and the other is not, how can the judge manage the trial or hearing impartially? The judge appears to be caught in a dilemma. If the judge does *not* intervene on behalf of the unrepresented **litigant**, the party may be unable to present evidence supporting its position and manifest injustice may result. If the judge *does* intervene, he or she may be violating the duty of impartiality and denying the represented party the benefit of retained counsel.

We have been involved in many discussions of these issues with trial and appellate judges. Trial judges have no common understanding of the applicable ethical standards, case law, or practical techniques to use to ensure that justice is done in their courtrooms—and to guarantee that they have not violated or bent the rules by “leaning over the bench” to assist a floundering unrepresented party. This article examines the applicable code of ethics and case law and suggests options for trial judges seeking helpful techniques.

This is not the first article to address this issue. In 2002 Dr. Jona Goldschmidt published an article entitled "The **Pro Se Litigant's** Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance" in *Family Court Review*.[3] He views judicial reluctance to assist self-represented **litigants** as arising from the traditional passive role of the judge in the adversary process and judges' basic antipathy, as lawyers, to self-representation. We discuss Dr. Goldschmidt's approach and recommendations later in this article. We hope that these two discussions will serve as the foundation of a rich written literature on this difficult topic—and that trial judges will participate actively in building this body of work.

As will become clear in the discussion of the case law, many judicial statements say that self-represented **litigants** should be **held** to the same rules as **attorneys**. For example, in promulgating a new set of forms for use in uncontested divorce and paternity cases in New Mexico, the New Mexico Supreme Court recently included the following statement: "A self-represented person must abide by the same rules of procedure and rules of evidence as lawyers. It is the responsibility of self-represented parties to determine what needs to be done and to take the necessary action."[4] Taken literally, this ***17** requirement would bring to a grinding halt every domestic relations case involving a self-represented **litigant** in New Mexico. Trial judges would wait for unrepresented **litigants** to present their cases as lawyers—with opening statements, qualified witnesses, direct and cross-examinations of witnesses using classic question and answer techniques, properly introduced and identified documents, and completely proven cases—before ordering relief. In fact, this standard is widely ignored by trial judges, who need to hear **litigants'** testimony, resolve disputed issues, enter appropriate orders, and remove the cases from their court calendars. The alternative is to routinely dismiss every case filed without a lawyer.

In fact, trial judges do not even apply this approach to cases involving **attorneys**. Several years ago, former Florida Chief Justice Major Harding recounted the following story in convening a statewide conference on self-represented **litigants**. A trial judge was hearing a divorce petition in which the respondent had defaulted. The wife presented the matter without counsel and failed to offer any evidence bearing on the court's jurisdiction to hear the matter. The judge told the wife that he could not grant her a divorce because she had failed to establish her entitlement to one, advising her to consult a lawyer. The woman left the courtroom in tears. In the next case, a lawyer for a wife in a defaulted divorce failed to elicit any evidence of the court's jurisdiction. The judge noted that counsel had failed to do so, and the **attorney** immediately recalled the client to the stand and asked her how long she had lived in the county. The judge granted the requested divorce. Suddenly aware of his double standard, the judge called his bailiff and asked him to quickly search the courthouse to find the woman whose case he had just dismissed. The bailiff succeeded. The judge reopened the case on the record, placed the woman under oath, asked how long she had lived in the county, and, after receiving an acceptable response, granted her divorce.

Why would this common-sense approach to dispensing justice leave judges feeling as though they have departed from their proper judicial role? Let us review the Canons of Judicial Ethics and the decided cases to shed light on the problem.

The Canons of Judicial Ethics

Canon 3 of the American Bar Association's Model Code of Judicial Conduct (2000)[5] reads: "A judge shall perform the duties of judicial office impartially and diligently." Subsection 3B sets forth the following Adjudicative Responsibilities:

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to **litigants**, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. [Commentary: A judge must perform judicial duties ***19** impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.]

(6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

Canon 2A also mentions impartiality: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Nothing in the text of or commentary to these Code sections bears directly on the issues that concern us. Unrepresented persons are not mentioned, except by implication in Subsection 3A(7), which enjoins judges to "accord every [unrepresented] person ... the right to be heard according to the law." In particular, the Code says nothing about requiring self-represented **litigants** to abide by the **same** rules and **standards** that apply to lawyers. We are aware of only three ethics decisions or advisories bearing on our issue. Each of them emphasizes a judge's obligation to accommodate the needs of self-represented parties. We found no instance in which a judge was disciplined or criticized for relieving a self-represented **litigant** of the strict requirements of procedural or evidentiary rules.

In a 1999 Decision and Order Imposing Public Censure,[6] the California Commission on Judicial Performance reprimanded a San Bernadino County Superior Court judge for nine instances of failure to respect the rights of unrepresented individuals. All but one of the incidents arose in the context of criminal matters; the exception concerned a juror who was incarcerated for being late to court without being informed of his rights in a contempt hearing.

In a 1997 Advisory Opinion, the Indiana Commission on Judicial Qualifications[7] concluded, "a judge's ethical obligation to treat all **litigants** fairly obligates the judge to ensure that a **pro se litigant** in a non-adversarial setting is not denied the relief sought only on the basis of a minor or easily established deficiency in the **litigant's** presentation or pleadings." The opinion, limited to non-adversarial matters, addressed situations such as a **litigant's** failure to aver that a name change was not sought for a fraudulent purpose, or a married couple's inadvertent failure to plead their county of residence. The commission stressed that a judge has no obligation to "cater to a disrespectful or *unprepared* ***pro se*** **litigant**" or to "make any effort on behalf of any citizen which might put another at a disadvantage." It also stated that a judge should not "normally 'try a case' for a **litigant** who is wholly failing to accomplish the task."

The Minnesota Conference of Chief Judges **Pro Se** Implementation Committee has issued the Proposed Protocol to Be Used by Judicial Officers During Hearings Involving **Pro Se Litigants**. (See text on page 18.) Far from requiring self-represented **litigants** to follow the same rules as lawyers, it explains how judges should set up *different* procedures for them. However, these procedures preserve the core of the rules of procedure and evidence, requiring sworn testimony, allowing for cross-examination, requiring identification of exhibits, and excluding inadmissible evidence.

In sum, the Canons of Judicial Ethics require judges to remain fair and impartial and to maintain the appearance of fairness and impartiality, but give no further guidance about the meaning of those terms when unrepresented persons appear in court. Two states have established guidelines for judges dealing with unrepresented parties. Both recognize that fairness and impartiality require the judge to treat unrepresented **litigants** differently than represented **litigants**. To our knowledge, no judge has been disciplined for doing so, and one has been disciplined for failing to respect the rights of unrepresented persons.

Social science sheds some interesting light on this issue. In a 1988 study of what causes a **litigant** to view a proceeding as fair, Tom Tyler found that the ability to present one's case was much more important to the **litigant** than his or her perception of the judge's impartiality.[8]

Case Law

In *Faretta v. California*,[9] the U.S. Supreme Court recognized a Sixth Amendment right, made applicable to the states through the Fourteenth Amendment, of self-representation in a criminal matter. The Court limited that ruling in 2000 by **holding**, in *Martinez v. Court of Appeal of California*,[10] that a convicted person has no similar right to self-representation in a direct criminal appeal.

In a speech to the Massachusetts ***20** Conference on **Pro Se Litigants** on March 15, 2001, Chief Justice Marshall of the Supreme Judicial Court of Massachusetts reviewed the deep historical roots of the right to self-representation in this country. In the early colonies, the right to have a lawyer was often limited, but never the right to represent oneself.[11]

All federal and virtually all state courts have precedents that papers submitted by persons representing themselves will be subject to a different standard of judicial review than filings submitted by lawyers. The courts will construe them as liberally as possible in favor of the **litigant**, searching them for any statement that could constitute a meritorious claim or defense.[12] On the other hand, appellate courts will not relieve a self-represented **litigant** of the consequences of a default, such as failure to object to an instruction or ruling by the trial court.[13] In reviewing many of the reported appellate cases, we found a rich set of judicial views on the general issue of how trial court judges should deal with self-represented **litigants**. Most of the cases are consistent in outcome even though they may differ in the reasoning used by the appellate court. We found only one case—from the Illinois intermediate appellate court—directly addressing this article's central issue. Here we present short summaries of some of the cases.

***Newsome v. Farer*, 708 P.2d 327 (1985)**. This case led the New Mexico Supreme Court to establish the standard contained in the instructions for the new domestic relations forms quoted earlier.[14] The court upheld the trial judge's dismissal of the plaintiff's case for Newsome's failure to attend a meeting at which the defendant was to produce documents requested by Newsome. The court dismissed Newsome's contention that he did not understand that he was required to follow the judge's directions.

> Finally, Newsome asserts his belief that he was not required to attend production of documents because the court did not affirmatively order him to do so. We view this argument as a disingenuous attempt to invoke special privilege because of his **pro se** status. He did not claim ignorance or misunderstanding in the trial court, and the assertion here conveniently overlooks the rule that a **pro se litigant** must comply with the rules and orders of the court, enjoying no greater rights than those who employ counsel. Although **pro se** pleadings are viewed with tolerance, a **pro se litigant**, having chosen to represent himself, is **held** to the **same standard** of conduct and compliance with court rules, procedures, and orders as are members of the bar. Production of documents was ordered upon Newsome's request. Even though one may not be legally trained, common sense dictates that when a party petitions the court to enforce a right to inspect public records, and the court responds by ordering that requested documents be produced, the petitioner is not then free to disregard the arrangements made to comply with the relief ordered, simply because the court did not affirmatively direct the petitioner to attend. Certainly it does not require legal training or even any great degree of intelligence to understand that documents are not ordered to be produced in a vacuum. Production necessarily implies inspection. Newsome's **pro se** status does not require us or the trial court to assume he must be led by the hand through every step of the proceeding he initiated. We reject his claims of compliance or excuse therefrom because of his layman's ignorance.

At the trial court, the trial judge clearly did not **hold** Newsome to the **same** **standards** as those for an **attorney**. He gave special attention to Newsome's discovery requests, fashioning an order for production of documents very close to that requested. He gave Newsome three separate hearings to attempt to explain his failure to attend the document disclosure session. The supreme court nowhere criticized the trial judge for the special accommodations given to this self-represented **litigant**; it merely **held** that he was not entitled to any more.

***Bates v. Jean*, 745 F.2d 1146 (8th Cir. 1984)**. The Federal Court of Appeals reversed a dismissal of a state prisoner's civil rights suit against a prison guard for cruel and unusual punishment on the grounds of inconsistency of special jury verdicts, even though the prisoner—representing himself—did not object to the inconsistent verdicts at trial. The court stated it "usually accord[ed] **pro** **se** **litigants** somewhat greater flexibility than **attorneys**" with regard to waiver of objections, noting that "the question of consistency of special verdicts in this case ***21** requires a greater degree of legal sophistication than we ordinarily demand of **pro** **se** prisoner **litigants**." The court noted that the trial judge merely asked the prisoner, "Do you have anything at this time, Mr. Bates?" and compared the generality of the judge's question to the specificity of another judge's question in a previous case involving special verdicts. There, the trial judge, addressing counsel, stated, "Gentlemen, there seems to be a discrepancy between the answer to the interrogatory and the verdict. Do either of you desire that I explain this matter to the jury and to ask them to return to the jury room for further deliberation?" In a footnote, the *Bates* court stated:

> We do not, of course, imply that the district court has a duty to point out possible inconsistencies in special jury verdicts to all **pro** **se** parties. However, the amount of guidance given by a district court judge is a factor to be considered in deciding whether a **pro** **se** **litigant** is barred from asserting an issue for the first time on appeal.

***Traguth v. Zuck*, 710 F.2d 90 (2d Cir. 1983)**. In this federal case from the Second Circuit, the appellate court reversed the trial judge's denial of a self-represented **litigant's** motion to vacate the entry of default against her. **Holding** that the trial judge had abused his discretion, the court stated:

> Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect ***pro*** ***se*** **litigants** from inadvertent forfeiture of important rights because of their lack of legal training. While the right "does not exempt a party from compliance with relevant rules of procedural and substantive law," it should not be impaired by harsh application of technical rules. Trial courts have been directed to read ***pro*** ***se*** papers liberally and to allow amendment of ***pro*** ***se*** complaints "fairly freely." The court's duty is even broader in the case of a ***pro*** ***se*** defendant who finds herself in court against her will with little time to learn the intricacies of civil procedure. Zuck had no reason to know, upon service of the complaint, that she faced default if she did not answer within twenty days. She searched in good faith for a lawyer to represent her and, failing in that, she responded within that period diligently, if unskillfully, to every pronouncement of the court.

***Ortiz v. Cornetta*, 867 F.2d 146 (2d Cir. 1989)**. Six years later, the same court reinforced the same principle in an even broader rule. The court stated:

> At the outset, we note the general standards—some of which have only recently emerged from both Supreme Court and second circuit decisions—which **hold** a **pro** **se** **litigant** to less stringent standards than those governing lawyers. Such has long been the case with rules governing **pro** **se** complaints (**pro** **se** complaint **held** "to less stringent standards than formal pleadings drafted by lawyers) (**pro** **se** complaint **held** to "less stringent standards of pleading"), but it has only been in the past year that courts have extended this principle to form a general standard. Once a **pro** **se** **litigant** has done everything possible to bring his action, he should not be penalized by strict rules which might otherwise apply if he were represented by counsel (incarcerated **pro** **se** petitioner's notice of appeal considered "filed" at moment of delivery to prison authorities because at that point, petitioner has done

all within his power to abide by filing requirements) (if *in forma pauperis* relief is subsequently granted, pro se complaint deemed "filed" when received by pro se office).

The court of appeals held that a complaint would be deemed filed when first received by the clerk's office, even though it was returned to the self-represented filer for correction of a defect. The corrected filing was not received until after the running of the statute of limitations.

***Bowman v. Pat's Auto Parts*, 504 So. 2d 736 (Ala. Civ. App. 1987)**. Alabama's rules of procedure require that an appeal be filed within fourteen days of the clerk's entry of judgment in the docket, whether or not a party receives actual notice of the entry of the judgment. The court ruled that a self-represented litigant is held to that rule.

Alaska has an interesting series of cases on these issues.

***Breck v. Ulmer*, 745 P.2d 66 (1987)**. In *Breck* the Alaska Supreme Court held that a trial judge has an "explicit" duty "to advise a pro se litigant of his or her right under the summary judgment rule to file opposing affidavits to defeat a motion for summary judgment" and that "[a] judge should inform a pro se litigant of the proper procedure for the action he or she is obviously attempting to accomplish ...." The court concluded that the trial judge's failure to do so in the instant case was not prejudicial.

***Keating v. Traynor*, 833 P.2d 695 (1992)**. The Alaska Supreme Court applied the same principle to a trial court's handling of a letter seeking permission to intervene. The trial court had a duty to notify the litigant of the proper procedure for seeking permission to intervene.

***Bauman v. DFYS*, 768 P.2d 1097 (1989)**. The court set an outside limit on the trial court's duty in *Bauman*, holding that the trial judge had no duty to warn a litigant of the consequences of failure to respond to a motion for summary judgment. "To require a judge to instruct a pro se litigant as to each step in litigating a claim would compromise the court's impartiality in deciding the case by forcing the judge to act as an advocate for one side."

In two recent cases, the Alaska court added to these precedents.

***Sopko v. Dowell Schlumberger, Inc.*, 21 P.3d 1265 (2001)**. The court characterized its prior cases as imposing a "limited" duty on the trial judge to assist a self-represented litigant. "We have imposed some limited duties on courts to advise pro se litigants of proper procedure, [including] ... the duty to inform ... (1) of specific procedural defects, ... and (2) of the necessity of opposing a summary judgment motion ***22** with affidavits or by amending the complaint." In *Sopko* the court found the court's advice proper.

***Collins v. Arctic Builders*, 957 P.2d 980 (1998)**. Here, the court overturned a trial court's dismissal of a notice of appeal for a procedural defect in a pro se's second attempt to comply with the appellate rules. The court stated, "We are not concerned that specificity in pointing out technical defects in pro se pleadings will compromise the superior court's impartiality."

***Wright v. Black*, 856 P.2d 477 (1993)**. The trial judge expressed his intention to take evidence at a child support hearing on the paternity issue raised by the father in an earlier pleading. Neither party objected. On appeal the father claimed that his failure to object should be excused because of his lack of familiarity with court proceedings. The court held that if the litigant had "attempted to object, or even hinted that he was unprepared to handle the paternity issue, then *Breck* might apply. While we may relax formal requirements for pro se litigants, even a pro se litigant must make some attempt to assert

his or her rights." (This latter point was also emphasized in *Noey v. Bledsoe*, 978 P.2d 1264 (1999), in which the court stated that **pro se litigants** are not excused from "making good faith efforts to assert their rights.")

***Rappleyea v. Campbell*, 884 P.2d 126 (1994)**. The California Supreme Court, in an opinion written by Justice Mosk, **held** that a self-represented couple from Arizona would be relieved of a default judgment entered against them even though they had not sought relief within the six-month period allowed by statute to vacate a default judgment. The court reasoned that their default had been caused by the court clerk's error in quoting the filing fee for an answer—thereby causing their timely answer to be rejected for failure to enclose the proper filing fee. Justice Mosk stated:

> [M]ere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo **attorney** representation .... A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to **litigation**.

***Gamet v. Blanchard*, 91 Cal. App. 4d 1276 (2001)**. The appellate court reversed the trial judge's dismissal of the plaintiff's case, citing lack of service of the court's order allowing her counsel to withdraw the "confusing, indeed misleading, nature of the various orders and communications" from the court to the plaintiff, and the plaintiff's involuntary pro per status. The majority stated:

> We further note that pro per **litigants** are not entitled to special exemptions from the California Rules of Court or Code of Civil Procedure. (*Rappelyea v. Campbell, supra*.) They are, however, entitled to treatment equal to that of a represented party. Trial judges must acknowledge that pro per **litigants** often do not have an **attorney's** level of knowledge about the legal system and are more prone to misunderstanding the court's requirements. When all parties are represented, the judge can depend on the adversary system to keep everyone on the straight and narrow. When one party is represented and the other is not, the lawyer, in his or her own client's interests, does not wish to educate the pro per. The judge should monitor to ensure the pro per is not inadvertently misled, either by the represented party or by the court. While **attorneys** and judges commonly speak (and often write) in legal shorthand, when a pro per is involved, special care should be used to make sure that verbal instructions given in court and written notices are clear and understandable by a layperson. This is the essence of equal and fair treatment, and it is not only important to serve the ends of justice, but to maintain public confidence in the judicial system.
>
> The confusing, indeed misleading, nature of the various orders and communications that Gamet received from the trial court is particularly important in light of Gamet's (involuntary) pro per status. As noted above, pro per **litigants** are not entitled to any special treatment from the courts. But that doesn't mean trial judges should be wholly indifferent to their lack of formal legal training. Clarity is important when parties are represented by counsel. How much more important is it when one party may not be familiar with the legal shorthand which is so often bandied around the courtroom or put into minute orders?
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> There is no reason that a judge cannot take affirmative steps—for example, spending a few minutes editing a letter or minute order from the court—to make sure any communication from the court is clear and understandable, and does not require translation into normal-speak. Judges are charged with ascertaining the truth, not just playing the referee. A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits. Judges should recognize that a pro per **litigant** may be prone to misunderstanding court requirements or orders—that happens enough with lawyers—and take at least some care to assure their orders are

> plain and understandable. Unfortunately, the careless use of jargon may have the effect, as in the case before us, of misleading a pro per **litigant**. The ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system. (citations omitted)

Judge Bedsford, in dissent, lamented the inconsistent message being sent to the trial judges:

> My colleagues recognize in one sentence the hoary but still vigorous rule that "pro per **litigants** are not entitled to any special treatment from the courts," but devote several paragraphs to setting out the kinds of special treatment trial judges will be obliged to accord them under this opinion.

> Pro per **litigants** have become more common in recent years and seem destined to become a much larger portion of the trial court docket than they have been in the past. It may be time to reassess our case law regarding them. And while I agree with much that is said in the majority opinion, and might be prepared to ***23** give a second look to our rules regarding pro per **litigants**, I think an ad hoc reversal which tells trial judges to treat pro pers the same as they treat represented **litigants**—only different— accomplishes little in the way of addressing the problem and does a disservice to the people who must deal with pro pers every day.

***Cersosimo v. Cersosimo*, 449 A.2d 1026 (1982)**. Connecticut articulated a standard similar to that used in the federal courts. In *Cersosimo* the supreme court stated:

> It is "our established policy to allow great latitude to a **litigant** who, either by choice or necessity, represents himself in legal proceedings, so far as such latitude is consistent with the just rights of any adverse party ...." This does not, however, mean that we will entirely disregard the established rules of procedure, adherence to which is necessary so that the parties may know their rights and the real issues in controversy may be presented and determined (internal citations omitted).

The case involved a petition for a change in child support and alimony payments; the former wife represented herself. The supreme court **held** that the trial court had erred in refusing to let the former wife have physical possession of the tax returns of the former husband solely on the grounds that she was representing herself. The trial court had appointed an accountant to review the former husband's financial affairs and report his annual income. The supreme court then found that the error was harmless.

***Pavilon v. Kaferly*, 561 N.E.2d 1245 (1990)**. In this interesting case the Appellate Court of Illinois, First District, Fifth Division, overturned a jury verdict against a self-represented **litigant** because of a series of remarks by the trial judge that demonstrated hostility towards the **pro se** defendant.

***Kasson State Bank v. Haugen*, 410 N.W.2d 392 (Minn. App. 1987)**. The Minnesota Court of Appeals reversed a trial judge's grant of summary judgment to a bank despite the defendant's testimony at the hearing that the loan in question was induced by the bank's own fraud. The court also found that the trial judge had abused his discretion in failing to grant the defendant a continuance to obtain counsel. The court's articulation of the standard to be followed by the trial judge is similar to that used in Connecticut: "[a] trial court has a duty to ensure fairness to a **pro se litigant** by allowing reasonable accommodation so long as there is no prejudice to the adverse party."

***Bullard v. Morris*, 547 So. 2d 789 (1989)**. The Mississippi Supreme Court **held** that the chancery court had abused its discretion in requiring one of the **litigants** in a divorce case arising from irreconcilable differences to appear personally before a decree would be issued. The **litigants** were not represented by counsel. One was in state prison, and the other lived in California.

***Brown v. City of St. Louis*, 842 S.W.2d 163 (1992)**. The Missouri Court of Appeals, Eastern Division, reviewed a trial court's affirmance of a Labor and Industrial Relations Commission dismissal of a claim for workers' compensation. After noting that the appellant filed a "nonsensical" brief with "no discernible relationship to the orders from which appellant purports to appeal,"[15] the court noted in typical language that "[a]lthough an appellant has the right to act **pro se** on appeal, he or she is bound by the same rules of procedure as **attorneys** and is entitled to no indulgence that would not have been given if the appellant were represented by counsel," and that the appeal was subject to dismissal for failure to comply with the appellate rules. The court nonetheless proceeded to dispose of the appeal on the merits: it affirmed the trial court. The court also noted that the appellant had been notified that his original brief did not comply with the appellate rules and was given an opportunity to file an amended brief. In sum, while stating the opposite principle, the court in actuality accorded the self-represented **litigant** different treatment than he would have received had he been represented by counsel (the opportunity to amend his brief and not dismissing the appeal for failure to file an acceptable brief and record).

***Boyer v. Fisk*, 623 S.W.2d 28 (1981)**. The same court reversed a trial court's vacating of a default judgment entered against a self-represented couple. The couple had partially filled in a form at the courthouse that stated "(no) cause of action" but did not sign it as an answer to a civil complaint, relying on assurance from the clerk's office that the filing was sufficient and they would be notified of a trial date. The court of appeals reinstated the default judgment, finding that the self-represented **litigants** did not exercise reasonable diligence in relying on the statements of the clerk and in failing to send a copy of their "answer" to plaintiff's counsel as required on the face of the summons.

***Brown v. Texas Employment Commission*, 801 S.W.2d 5 (Tex. App.—Hous. 1990)**. The appellant sought to be relieved of procedural requirements to timely file an appeal of an administrative determination within the administrative process, to timely file an appeal in court, and to join an indispensable party. The court refused, stating that a self-represented **litigant** is **held** to the same procedural rules as one represented by counsel.

***Plummer v. Reeves*, 93 S.W. 3d 930 (2003)**. The Texas Court of Appeals, Amarillo, dismissed an appeal because the **pro se** appellant, given several opportunities, failed to file a brief with citations to legal authority supporting her position. The court wrote, "Finally, as judges, we are to be neutral and unbiased adjudicators of the dispute before us. Our being placed in the position of conducting research to find authority supporting legal propositions uttered by a **litigant** when the **litigant** has opted not to search for same runs afoul of that ideal, however. Under that circumstance, we are no longer unbiased, but rather become an advocate for the party."

***42** ***Kelley v. Secretary, U.S. Department of Labor*, 812 F.2d 1378 (Fed. Cir. 1987)**. The U.S. Court of Appeals for the Federal Circuit similarly **held** that a plaintiff's failure to file a court action within sixty days of notice of the government's publication of notice in the Federal Register deprived the trial court of jurisdiction to hear the case, despite the plaintiff's status as a **pro se litigant**.

***Waushara County v. Graf*, 480 N.W.2d 16 (1992)**. Wisconsin courts limit the rule for lenient treatment of self-represented **litigants** to prisoners. In a case involving the appellate court's consideration of issues not raised on appeal, the Wisconsin Supreme Court wrote:

> While **pro se litigants** in some circumstances deserve some leniency with regard to waiver of rights, the rule applies only to ***pro se*** prisoners .... We recognize that the confinement of the prisoner and the necessary reasonable regulations of the prison, in addition to the fact that many prisoners are "unlettered" and most are indigent, make it difficult for a prisoner to obtain legal assistance or to know and observe jurisdictional and

> procedural requirements in submitting his grievances to a court. These concerns have not been extended to persons who are not incarcerated (internal citations omitted).

***Meyers v. First National Bank of Cincinnati*, 444 N.E.2d 412 (Ohio App. 1981)**. An Ohio intermediate appellate court decision rests on the same distinction as above. The court upheld a municipal court's dismissal of plaintiff's case pursuant to its local rule requiring the submission of a memorandum in opposition to a motion to dismiss. The court wrote:

> Appellants' argument that as ***pro*** ***se*** civil **litigants** they should receive special consideration and not be bound by the same rules as civil **litigants** represented by counsel is against the weight of Ohio as well as national authority. ***Pro*** ***se*** civil **litigants** are bound by the same rules and procedures as those **litigants** who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors. Appellants' argument that prisoners in ***pro*** ***se*** *habeas corpus* proceedings do not have to meet the **same** procedural **standards** as those with counsel is inapplicable to the case sub judice (internal citations omitted).

***Hodgins v. State*, 1 P.3d 1259 (2000)**. The courts of Wyoming apply a standard of leniency to self-represented **litigants**. The Wyoming Supreme Court set forth this standard: "The **litigant** acting **pro** **se** is entitled to 'a certain leniency' from the more stringent standards accorded formal pleadings drafted by lawyers; however, the administration of justice requires reasonable adherence to procedural rules and requirements of the court." In this case the court imposed the sanction of costs on the **litigant** for filing a frivolous appeal, noting that he was familiar with the rules of appellate procedure and should be **held** to account for violating them by filing an appeal utterly lacking in legal justification.

***Oko v. Rogers*, 466 N.E.2d 658 (Ill. App. 3d 1984)**. This is the only case we found that is directly on point for the issue addressed in this article. The plaintiff, represented by counsel, sued the defendant doctor, who represented himself, for medical malpractice. The jury returned a verdict for the doctor. The plaintiff appealed, claiming among other things that the trial judge denied her a fair trial by giving assistance to the defendant in presenting his case. Because both the facts and the legal analysis in this case are important, we include lengthy quotes from both the majority and dissenting opinions:

> **Majority**: Although the defendant on numerous occasions departed from the rules of trial court practice, his excursions were usually cut short by objections which were sustained and repeated until the defendant conformed to proper procedures. The defendant was not permitted to do as he pleased. Furthermore, the trial court took steps to make sure that the defendant's unorthodox questions did not confuse the jury. Whenever necessary, the trial judge would make his own brief and limited examination of a witness in order to clarify the testimony. The court also guided the defendant through parts of his own testimony in order to avoid a long narrative on irrelevant matters.

> Considerable latitude must be allowed a judge in conducting a trial. The conduct and remarks of the judge are grounds for reversal only if they are such as would ordinarily create prejudice in the minds of the jury. We find that the judge remained within his proper provinces in the present case. The judge gave due consideration to the defendant's **pro** **se** status but was never reluctant to sustain the plaintiff's objections when necessary. Although the judge would carefully explain to the defendant why certain objections were being sustained, there is no evidence that he conducted the defendant's case for him or failed to remain impartial.

As any judge or lawyer knows, the conduct of a jury trial with a **pro se litigant** who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. There is no law that requires a **litigant** to have a lawyer. The lawyer for the opposing side cannot be expected to advise the opposing party who is **pro se**. The judge cannot presume to represent the **pro se** party. In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides. We believe that Judge Cerri adequately faced up to that high responsibility in this case (footnote and citation omitted).

Dissent: At the conclusion of her examination of defendant, the trial court explained to defendant the tactical alternatives available to him— ***43** i.e., that he could wait and testify as a part of his own case or he could give direct testimony at the conclusion of plaintiff's examination of him. Defendant indicated that he wanted to testify right then, and the trial judge proceeded to question defendant at length about his post-operative treatment of plaintiff and about her progress under that treatment. Thus the court conducted the direct examination of defendant. Later, while defendant was attempting to cross-examine plaintiff's expert medical witness, defendant started to read from an article that had not been introduced into evidence. After sustaining plaintiff's objection to defendant's questions, the court told defendant, “Ask him if he read it and is familiar with the article, Doctor, the operation procedure.” During subsequent cross-examination of the same witness, defendant attempted several times to ask the witness whether his responsibility to his patient did not end when she terminated her relationship with him. After several versions of the question were objected to by plaintiff and the objections sustained by the court, defendant asked, “Is there any way I can accomplish that?” and the court advised defendant, “Ask him what is customary.” Following plaintiff's redirect examination of the witness, defendant had no recross, but the trial court asked several questions to clarify certain details of surgical procedure which had been mentioned by the witness on redirect. In effect, the court conducted the recross examination for defendant.

During another occasion, while defendant was questioning his own expert witness, Dr. McSweeney, the court overruled an objection by plaintiff to the form of a question asked by defendant relating to the surgical procedures the witness would use, and then the court provided defendant with the correct form by adding, “Based on the standards of our local community.” At the close of Dr. McSweeney's testimony, plaintiff moved that the testimony be stricken as not relevant to the issue of the prevailing standard of care for a reasonably well-qualified surgeon. The court stated: “Well, normally if I had a lawyer sitting there, I would—you might be technically correct. You might be correct. With Dr. Rogers, who at least in his artful questioning, I think the concept is sufficiently established in the record to allow that testimony to stand.” It is apparent to us that the trial court did not **hold** defendant to the same rules of procedure as he would have an **attorney** in determining the relevancy and admissibility of this evidence. To condone such actions of the trial court here is to invite **pro se** representation in difficult trials which would make a mockery of the judicial process, even though to fully inform a jury is a commendable purpose. Defendant was entitled to a fair opportunity to present his evidence, but nothing more. If he was insufficiently versed in legal procedure to place his evidence before the jury pursuant to the ordinary rules of procedure, then he was not entitled to have the court assist him by phrasing questions, by conducting the examination of witnesses, or by special rulings in his favor.

Without unnecessarily lengthening this opinion with additional examples, it is my firm belief the trial court overstepped the bounds of judicial discretion in assisting defendant with the trial of this cause, and accordingly, that plaintiff is entitled to have the judgment reversed and a new trial granted.

A Suggested Synthesis

What does all this mean? In reviewing the case law, we were struck with the large number of instances in which appellate courts reversed trial judges who were short or summary in their rejection of the causes of unrepresented **litigants**. Trial courts are expected to lean over backward (if not "lean over the bench") to identify meritorious issues hidden in the presentations of an unrepresented **litigant**. This comports well with the ethical requirement in Canon 3A(7) that the judge "shall accord to every person who has a legal interest in a proceeding ... the right to be heard according to law."

The courts appear to espouse three different standards for limiting the judge's duty to actively seek out the merit of an unrepresented **litigant's** case. The majority position is that self-represented **litigants** will be treated the same as **attorneys**. The minority position, taken by the federal courts, Alaska, Connecticut, and Minnesota (as articulated by Minnesota), is that "[a] trial court has a duty to ensure fairness to a **pro se litigant** by allowing reasonable accommodation so long as there is no prejudice to the adverse party." The very minority view is taken by Ohio and Wisconsin: standards applied to prisoners and other unrepresented **litigants** differ (more flexible and less flexible, respectively). We do not believe this third position can withstand careful analysis. Prisoners operate under a number of factors not imposed on other citizens, and courts should be solicitous of their right to access to the courts to present grievances, but other citizens should have equal access to judicial remedies.

The first two positions differ quite a bit from each other. The first takes the view that it is best when a judge accords the self-represented **litigant** no "special treatment." Exceptions exist, but they are limited. The emotional message that seems embedded in the majority view is that self-representation is a voluntary choice, it is moreover a foolish choice, and **litigants** who put themselves in this position "deserve" the consequences of that choice. The minority view is the opposite: a judge has a duty to accommodate the special circumstances of the unrepresented **litigant** up to the point that such accommodation infringes on the rights of the other side. The emotional message in minority view opinions is that a person's lack of counsel likely is not voluntary and is instead the result of a lack of means—but that even if voluntary, self-representation is a choice vouchsafed by the Constitution. The court has an obligation to provide as fair a process for the uninformed and unsophisticated citizen as for the one who can afford the most accomplished and aggressive **attorney**.

These contrasting standards give very different messages to the trial judge attempting to cope with an ***44** unrepresented **litigant** in the courtroom. The first posits a basically passive role for the judge, with the **litigant** bearing the burden of becoming sufficiently familiar with the law, rules of procedure, and rules of evidence to function as a lawyer. The second instructs the judge to aid the unrepresented **litigant**, who cannot be expected to perform as a trained lawyer would, in every way short of prejudicing the opponent. It is no accident that Minnesota is the only state to generate a protocol for judges dealing with self-represented **litigants**; its protocol follows from the standard articulated in its appellate case law.

In fact we think that these different standards have even less impact in the appellate court **holdings** than the above review suggests. In every case summarized above, the "majority rule" appears to be dictum. It is a formula intoned *after* the court announces its decision. The analysis in the court's ruling does not focus on the standard to which **attorneys** will be **held**. The statement that self-represented **litigants** will be **held** to the standard of an **attorney** seems, instead, to be merely a shorthand phrase for stating that the court will not let the unrepresented **litigant** use his or her status as a reason to avoid application of a particular procedural rule. The **holdings** of the cases summarized here can be synthesized into the following six basic propositions:

· The law must produce a consistent outcome for all **litigants**, regardless of their legal representation, based on the law and facts of their case. The real message behind the statement that self-represented **litigants** must follow the same rules as **attorneys** is the fundamental idea that an unrepresented **litigant** cannot obtain relief from the court in cases in which a party represented by an **attorney** would not prevail. The outcome of the matter should be directly related to the merits of a party's

case. An unrepresented party must meet the **same** legal **standards** for obtaining a judicial remedy as a party represented by counsel and should receive no sympathy or other advantage because of choosing to proceed without a lawyer.

· The "hard" procedural bars—pertaining to statutes of limitations, availability of administrative remedies, and time limits for filing an appeal— apply equally to unrepresented and represented **litigants**. Some of the cases do not support this principle, but the majority do. These procedural bars are fundamental rules governing the legal process. For the most part, appellate courts are uncomfortable applying them differently to different parties for any reason—and particularly not because they are or are not represented by counsel.

· "Soft" procedural bars—pertaining to contemporaneous objection, raising issues on appeal, or vacating a default judgment—can be mitigated for unrepresented **litigants**. The issue becomes murkier when it involves failure to preserve error by stating an objection on the record in the trial court, or in applying the standard for relief from a default judgment. Whether or not to apply these matters falls within the equitable discretion of the trial court. An appellate court can always decide an issue not raised by a party when it discovers "fundamental error." It can waive the contemporaneous objection rule for the same reason. Relief from a default judgment does not create the same degree of prejudice to the other party as overturning a decision on the merits. So, in exercising inherently equitable principles, judges are more likely to consider the ignorance and inexperience of an unrepresented party. If the unrepresented party did all that a reasonable person in the situation could do, that factor will weigh in the person's favor. If the individual appeared to scorn the court's rules and directives, the facts will weigh in the other direction. This is as it should be.

· Courts will grant unrepresented **litigants** enormous leeway in both form and content of the documents they file. This standard is universally observed. Of course courts cannot and will not assert a claim for a party that the party has not raised. This is the point of the Alaska cases, imposing the duty to assert individual rights on the self represented **litigant**.

· Judges will help assure that a **litigant** has an opportunity to present evidence in court, so long as the judge does not prejudice the other side in doing so. The only reported case we discovered is *Oko v. Rogers*. We repeat the majority's analysis in that case:

> As any judge or lawyer knows, the conduct of a jury trial with a **pro se litigant** who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. There is no law that requires a **litigant** to have a lawyer. The lawyer for the opposing side cannot be expected to advise the opposing party who is **pro se**. The judge cannot presume to represent the **pro se** party. In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides.

· Judicial efforts to enable unrepresented **litigants** to present their cases should be limited to assistance to the party in accomplishing the party's own strategy, not in suggesting a different or better strategy. So long as the judge is merely facilitating the unrepresented **litigant's** presentation of his or her own case—as the **litigant** has conceived it—the judge can be seen to be giving the party "legal information" about how to do in court what the party seeks to accomplish. The judge would lose his or her impartiality and "become the advocate" for the unrepresented **litigant** if the judge gives "legal advice" such as tactical or strategic recommendations for how the case should be presented—what witnesses to call, what arguments to make, what additional evidence to seek.

***45** As the majority in *Oko v. Rogers* pointed out, the trial judge can ensure the self-represented **litigant's** right to be heard without departing from the judge's duty to remain impartial. The duty of ensuring both parties' right to be heard is not inherently in conflict with the duty to remain impartial. We believe this position will be adopted by other appellate courts

when and if they address the practical problems facing the trial judge in similar cases. We also believe that trial judges can use a number of practical techniques to reduce the appearance of such a conflict.

Judicial Techniques

As noted earlier, our analysis of issues facing the trial judge is somewhat different from that of Dr. Goldschmidt in his *Family Court Review* article. Although we agree that trial judges cannot maintain a passive role, we do not necessarily espouse all of his specific recommendations for a more active role for judges and court staff.[16] We address some of his recommendations in the following discussion, which is divided into three areas: general principles, specific approaches to cases involving two unrepresented **litigants**, and cases involving the more difficult situation where one party is represented and the other is not.

General Principles

· Prepare. **Pro se** cases require a much more active role on the part of the trial judge—who must master the substantive law applicable to the case. When handling a case with two well-prepared lawyers, the trial judge can depend on counsel to identify the legal issues involved, but this is not so with cases in which no lawyers appear. The judge has the full responsibility for knowing and explaining the law. Most self-represented **litigants** appear in a few types of cases: family law (including divorce, paternity, child custody, child and spousal support, and domestic violence); traffic and misdemeanors; landlord/tenant; and small claims. In most urban areas, judges handle these calendars as regular assignments and consequently are steeped in the law and process related to each case type. However, a judge called to cover for a sick or absent judge in one of these assignments may be in an awkward situation unless the judge has reviewed the legal elements and standards governing the matters likely to arise.

· Provide the parties with guidelines. In **pro se** cases it is helpful for the judge to explain the applicable substantive and procedural principles. When both parties are represented by counsel, this is not necessary; each **attorney** is aware of the requirements and can be expected to address them. Unrepresented **litigants** may need more. By presenting background at the beginning of the hearing, the judge neutrally aids both parties. Much of this information can be given to the parties in writing before the hearing or trial. The following items are particularly helpful:

* A basic primer on courtroom protocol, addressing who sits where in the courtroom, how to behave (rising when the judge enters and leaves the courtroom; not interrupting another person who is speaking), order of events (the moving party presents first), how to state objections, attire, and other matters the judge considers important (for example, gum chewing).

* Basic rules for evidence presentation, including the burden on the moving party to prove entitlement to relief. Many **litigants** literally expect the trial judge to be omniscient—to "know" the truth behind all matters without needing evidence. They should be instructed that the judge will rule based only on the evidence presented. The judge may explain the different types of evidence— testimony, documents, exhibits—and how each is presented to the court. (Item 6 in the Minnesota protocol briefly describes the more important rules of evidence.)

* A list of elements that must be proved in order to obtain relief. This section should be short and clear, with no explication of legal nuances. For example, a motion to modify child support must establish a change in the non-custodial parent's financial situation and show why the custodial parent should receive increased support. Where possible, the list should explain what evidence can prove the elements, such as a pay stub, tax return, and the like.

Judge Albrecht combines the latter information with a minute entry notifying **litigants** of the date and time of the hearing or trial. She uses standard word processing templates for recurring situations, so her staff can easily include the pertinent information in any printed communication. Providing the materials in advance greatly increases the likelihood that the parties will be prepared to proceed when the case is called. Some courts provide these materials on a website, and others make them

available at a "self-help center" in the courthouse. Whatever the form, it is helpful either to provide the information in writing or to give the parties written notice of the location of the material, their duty to review it before the hearing or trial, and where additional copies or information are available.

Even if materials have been provided in advance, the hearing or trial should begin with the judge's review of all three topics—explaining how the proceeding will be conducted, the legal elements of the matter, and types and forms of acceptable evidence. Judge Albrecht explains that each party will have an opportunity to present its position (or tell its story), that she will ask questions as needed to obtain additional information, and that she will apply the rules of evidence in deciding what weight to give the evidence presented.[17] She also explains that she may interrupt either party—if she believes she does not understand the point being made, has heard enough on the point, or if she believes the party is going into an area that is not legally relevant—and ask that the individual move to the next point.

To the extent judges give general instructions in advance to both parties, they minimize the likelihood that their ***46** instructions can be perceived as favoring one party. The Minnesota Protocol on page 18 provides an excellent outline for these preliminary instructions.

· Conduct the proceeding in a structured fashion based on the required legal elements. We suggest that the judge provide the parties with an outline of the decision-making process and follow it explicitly during the proceeding. To continue with our child support example: The judge would state that the first determination is whether the court has jurisdiction to decide the case, then whether financial circumstances of the non-custodial parent have changed, and finally, if so, what change in monthly child support would be appropriate. After taking testimony on the first issue, the judge would clearly state, "Let the record show that the court has jurisdiction in this case." After hearing testimony on the non-custodial parent's changed income, the judge would conclude that phase of the proceeding with, "I find that Mr. Jones's income has increased from $X per month when child support was first established in this case in 1999 to $Y per month today." Then the judge would announce the guideline child support amount and invite the parties to give reasons, if any, for departing from them. At the end, the judge would announce the final result: "The child support guidelines call for monthly support of $Z in these circumstances. I find no reason to deviate from the guidelines. I order an increase in Mr. Jones's monthly child support from $Q to $Z."

Attorneys of course are already familiar with this outline and address all of the topics in the course of presenting the case. Using this approach will enable the judge to structure the proceeding for both parties and set clear boundaries for arguments and presentations; it will help them focus on the specific topic being addressed. Any extra time required for the judge to establish this agenda will be more than offset by the reduced time needed for the parties to present evidence and arguments.

Judges may want to use visual aids to assist the parties in understanding and following the issue outline. Richard Zorza discusses the options of flipcharts and more highly automated alternatives in his book.[18]

· Create an informal atmosphere for the acceptance of evidence and testimony. Dr. Goldschmidt recommends that the formal rules of procedure and evidence be relaxed for cases involving self-represented **litigants**. We agree and suggest that the judge can easily accomplish this by using informal language. By stating, "I will give each of you a chance to tell me what you think I need to know to decide each of the issues in this case," the judge can create an informal environment for accepting evidence. Any party can object at this point and insist on following the rules of evidence, but this is unlikely. In the absence of objection, the parties can waive the rules of evidence regarding following the traditional question and answer format, establishing a foundation for introducing documents and exhibits, qualifying an expert, and the like.

Generally, such an introductory statement will suffice because issues of privilege rarely arise in most matters in which **litigants** typically self-represent. However, judges may need to deal more explicitly with hearsay. Hearsay will be excluded if a party objects, but it is otherwise probative—if a party does not object, a judge or jury may consider hearsay evidence. Does the judge have a duty to inform the parties of this rule? The Minnesota protocol suggests that a judge do so but does not require specific notice. We suggest the judge's initial advice to the parties include such language but not that the court bring it to the attention of the parties. The initial instruction should suffice.

· Ask questions. Judges should freely ask questions of unrepresented parties and their witnesses. When judges make clear to the parties at the beginning of the hearing that they will ask questions—and explain why (to make sure they have the information they need to make a decision)—chances are minimal that their apparent impartiality could be impaired. The Minnesota protocol suggests that the judge pose questions in the most general form to avoid the appearance of leading a party or witness to a particular conclusion.

· Provide written notice of further hearings, referrals, or other obligations of the parties. Optimally, the parties will leave the courtroom with an order or minute entry documenting the next court date, the court's referral to another service or resource (such as the court's self-represented **litigants** support office, a courthouse facilitator program, or an alternative dispute resolution program), and any other obligations the parties may have (such as preparing and serving further papers or proposed orders).

Dr. Goldschmidt suggests that judges call witnesses and conduct "limited independent investigations" if they believe either process is necessary to discover the truth of a matter. We do not endorse this suggestion. A judge should feel free to ask questions of a witness already in the courtroom and should be prepared, in special circumstances, to continue a matter to allow a party to secure the presence of an additional witness. But we do not believe it proper for a judge to decide an additional witness is needed and to subpoena or call that witness. Nor do we think it possible for the judge to conduct an independent investigation without losing the appearance of impartiality.

Cases Involving Two Unrepresented Parties

We suggest these additional procedures for cases involving two unrepresented parties.

· Swear both parties at the beginning of the proceeding. When both parties are sworn, distinctions between their arguments and their testimony are not necessary. All statements made by the parties can now be considered as evidence. The judge should explain that the parties must remember they are ***47** under oath throughout the hearing or trial and that anything they say— as a question, statement, or argument—must be truthful.

· Maintain strict control over the proceedings. Most self-represented **litigants** are respectful of the court and will conduct themselves in a dignified manner. However, especially in family law matters, emotions often flare, and the judge should quickly terminate arguments and calm anger. Recessing for a moment may be necessary to give the parties a chance to regain their composure. The judge must be alert and set and enforce clear ground rules, especially that the parties may not interrupt each other and that each will have an opportunity to be heard. The judge may need to use the contempt power or authority to dismiss the lawsuit for abuse of the legal process as a threat to restrain inappropriate behavior.

· Remain alert to imbalances of power in the courtroom. The judge must ensure that both sides have a full opportunity to present their points of view, especially where it is clear that one of the parties has more power (relationships involving domestic abuse, disputes in which one party is far more sophisticated than the other, or situations in which one of the parties has a limited knowledge of English). Judges should make a special effort here to ask the less powerful party its views on each issue or even to draw out those views with follow-up questions. The judge should not rely on the party's ability to take the initiative or to speak proactively. In extreme cases, the judge should continue the matter and seek pro bono legal representation for one or both parties.

Cases Involving Represented and Unrepresented Parties

Most trial judges find cases with unequal resources most difficult, as illustrated in *Oko v. Rogers*. Problems arise when counsel advocate for their clients to prevent unrepresented **litigants** from adducing testimony or other evidence to support their cases. Judges can use a number of different approaches to ensure that unrepresented **litigants** fully present their case

without negating altogether the value of counsel for represented parties. Counsel must fully represent the client, leading in presentation of testimony, documents, and exhibits; cross-examining testimony presented by the unrepresented party; and arguing the legal and factual merits of the client's case. In terms of the minority standard, the judge accommodates the special needs of the self-represented party but does not prejudice the case of the represented party. The represented party is not prejudiced, in the legal sense of that term, by the introduction of the other side's evidence. That is what the hearing and trial are for. The represented party retains an unfettered opportunity to object to the admissibility of all evidence offered.

We recommend as a first principle, as the Minnesota protocol provides, that all cases involving self-represented **litigants** be handled in the same fashion, whether or not the other party retains counsel. The most serious problems arise when judges conduct the case as if both sides are represented by **attorneys** but find, as in the *Oko* case, they must intervene repeatedly in order to enable the non-lawyer to function in the proceeding. When this occurs, the lawyer must accommodate to the informal setting established by the judge. The lawyer may lead the client and witnesses through testimony, cross-examine the opposing party and its witnesses, make objections to testimony or documents, and argue the merits of the client's case. Most **attorneys** recognize the need for the judge to proceed informally, but a few will insist that the proceeding be conducted in strict compliance with the rules of evidence. The judge has several options in dealing with this objection.

· Convince the **attorney** of the benefits of proceeding informally. The judge can call the **attorney** to the bench, explain the reasons for the informal structure, and convince the lawyer to withdraw the objection. The judge can point out that going through the question and answer process will take much more time—for the judge, the **attorney**, and the **attorney's** client—and could be much more difficult and frustrating for everyone concerned.

· Overrule. The judge can overrule the objection on the grounds that it would be a waste of judicial resources to proceed in formal compliance with the rules of evidence.

· Set special ground rules for the conduct of the proceeding under the rules of evidence. The judge can inform counsel that if the matter proceeds under the formal rules of evidence, the lawyer will be required to explain to the unrepresented **litigant** the basis for any objection the **attorney** makes, with enough detail so that the unrepresented **litigant** can take whatever corrective steps are needed to proceed. For example, if the **attorney** objects to a leading question, the **attorney** would need to explain the objection sufficiently so the self-represented party would be able to pose an appropriate non-leading question.

This is not the same as requiring counsel to assist the unrepresented **litigant** by formulating that party's questions. It merely makes counsel responsible for explaining, in whatever depth necessary, the nature of counsel's objection. The judge, as well, will help assure that the unrepresented **litigant** is equipped with the tools needed to get all evidence before the judge for a fair determination of the matter. The judge should explain to counsel that counsel may decide at any time during the proceeding to abandon the objection and proceed informally from that point.

· Refuse to uphold objections to the form of questions or testimony. The judge can decide not to entertain objections to the form of questions or testimony and limit such objections to only the admissibility of the evidence itself. For instance, if the **attorney** objects to the manner in which the self-represented **litigant** attempts to introduce a document, the judge can cut to the ultimate question: “Counsel, does your client contend ***48** that this document is either inadmissible or something other than what it purports to be?” The lawyer thus can protect the client's interests without prolonging the process or requiring the judge to provide additional assistance to the **litigant**.

· Use leading questions or prompts as often as necessary to remind the unrepresented **litigant** to present evidence in a manner consistent with the rules of evidence. This should be a last resort but, as *Oko* illustrates, is proper. Judges should try all other approaches first because these generally produce less cumbersome, less frustrating, and less contentious hearings and trials. But if counsel refuses to cooperate with the other approaches introduced by the judge, the judge will have established on the record the need for measures to ensure the unrepresented **litigant's** right to be heard.

· Offer the unrepresented **litigant** the option of a continuance if necessary. This could mean reconvening later the same day or returning to court another day. If, for example, an unrepresented **litigant** does not have the witnesses present to

authenticate a document or photograph and counsel insists on the need for such authentication, the judge can offer to continue the matter long enough for the **litigant** to contact and summon the necessary witnesses. This approach puts additional pressure on counsel to be reasonable in voicing objections and enables the judge to demonstrate doing whatever is necessary in order to maintain a level playing field within the courtroom. Counsel will have to weigh the delay and expenditure of additional time and money to return to court against the possibility of discovering weaknesses in the documents or exhibits introduced.

· Allow or help obtain assistance for the unrepresented **litigant**. The Minnesota protocol recognizes the potential benefit of a friend or counselor who can sit with the **litigant** at counsel table. The assister is not allowed to ask questions or argue on behalf of the **litigant** but may provide advice on the form of questions and the procedures for introducing evidence as the case proceeds. Assisters do not necessarily need court experience to provide help. If the **litigant** has language difficulty or is otherwise limited in literacy or comprehension of the process, a friend who is able to read and understand the materials and accurately interpret the information provided by the judge and opposing counsel would be helpful to the **litigant**. In extreme cases, the judge may need to adjourn the matter sua sponte and seek pro bono counsel for the unrepresented party. This is particularly appropriate when the **litigant** speaks a different language or is a person with mental or comprehension handicaps.

Conclusion

The challenge for the trial judge dealing with unrepresented **litigants** is to ensure they have a full opportunity to present their cases for resolution on the merits. The duty of impartiality requires the judge to consider all competent evidence in the possession of the unrepresented **litigant**. We have suggested a number of techniques to help judges accomplish that result. We believe that they are fully acceptable under both the majority and minority views of the judge's role in these types of proceedings. We invite responses to this analysis and hope it will encourage trial judges to contribute additional techniques they have found useful and effective in these situations.[19]

Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants

> **Editor's Note**: *The following text is the product of the **Pro Se** Implementation Committee of the Minnesota Conference of Chief Judges*.

Judicial officers should use the following protocol during hearings involving pro se litigants:

1. Verify that the party is not an **attorney**, understands that he or she is entitled to be represented by an **attorney** and chooses to proceed **pro se** without an **attorney**.

2. Explain the process. “I will hear both sides in this matter. First I will listen to what the Petitioner wants me to know about this case and then I will listen to what the Respondent wants me to know about this case. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. So please do not interrupt while the other party is presenting their evidence. Everything that is said in court is written down by the court reporter and in order to insure that the court record is accurate, only one person can talk at the same time. Wait until the person asking a question finishes before answering and the person asking the question should wait until the person answering the question finishes before asking the next question.”

3. Explain the elements. For example, in Order for Protection (OFP) cases: “Petitioner is requesting an Order for Protection. An Order for Protection will be issued if Petitioner can show that she is the victim of domestic abuse. Domestic abuse means that she has been subject to physical harm or that she was reasonably in fear of physical harm or that she was reasonably in

fear of physical harm as a result of the conduct or statements of the Respondent. Petitioner is requesting a Harassment Restraining Order. A Harassment Restraining Order will be issued if Petitioner can show that she is the victim of harassment. Harassment means that she has been subject to repeated, intrusive, or unwanted acts, words, or gestures by the Respondent that are intended to adversely affect the safety, security, or the privacy of the Petitioner."

4. Explain that the party bringing the action has the burden to present evidence in support of the relief sought. For example, in OFP cases: "Because the Petitioner has requested this order, she has to present evidence to show that a court order is needed. I will not consider any of the statements in the Petition that has been filed in this matter. I can only consider evidence that is presented in court today. If Petitioner is unable to present evidence that an order is needed, then I must dismiss this action."

5. Explain the kind of evidence that may be presented. "Evidence can be in the form of testimony from the parties, testimony from witnesses, or exhibits. Everyone who testifies will be placed under oath and will be subject to questioning by the other party. All exhibits must first be given an exhibit number by the court reporter and then must be briefly described by the witness who is testifying and who can identify the exhibit. The exhibit is then given to the other party who can look at the exhibit and let me know any reason why I should not consider that exhibit when I decide the case. I will then let you know whether the exhibit can be used as evidence."

6. Explain the limits on the kind of evidence that can be considered. "I have to make my decision based upon the evidence that is admissible under the Rules of Evidence for courts in Minnesota. If either party starts to present evidence that is not admissible, I may stop you and tell you that I cannot consider that type of evidence. Some examples of inadmissible evidence are hearsay and irrelevant evidence. Hearsay is a statement by a person who is not in court as a witness: hearsay could be an oral statement that was overheard or a written statement such as a letter or an affidavit. Irrelevant evidence is testimony or exhibits that do not help me understand or decide issues that are involved in this case."

7. Ask both parties whether they understand the process and the procedure.

8. Non-**attorney** advocates will be permitted to sit at counsel table with either party and provide support but will not be permitted to argue on behalf of a party or to question witnesses.

9. Questioning by the judge should be directed at obtaining general information to avoid the appearance of advocacy. For example, in OFP cases: "Tell me why you believe you need an order for protection. If you have specific incidents you want to tell me about, start with the most recent incident first and tell me when it happened, where it happened, who was present, and what happened."

10. Whenever possible the matter should be decided and the order prepared immediately upon the conclusion of the hearing so it may be served on the parties.

Note: Idaho has developed a draft protocol for its trial judges derived from the Minnesota protocol.

Footnotes

a1 **Rebecca A. Albrecht** is a judge of the Maricopa County Superior Court in Phoenix, Arizona. During her term as deputy presiding judge of the court, she was instrumental in creating its nationally acclaimed Self Service Center. She frequently speaks to judges about their handling of cases involving self-represented **litigants**.

a2 **John M. Greacen** is a former court administrator who is currently a principal in Greacen Associates, LLC, a consulting group focused on court improvement, court use of technology, performance measurement, and leadership

development.

a3 **Bonnie Rose Hough** is supervising **attorney** for the Center for Families, Children and the Courts within the California Administrative Office of the Courts. Her unit encourages, guides, and funds the self-help centers in California's trial courts and has developed the state's 900-page self-help website of legal information and forms.

a4 **Richard Zorza** is an **attorney** and technology consultant who developed the judicial decision support system application for the Midtown Community Court in Manhattan. He has advised the Washington State Access to Justice Board on a technology bill of rights and has written and spoken widely on the courts' responses to self-represented **litigants**.

1 *See* John M. Greacen, *No Legal Advice from Court Personnel: What Does That Mean*, Judges' J., Winter 1995, at 10; J. Greacen, *Legal Information vs. Legal Advice: Developments during the Last Five Years*, Judicature 84 (2001), at 198; Richard Zorza, *Reconceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*; 67 Fordham L. Rev. 2659 (1999); R. Zorza, The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers (National Center for State Courts 2002).

2 John M. Greacen, *What We Know and Do Not Know about Self-Represented **Litigants*** (California Administrative Office of the Courts, Center for Children and Families).

3 Fam. Ct. Rev., vol. 40, no. 1 (Jan. 2002). *See also* Russell Engler, *And Justice for All-Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* (1988).

4 Form 4A-201 B, District Court Rules of Procedure for Domestic Relations Matters, Responsibility of Self-Represented Party.

5 *Available at* www.abanet.org/cpr/mcjc/toc.html. Although the ABA Code of Judicial Conduct applies to judges only as it was adopted in the state in which the judge presides, and states often modify ABA codes in the course of adopting them, we are not aware of any state that has modified these sections in any way that would affect our analysis.

6 State of California, Commission on Judicial Performance, Inquiry Concerning Judge Fred L. Heene, Jr., No. 153 (Oct. 13, 1999).

7 ABA Model Code of Judicial Conduct, 1-97.

8 Tom Tyler, *What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 Law and Society Review 1 (1988), at 103. On page 126, Tyler reports separately the data for uncontested and contested matters. We rely on the data for contested matters. The study found overall that the most important factor in **litigants**' assessments was the perception of the judge's effort to be fair.

9 422 U.S. 806 (1975).

10 528 U.S. 152 (2000).

11 Margaret H. Marshall, Massachusetts Conference on **Pro Se Litigants** (Mar. 15, 2001) (unpublished speech) (on file with author).

12 Haines v. Kerner, 404 U.S. 519, 520-21 (1972). *But see* Mmoe v. Commonwealth, 473 N.E.2d 169 (Mass. 1985) (Mass. Supreme Judicial Court reversed trial judge's denial of motion to dismiss **pro se** complaint following three-day hearing at which **pro se litigant** was allowed to supplement and clarify 35-page complaint orally).

13 Eagle Eye Fishing Corp. v. U.S. Dep't of Commerce, 20 F.3d 503 (1st Cir. 1994); Malik v. Coughlin, 506 N.Y.S.2d 844 (N.Y. Sup. 1986); Conn. Light & Power Co. v. Kluczinsky, 370 A.2d 1306 (Conn. 1976).

14 *See supra*, note 4

15 The court surmised that the appellant merely copied a brief from another case and changed a few words in an attempt to make it relevant to his case.

16 For instance, Dr. Goldschmidt urges that court staff be trained to advise **litigants** concerning "the elements of common causes of action, defenses, statutes of limitations, service of process, execution of judgment, and other procedural requirements," taking issue with limitations one of the authors advocated in other articles. (*See supra*, note 1.) We choose not to address those issues here because the article focuses on the role of the trial judge, not staff.

17 Dr. Goldschmidt recommends the formal rules of procedure and evidence be relaxed for cases involving self-represented **litigants**. We know of no state that has formally adopted this principle in its rules. However, the trial judge can choose to conduct a hearing or trial in an informal manner and signal this to the parties by stating that they will be given an opportunity to tell the judge whatever they think the judge needs to know about the matter.

18 Zorza, The Self-Help Friendly Court, *supra* note 1, at 75.

19 John M. Greacen writes a regular column in *The Judges' Journal* and will include all suggestions and comments received in response to this article in a future column. He can be reached at john@greacen.net.

42 No. 1 JUDGEJ 16

End of Document

SUGGESTED VOIR DIRE FOR DEFENDANT
WHO WISHES TO PROCEED PRO SE
Presented at a Summer Judicial Seminar Many Years Ago
by
Honorable Peter M. Levitt

Pro Se Representation

Pro Se Request as Part of Counsel Change Need NOT Be Addressed
People v. Nunez, 2010 WL 1817846 (N.Y.A.D. 4 Dept.): We reject the contention of defendant that County Court erred in failing to address his requests to proceed pro se. "Defendant never made an unequivocal invocation of his right of self-representation [ ] because each of his requests to proceed pro se was made in the context of a request for substitution of counsel" (*People v. McClam*, 297 A.D.2d 514, 514; *lv denied* 99 N.Y.2d 537; *see also People v. Caswell*, 56 AD3d 1300, 1301-1302, *lv denied* 11 NY3d 923, 12 NY3d 781; *see generally People v. Gillian*, 8 NY3d 85, 88). Before a defendant can represent himself at a criminal proceeding, the following three requirements must be met:

1. The request for pro se representation must be unequivocal and timely made;
2. The defendant's waiver of representation by an attorney must be knowingly and intelligently made; and
3. The defendant must not have engaged in conduct which would prevent the fair and orderly exposition of the issues.

In order to insure a knowing and intelligent waiver, the court must conduct sufficient inquiry to insure that the defendant is cognizant of the dangers of waiving his right to be represented by counsel.

Introduction

"You appear before me today because you seek to represent yourself in this case. The law requires that before I rule on this application, I must first determine whether your request is unequivocal and whether your offer to give up the right to be represented by a lawyer is knowingly and intelligently made. My decision will be made after I ask you a series of questions. I will rely on your answers to these questions in deciding whether your request to represent yourself is a knowing, intelligent and unequivocal choice. If I or anyone else says anything that you do not understand, please call that fact to my attention and we will not continue until you do

understand.

A. Defendant's Background:

1. What is your full name and your date of birth?
2. Can you read, write, speak and understand the English language?
3. Have you ever received or are you now receiving treatment for a mental or physical condition that affects your ability to understand?
4. Do you now have any mental or physical condition that prevents you from understanding what is happening?
5. Have you had sufficient time to reflect on your decision to represent yourself?
6. How many years of schooling have you had? Did you graduate from high school/college?
7. What course of study did you pursue in college (if applicable)?
8. What is your employment history? What type of work have you done in the past? What companies have you worked for in the past? How many jobs have you held in the past? What type of work are you qualified to do?
9. Have you ever been involved in the criminal justice system before? What is your past record? What courts have you appeared before in the past?
10. Has anyone threatened you, coerced you, or in any other way attempted to influence you against your own free will to get you to make this request to represent yourself?

B. Defendant's Awareness of Court Proceedings

11. Can you explain to me what you are charged with?
12. What is the present status of those charges?
13. Can you explain to me what the purpose of today's court proceeding is?
14. Can you explain to me what the next step of these proceedings will be?
15. Can you explain to me what the purpose of a trial of these charges is?
16. Can you explain to me what the functions of the court and jury are?
17. Can you explain to me what your role as attorney will be, as well as the role of the prosecutor?
18. Have you ever represented yourself in court proceedings in the past? What was the outcome of this pro se representation?

19. Do you have any other experiences which have enabled you to ask questions/conduct examinations of witnesses?
20. Have you discussed this case with your attorney?
21. Have you had any difficulty understanding your attorney's explanations or discussions of court procedures or other legal matters relative to these charges?
22. Why do you wish to waive your right to be represented by counsel in this case? Is your choice to represent yourself made because you are dissatisfied with your defense lawyer?

C. Advisement of Dangers of Self-Representation

The law recognizes the right of a person to defend himself. But the law also recognizes that such a choice may not be a wise one. Let me alert you to some of the dangers of self-representation so that you will be aware of them before you finally decide whether you wish to give up your right to be represented by a lawyer.

Even the intelligent and educated layman has small and sometimes no skill in the field of law. Left without the assistance of counsel, he may be put on trial without a proper charge and convicted upon incomplete, irrelevant or inadmissible evidence. Often the layman lacks the skill and knowledge to adequately prepare his defense, even though he has a good one. Without counsel, though an accused may not be guilty, he faces the danger of conviction because he does not know how to adequately protect his legal rights. Lawyers generally are both college and law school trained before they are permitted to take the bar examination. Only those who pass the bar are licensed to practice law and the number who become trial lawyers is small. In order to adequately represent a client, a trial lawyer needs comprehensive knowledge of the rules of evidence as well as an understanding of the art of jury selection and the art of cross-examination. Most non-lawyers do not have such education or training.

23. Do you understand that many pro se representations are not successful?
24. Do you understand that in choosing to represent yourself, you are not entitled to any aid from an attorney throughout these proceedings at all? Do you understand that this includes both pretrial proceedings and the trial itself? Do you understand that this includes your own testimony as well, should you choose to testify?
25. Do you understand that you will be held to the same legal standards at this trial, should you represent yourself, as if you were an attorney?

26. The legal profession contains many terms of art which would not be known to an individual untrained in the law. Do you understand that by representing yourself, you risk not being able to understand these terms or art when used during court proceedings, so that you may not understand what is happening?
27. The legal profession also incorporates entire legal concepts and theories by the mere usage of a case name. Again, a layman unschooled in the law would now know the meaning behind these case names. Do you understand that by representing yourself, you risk being unable to understand any such case names used, and what they stand for?
28. The field of criminal law is quite complex, with many theories and principles known only by someone trained in the law - oftentimes involves much more than mere common sense. Do you understand that by choosing to represent yourself, you may be unaware of some legal theories or rules which might be applicable to your case?
29. Do you understand that if you choose to represent yourself, you will be subject to the same rules of evidence at any evidentiary proceeding that an attorney would be?
30. Do you understand that by representing yourself, you run a risk of not being able to introduce into evidence those matters which you would like to because of your lack of legal training pertaining to these rules of evidence?
31. Do you understand that at times you may be called upon to give legal explanations for your actions in the role of attorney?
32. Do you understand that you run a risk of having evidence precluded, or of motions being denied, because of the possibility that you will be unable to give legal explanations?
33. Do you understand that your examination of witnesses will be held to the same procedural and evidentiary limitations as an attorney?
34. Do you understand that if you choose to represent yourself any opening or closing addresses you wish the jury to hear must be made by you, and that you are not entitled to an attorney either to do so, or to advise you in doing so?
35. Do you understand that the district attorney who will be appearing in opposition to you throughout the case, is trained in the law, and does know legal terms of art as well as criminal law theory and principles?
36. Do you understand that _____ is an experienced district attorney and has been prosecuting felony cases for _____?

37. Do you understand that the district attorney will also hold you to the same standards as if you were an attorney, and will not "go easy" on you during these proceedings?
38. Do you understand that by waiving your right to be represented by counsel you are foregoing the benefits of courtroom experience and legal training which your attorney possesses?
39. Do you understand that by waiving legal representation in this case, you are foregoing the benefit of your attorney's ability, training and past experiences in speaking to a jury?

40. Do you understand that if you choose to represent yourself, you will be expected to conduct yourself appropriately in the courtroom?
41. Do you believe that you are capable of representing yourself in this case?
42. Do you still wish to waive your right to be represented by an attorney in this case, and to represent yourself?

D. Advisement of Trial Conduct

Self-representation is not a license to abuse the dignity and decorum of the courtroom. The individual who represents himself must conduct himself as would any lawyer in the case. If you conduct yourself in such a way that the fair and orderly presentation of the issues during the trial is prevented or the progress of the trial is undermined, upset or unreasonably delayed, then you may be removed from the courtroom. If that occurs, do you understand that during the period of any such removal, you will not be represented by anyone in the case?[1]

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[1] *People v. Davis*, 270 A.D.2d 162 (1st Dep't 2000): "Defendant's decision to represent himself because of his dissatisfaction with his attorney was knowingly and voluntarily made. The court thoroughly warned defendant, who was no stranger to the criminal justice system, about the dangers of self-representation. The court properly removed defendant from the courtroom when, despite several warnings, he behaved in a disruptive manner on several occasions, and his conduct was admittedly designed to provoke a mistrial. Defendant was not deprived of his rights to confrontation or counsel; he alone was responsible for the manner in which the trial was conducted. Defendant hurled racial epithets at the jurors when given the chance to cross-examine a witness who had testified in his absence, thereby causing his removal for a second time. Defendant repeatedly instructed the court that he did not want his attorney (serving as his standby legal advisor) to represent him in his absence. *But see People v. Anderson*, 133 AD2d 120 (2d Dep't 1987), where reversal was ordered because court should have anticipated the need for stand-by counsel due to a disruptive defendant and should have kept counsel in courtroom to

Do you still wish to waive your right to be represented by an attorney in this case, and to represent yourself?

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takeover in the event defendant forfeited his right to be present.

957 N.E.2d 255, 932 N.Y.S.2d 765, 2011 N.Y. Slip Op. 07148

KeyCite Yellow Flag - Negative Treatment
Distinguished by People v. Silburn, N.Y., April 3, 2018

17 N.Y.3d 469
Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,
v.
Alexander G. CRAMPE, Appellant.
The People of the State of New York, Respondent,
v.
Blake Wingate, Appellant.

Oct. 13, 2011.

Synopsis

Background: After waiving his right to counsel, defendant was convicted in the Justice Court of the Town of Riverhead, Suffolk County, Allen M. Smith, J., of criminal possession of a controlled substance in the seventh degree, and he appealed. The Supreme Court, Appellate Term, 26 Misc.3d 144, 907 N.Y.S.2d 102, affirmed. In separate case, defendant who also waived his right to counsel was convicted in the Supreme Court, Queens County, Spires, J., of criminal possession of stolen property in the fourth degree and criminal possession of a controlled substance in the seventh degree, and he appealed. The Supreme Court, Appellate Division, 70 A.D.3d 734, 892 N.Y.S.2d 867, affirmed as modified. Leave to appeal was granted in both cases.

Holdings: The Court of Appeals, Read, J., held that:

[1] town justice did not make requisite searching inquiry to insure that defendant was aware of the drawbacks of self-representation before allowing him to proceed pro se;

[2] colloquy conducted by suppression court when defendant stated he wished to represent himself was deficient;

[3] colloquy conducted by trial judge was sufficient; but

[4] trial court's warnings about the dangers of self-representation could not retrospectively cure suppression court's error.

Reversed in part; affirmed as modified in part.

West Headnotes (11)

[1] **Criminal Law**—Capacity and requisites in general

Before proceeding pro se a defendant must make a knowing, voluntary and intelligent waiver of the right to counsel. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

45 Cases that cite this headnote

[2] **Criminal Law**—Capacity and requisites in general

For a waiver of the right to counsel under the state constitution to be effective, the trial court must be satisfied that it has been made competently, intelligently and voluntarily.

6 Cases that cite this headnote

[3] **Criminal Law**—Duty of Inquiry, Warning, and Advice

To ascertain whether a waiver of the right to counsel is knowing, voluntary and intelligent, a court must undertake a searching inquiry designed to insure that the defendant is aware of the dangers and disadvantages of proceeding without counsel. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

42 Cases that cite this headnote

[4] **Criminal Law**—Duty of Inquiry, Warning, and

Advice

Searching inquiry required when defendant seeks to waive right to counsel encompasses consideration of a defendant's pedigree since such factors as age, level of education, occupation and previous exposure to the legal system may bear on a waiver's validity. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

8 Cases that cite this headnote

[5] **Criminal Law**Duty of Inquiry, Warning, and Advice

Court's record exploration of defendant's waiver of right to counsel must accomplish the goals of adequately warning defendant of the risks inherent in proceeding pro se, and apprising defendant of the singular importance of the lawyer in the adversarial system of adjudication. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

37 Cases that cite this headnote

[6] **Criminal Law**Counsel

Reviewing court may look to the whole record, not simply to the waiver colloquy, in order to determine if a defendant effectively waived counsel. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

7 Cases that cite this headnote

[7] **Criminal Law**Waiver of right to counsel

Town justice did not make requisite searching inquiry to insure that defendant was aware of the drawbacks of self-representation before allowing him to proceed pro se; form that town justice read aloud only pointed out that proceeding pro se brought with it the danger of conviction, a risk that also exists when the accused is represented by counsel, and that criminal trials and proceedings are complicated. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

8 Cases that cite this headnote

[8] **Criminal Law**Waiver of right to counsel

Colloquy conducted by suppression court when defendant stated he wished to represent himself at suppression hearing was deficient; court's inquiry did not direct defendant's attention to the dangers and disadvantages of self-representation beyond the risk of a felony conviction. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

4 Cases that cite this headnote

[9] **Criminal Law**Waiver of right to counsel

Colloquy conducted by trial judge was sufficient to show that defendant's decision to defend himself at trial was knowing, voluntary and intelligent; court engaged in an extensive colloquy with defendant, drawing his attention to the many challenges that he would face if he proceeded pro se rather than avail himself of legal representation. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

5 Cases that cite this headnote

[10] **Criminal Law**Waiver of right to counsel

Trial court's warnings about the dangers of self-representation could not retrospectively cure suppression court's error in failing to adequately warn defendant about such dangers beyond the risk of a felony conviction. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

2 Cases that cite this headnote

[11] **Criminal Law**Duty of Inquiry, Warning, and Advice

Scope of a searching inquiry required when defendant seeks to waive right to counsel turns on the context in which the right to counsel is waived. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

3 Cases that cite this headnote

Attorneys and Law Firms

***766** Legal Aid Society, Appeals Bureau, Riverhead (Adrienne Wallace, Robert C. Mitchell and Alfred J. Cicale of counsel), for appellant in the first above-entitled action.

Thomas J. Spota, District Attorney, Riverhead (Marcia R. Kucera of counsel), for respondent in the first above-entitled action.

Warren S. Landau, New York City, and Lynn W.L. Fahey for appellant in the second above-entitled action.

Richard A Brown, District Attorney, Kew Gardens (John F. McGoldrick and John M. Castellano of counsel), for respondent in the second above-entitled action.

OPINION OF THE COURT

READ, J.

256 *472 The common question in these appeals is whether the courts fulfilled their responsibility to make a "searching inquiry" before allowing defendants to give up the right to **257 ***767 a lawyer and conduct their defenses pro se (*see* *People v. Arroyo,* 98 N.Y.2d 101, 103, 745 N.Y.S.2d 796, 772 N.E.2d 1154 [2002]; *People v. McIntyre,* 36 N.Y.2d 10, 17, 364 N.Y.S.2d 837, 324 N.E.2d 322 [1974]; *see also* *Faretta v. California,* 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 [1975]; ***473 *Iowa v. Tovar,* 541 U.S. 77, 88–89, 124 S.Ct. 1379, 158 L.Ed.2d 209 [2004]). In both cases, we conclude that the inquiries were deficient because defendants were not adequately advised of the dangers and disadvantages of self-representation.

I.

Crampe

Defendant Alexander Crampe was arrested and charged with seventh-degree criminal possession of a controlled substance (Penal Law § 220.03) for possessing a vial of phencyclidine, or PCE When he appeared in Justice Court, defendant acknowledged that he had not retained an attorney to represent him. The town justice then asked defendant if he intended to proceed pro se, and defendant replied "I guess[ ] so, your Honor."

This exchange prompted the judge to hand defendant a pretrial order meant to apply to the six cases then pending against him. The form order, which the judge reviewed with defendant by reading it aloud to him, stated that defendant's failure to accept the referral to the Legal Aid Society would be taken as a waiver of his right to assigned counsel and his election to proceed without counsel; that he should be prepared to proceed to trial on the next scheduled adjourn date; and that his failure to appear with counsel would "be deemed an acknowledgment of the advice and warnings of this Court relative to the right of counsel."

The form order continued as follows:

> "The defendant has the absolute right to have counsel at all times during this proceeding. The defendant has a further constitutional right to represent himself in a criminal proceeding.
>
> "The defendant acknowledges and understands the risk of representing himself and the failure to cooperate with counsel. Among those risks is the risk that he could be convicted of a crime, and he may be sentenced to jail if found guilty.
>
> "The defendant acknowledges that a criminal trial and proceedings associated with a trial are difficult to understand and complex in nature.
>
> "If you elect to represent yourself by failure to cooperate with the Legal Aid Society and retain counsel, you

acknowledge that you are under no distress, no threats or promises have been made to ***474** you, and you are not suffering from any mental defect, and your election to represent yourself is not affected by drugs or alcohol.

"You are further advised that you have a constitutional right to be present at a trial of these charges before this Court. This right may be waived by your conduct. Such conduct must be a knowing, voluntary, intelligent waiver of this right. Acknowledgment of this right is by your signature hereon this date.

"Further, your signature is taken as evidence that you are not under any distress or compulsion, and you are ready for trial on August 21, 2008 at 9:30 [am.], or any adjourn date thereafter without justifiable excuse, shall be deemed a waiver of your right to be present at the trial of these charges, and we will proceed in your absence at that time."

Defendant signed the order, and the case was adjourned for trial. The judge cautioned him as he left: "Be here with a lawyer or without a lawyer, as you choose. ****258 ***768** I advise you to get a lawyer, sir." Defendant did not heed the judge's advice, however, and so went to trial pro se, with standby counsel. The jury returned a verdict of guilty, and the judge sentenced defendant to six months of incarceration.

Upon defendant's appeal, the Appellate Term unanimously affirmed, concluding that "Justice Court adequately warned defendant of the importance of legal representation and the risks associated with proceeding pro se" (26 Misc.3d 144[A], 2010 N.Y. Slip Op. 50421[U], 2010 WL 936164 [2010]). The court added that it was "apparent[ ] from defendant's prior arrest and conviction record" that he was "not unfamiliar with the operation of the criminal justice system." A Judge of this Court granted defendant leave to appeal (15 N.Y.3d 748, 906 N.Y.S.2d 821, 933 N.E.2d 220 [2010]).

Wingate

Defendant Blake Wingate was arrested and subsequently indicted for fourth-degree criminal possession of stolen property (Penal Law § 165.45[5]) and seventh-degree criminal possession of a controlled substance (Penal Law § 220.03) after the police found him sitting in a stolen van and recovered a crack pipe from his pocket.

When defendant informed his assigned counsel that he might "go to the grievance committee," the attorney successfully ***475** moved to be relieved. Supreme Court appointed a second attorney to represent defendant, who asked if there were "any way" he could represent himself with this new counsel assisting him. The judge instructed him to consult with his new attorney first. But at the next calendar call, defendant's second assigned counsel informed the court that defendant did not want her to represent him "in any way, shape or form," and "[o]n top of that, he [had] sent correspondence indicating his displeasure" and "[t]he lines of communication [were] irreparably broken." She requested to be relieved.

Defendant complained to the judge that his attorney "was trying to talk [him] out of [his] ... defense." The judge asked defendant if he wanted to represent himself at the suppression hearing, and defendant responded that he did, but "need[ed] co-counsel" and had previously represented himself with a lawyer's assistance. The judge advised defendant that he was not entitled to hybrid representation, and again inquired as to what he wanted to do. Defendant replied "Same as before. Request to represent myself." At that point, the judge engaged in the following exchange with defendant:

"the court: You understand that you're facing felony charges, sir?

"the defendant: Yes.

"the court: You understand that you face jail time if convicted of the top charge in this indictment?

"the defendant: Yes.

"the court: Do you understand that the right to represent yourself is not an absolute right? If you can't conduct yourself in a proper manner in the courtroom, you would

forfeit the right to pro se representation. Do you understand that?

"the defendant: Yes.

"the court: Sir, notwithstanding any of the risks that you face representing yourself, do you still wish to go forward and defend yourself in this case? That's your constitutional right. Do you understand that?

"the defendant: Yes.

"the court: Okay. I will allow you to represent yourself."

***476** A suppression hearing was held before a judicial hearing officer later the same day. The hearing officer recommended ****259 ***769** denial of defendant's motion to suppress physical evidence (the crack pipe) and statements that he made to the police, and referred the case back to Supreme Court for determination. Supreme Court adopted the hearing officer's findings of fact and conclusions of law, and denied defendant's motion.

The case went to trial five months later before another Supreme Court Justice, who explored with defendant whether he had "considered legal representation." This judge first confirmed with defendant that he had turned down an offer of a minimum sentence of 1 ½ to 3 years; warned him that he faced a sentence of 15 years to life if convicted and sentenced as a discretionary persistent felon; and stressed that, "based on [his] many years of experience," it was his

> "good faith belief that it is a mistake to represent yourself. Areas of law can be complicated and a person, not even another lawyer [should] engage in self-representation. So I strongly urge you to get a lawyer, and if you cannot afford one, a lawyer will be appointed for you. That is my honest heartfelt belief. Because of the exposure that you may be facing in terms of incarceration, should you lose and the intricacies involved in self-representation and legal matters, you should seriously get a lawyer to represent you. Do you understand that?"

Defendant responded that he understood.

After reiterating that defendant "could be facing a long time in jail, up to life," the trial judge cautioned that it was "a big mistake to go it alone." The judge then asked defendant if he had any legal training, and defendant replied that he had been studying law for the last 10 or 12 years "in the street and different libraries" and was "not a paralegal [but] just received legal research certificates." When the judge inquired if he was a college graduate, defendant responded that he held a two-year associate's degree in labor studies from Empire State College, and was "a law librarian, library clerk in the facility" where he worked.

Again, the trial judge "strongly urge[d]" defendant "with all the sincerity that [he could] muster that [defendant] must" get a lawyer. As the judge put it, "I say that because obviously the decision is yours, but I use the term 'must' get a lawyer. You are ***477** facing too much in this case. Once it's over, it's over. So you should seriously consider that." Before sending the case to the trial-ready part for disposition of defendant's pro se speedy trial motion, the judge reiterated that defendant should think twice before representing himself:

"the court: You think about what I told you. This case may be disposed of. You may be back here or not. Whatever you do, you may seriously think about what I am telling you. I can't tell you in [any] stronger terms [:] get a lawyer. Don't play with this.

"the defendant: I requested an assistant.

"the court: Listen to me. Get a lawyer. Don't play with this. You will end up in jail for the rest of your life and that's ridiculous.

"the defendant: I appreciate it.

"the court: You insist that a lawyer represent you."

After defendant's speedy trial motion was denied and his case was recalled for trial, the trial judge "reiterate[d]" that he had "indicated to [defendant] before the matter was referred back [to the trial-ready part] that [he] should

seriously consider getting a lawyer." When the judge asked defendant whether he had "done that," defendant replied "Yes, I have considered **260 ***770 it, your Honor." He explained that "the reason why I am persistent now is because I had attorneys. I am going this by myself. I appreciate what you said. I asked for an attorney to assist me, but I am not going to let them take control because that's why I am persistent." At that point, the judge said there was "[n]o reason for any further explanation," and appointed standby counsel to assist defendant, as he had requested.

Stating that there were "a few questions" that he had to pose before he might allow defendant to represent himself, the trial judge next carried out an extensive dialogue with him, filling 20 pages of transcript. The judge first looked into defendant's age and competency in English; he explored whether defendant was taking or had ever taken medications that might compromise his understanding; he confirmed that defendant did not suffer from any mental or physical condition that might impair his ability to follow what was happening in court. The judge inquired if defendant had been afforded "sufficient time to reflect on [his] decision to represent [him]self." When defendant responded affirmatively, the judge asked "And having *478 reflected on this decision, you are now desirous of continuing to represent yourself?" Defendant answered "Yes."

The trial judge then reviewed defendant's schooling, work history and knowledge of the criminal justice system, eliciting that defendant had achieved an "A" average at Empire State College; had worked as an electrician, a cook, and a legal clerk; was not a stranger to the criminal justice system; had experienced some success representing himself in this case in the past; and had appeared in court with a lawyer, although he ultimately did not get along with either of his two assigned attorneys. The judge followed up by establishing that defendant had never represented himself at trial, and examining whether he knew anything about the rules of evidence. (He ultimately announced that he was "convinced" that defendant knew next to nothing about this topic.) The judge looked at whether defendant had been coerced or threatened or in any way influenced to request to represent himself.

The trial judge probed defendant's comprehension of the charges against him, the plea offer that had been made (and that he would have "minimal time" left if he accepted it) and the length of the sentence he might receive if convicted. In response to the judge's questions, defendant claimed to understand his lawyers' explanations of court procedures and legal issues related to the charges. When asked to explain to the judge exactly why he wished to waive his right to counsel, defendant asserted that, otherwise, he would not know about "things ... going on between [his attorney] and the DA," wanted to "eliminate the middle person" and believed he was "better off just representing [him]self."

The trial judge pursued whether defendant knew the functions of the court and the jury, and defendant answered that the "jury would be the triers of the facts" and would decide the case "based on the facts ... presented ... and the instructions." When the judge called upon defendant to explain his role and the prosecutor's role, defendant responded that the

> "prosecutor's role is ... to seek justice not just convictions. Her duty is to present her case ... and to do it fairly. My job is to protect, preserve the rights of myself ..., and to present the same information or evidence that I have to contradict what is being stated by the witnesses ... that [the] prosecution presents."

***771 *479 **261 The tried judge observed to defendant that

> "[t]he law recognizes the right of a person to defend himself or herself. However, the law also recognizes such a choice may not be a wise one. Let me alert you now to some of the [dangers] of self-representation so that you will be aware of them before you finally decide whether you wish to give up your right to be represented by a lawyer. Please listen to me carefully. Even the most intelligent and educated layman has small and sometimes no skills in the field of law. Left without the assistance of counsel, he or she may be put on trial without a proper charge and

> convicted upon incomplete[ ], irrelevant, or inadmissible evidence. Often the layman lacks the skill [or] knowledge to adequately prepare his or her defense, even though he may have a good one. Without counsel, though an accused may not be guilty, he faces the danger of conviction because he does not know how to adequately protect his legal rights. Lawyers are both generally college and law school trained before they are permitted to take the bar examination. Only those who pass the bar are licensed to practice law. The number who become trial lawyers [is] small. In order to adequately represent a client, a trial lawyer needs a comprehensive knowledge of the rules of evidence, which I believe you do not possess, as well as an understanding of the art of jury selection and the art of cross-examination ... [M]ost non-lawyers do not have such education and training. Did you understand what I just said?"

Defendant answered "Yes."

The trial judge then asked defendant if he understood that almost all pro se representations are unsuccessful; that by choosing to represent himself he was not entitled to a lawyer, although the judge would appoint a lawyer to "sit next to [him] and give [him] legal advice"; that he would be held to the same legal standards as an attorney; that he would "receive no advantage or assistance from [the] court" because "[e]ven in those cases where [he] show[ed] a lack of complete knowledge of how to represent [himself], [the court couldn't] jump in the middle" and help him out; that when defendant did "something wrong," the judge was going to "call [him] on it" and he had to ***480** "live with that"; that he risked not being able to understand legal terms of art used in court proceedings, the "case names used and what they stand for" and potentially applicable rules or theories of criminal law; that he would be subject to the same rules of evidence as an attorney and chanced not being able to introduce evidence because of his ignorance of these rules; that his examination of witnesses would be held to the same standards as those expected of an attorney; that he would have to make his own opening and closing statements to the jury; that the assistant district attorney presenting the case against him was trained in the law and was familiar with criminal law principles, and would not "go 'easy' on" him because he was representing himself; that by waiving his right to counsel he was giving up the "benefit of [an] attorney's ability, training, and past experiences in speaking to a jury"; and that he would be expected to "conduct [himself] appropriately in the courtroom." Defendant indicated that he understood all of these things, and "[w]ithout a doubt" still wished to represent himself.

The trial judge elaborated on his admonition to defendant that "self-representation [was] not a license to abuse" the courtroom's "dignity and decorum," cautioning him that if he did not conduct himself properly he might lose his right to be present at trial. Again, defendant ****262** *****772** said that he understood. With that representation, the judge pronounced himself satisfied that he had asked defendant the "relevant questions to determine if [he understood] the consequence[s] and the pitfalls of self-representation."

The case went to trial, and the jury convicted defendant of the charged crimes. Supreme Court subsequently sentenced him to prison terms of 2 to 4 years on the stolen property charge, and one year on the drug possession charge, to run concurrently.

The Appellate Division unanimously modified by vacating the conviction of possession of stolen property and dismissing that count of the indictment, and otherwise affirmed (70 A.D.3d 734, 892 N.Y.S.2d 867 [2d Dept.2010]). Although defendant's legal sufficiency claim was unpreserved, the court reached it in the interest of justice and determined that his presence in the van was too brief to establish the element of possession. The court further held that, although the suppression court did not conduct a proper waiver colloquy before allowing defendant to represent himself at the pretrial suppression hearing, "the record as a whole demonstrate[d] that the defendant made a knowing, voluntary, and ***481** intelligent decision to waive his right to counsel and proceed pro se" (*id.* at 735, 892 N.Y.S.2d 867). A Judge of this Court granted defendant leave to

appeal (15 N.Y.3d 780, 907 N.Y.S.2d 468, 933 N.E.2d 1061 [2010]).

II.

[1] [2] "[B]efore proceeding pro se a defendant must make a knowing, voluntary and intelligent waiver of the right to counsel" (*Arroyo,* 98 N.Y.2d at 103, 745 N.Y.S.2d 796, 772 N.E.2d 1154, citing *People v. Slaughter,* 78 N.Y.2d 485, 491, 577 N.Y.S.2d 206, 583 N.E.2d 919 [1991] [in order for a defendant to "forego( ) the benefits associated with the right to counsel ... the court must be satisfied that (the defendant's waiver) was unequivocal, voluntary and intelligent" (citations omitted)] and *People v. Vivenzio,* 62 N.Y.2d 775, 776, 477 N.Y.S.2d 318, 465 N.E.2d 1254 [1984] ["Regardless of his lack of expertise and the rashness of his choice, defendant could choose to waive counsel if he did so knowingly and voluntarily"]). As we emphasized in *McIntyre*—the foundation stone of our self-representation jurisprudence under article I, § 6 of the New York State Constitution—"[i]mplicit in a defendant's assertion of his right to defend *pro se* is the decision to disavow the constitutional right to counsel. For such a waiver to be effective, the trial court must be satisfied that it has been made competently, intelligently and voluntarily" (36 N.Y.2d at 17, 364 N.Y.S.2d 837, 324 N.E.2d 322).

[3] [4] To ascertain whether a waiver is knowing, voluntary and intelligent, a court must undertake a "searching inquiry" designed to "insur[e] that the defendant [is] aware of the dangers and disadvantages of proceeding without counsel" (*People v. Providence,* 2 N.Y.3d 579, 582, 780 N.Y.S.2d 552, 813 N.E.2d 632 [2004] [internal quotation marks and citation omitted]; *see also People v. Sawyer,* 57 N.Y.2d 12, 21, 453 N.Y.S.2d 418, 438 N.E.2d 1133 [1982], *rearg. dismissed* 57 N.Y.2d 776, 454 N.Y.S.2d 1033, 440 N.E.2d 1343 [1982], *cert denied* 459 U.S. 1178, 103 S.Ct. 830, 74 L.Ed.2d 1024 [1983] [to ascertain the validity of a waiver, "the court should undertake a sufficiently searching inquiry of the defendant to be reasonably certain that the dangers and disadvantages of giving up the fundamental right to counsel have been impressed on the defendant" (internal quotation marks omitted)]; *People v. Kaltenbach,* 60 N.Y.2d 797, 799, 469 N.Y.S.2d 685, 457 N.E.2d 791 [1983] [court ****263 ***773** did not satisfy the duty to make a searching inquiry by declaring that defendant was entitled to legal representation, was facing a serious charge and, if convicted, might receive a year's imprisonment because this "precautionary inquiry (did not) adequately warn defendant of the risks inherent in representing himself or apprise him of the value of counsel" (internal quotation marks omitted)]; *Slaughter,* 78 N.Y.2d at 491, 577 N.Y.S.2d 206, 583 N.E.2d 919 [suppression court failed to undertake sufficiently searching inquiry to be ***482** reasonably certain that defendant understood the dangers and disadvantages of proceeding pro se]; *People v. Smith,* 92 N.Y.2d 516, 520, 683 N.Y.S.2d 164, 705 N.E.2d 1205 [1998] ["To pass muster, a searching inquiry must reflect record evidence that defendants know what they are doing and that choices are exercised with eyes open" (internal quotation marks omitted)]; *Arroyo,* 98 N.Y.2d at 103, 745 N.Y.S.2d 796, 772 N.E.2d 1154 ["In determining whether a waiver (is knowing, voluntary and intelligent), the court should undertake a searching inquiry of defendant" (internal quotation marks omitted)]). Additionally, a searching inquiry encompasses consideration of a defendant's pedigree since such factors as age, level of education, occupation and previous exposure to the legal system may bear on a waiver's validity (*see Providence,* 2 N.Y.3d at 583, 780 N.Y.S.2d 552, 813 N.E.2d 632; *Arroyo,* 98 N.Y.2d at 104, 745 N.Y.S.2d 796, 772 N.E.2d 1154; *Smith,* 92 N.Y.2d at 520, 683 N.Y.S.2d 164, 705 N.E.2d 1205).

[5] [6] "Although we have eschewed application of any rigid formula and endorsed the use of a nonformalistic, flexible inquiry, the court's record exploration of the issue 'must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding *pro se,* and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication' " (*Arroyo,* 98 N.Y.2d at 104, 745 N.Y.S.2d 796, 772 N.E.2d 1154, quoting *Smith,* 92 N.Y.2d at 520, 683 N.Y.S.2d 164, 705 N.E.2d 1205 [citing *Kaltenbach,* 60 N.Y.2d at 799, 469 N.Y.S.2d

685, 457 N.E.2d 791]; *see also* *Providence,* 2 N.Y.3d at 583, 780 N.Y.S.2d 552, 813 N.E.2d 632).

Finally, we have held that "a reviewing court may look to the whole record, not simply to the waiver colloquy, in order to determine if a defendant effectively waived counsel" (*id.*).

[7] In *Crampe*, the town justice did not make the requisite searching inquiry to insure that defendant was aware of the drawbacks of self-representation before allowing him to go down that path. The form that he read aloud only pointed out that proceeding pro se brought with it the danger of conviction—a risk that also exists when the accused is represented by counsel—and that criminal trials and proceedings are complicated (*cf. Vivenzio,* 62 N.Y.2d at 776, 477 N.Y.S.2d 318, 465 N.E.2d 1254 [waiver colloquy sufficient where, among other things, "(t)he court warned defendant forcefully that he did not have the training or knowledge to defend himself, that others who had done so had been unsuccessful and that if he insisted upon appearing *pro se* he would be held to the same standards of procedure as would an attorney"]).

[8] [9] [10] The colloquy conducted by the suppression court in *Wingate* was deficient for the same reason—the court's inquiry did ***483** not direct defendant's attention to the dangers and disadvantages of self-representation beyond the risk of a felony conviction. Conversely, the trial court engaged in an extensive colloquy with defendant, drawing his attention to the many challenges that he would face if he proceeded ****264** *****774** pro se rather than avail himself of legal representation. As a result, there is a sufficient showing that defendant's decision to defend himself *at trial* was knowing, voluntary and intelligent. And certainly, it may logically be inferred from this record that nothing the suppression court might have said would have dissuaded defendant from representing himself at the pretrial hearing: he was impervious to the trial court's later repeated and thorough explanations of the perils of defending himself at trial and the importance of counsel, and was dissatisfied with the attorneys assigned to represent him and, ultimately, with standby counsel as well. This may be what the Appellate Division meant when it decided that the "record *as a whole* " demonstrated a valid waiver of counsel and election to proceed pro se (70 A.D.3d at 735, 892 N.Y.S.2d 867 [emphasis added]), citing *Providence.* There, we looked to the record as a whole to establish that the judge was already familiar with the defendant's pedigree information when he engaged in the waiver colloquy. While the record as a whole may also be considered when a court assesses whether the accused is aware of the dangers of self-representation, we agree with defendant that this situation is very different. Simply put, the trial court's warnings were incapable of retrospectively "curing" the suppression court's error. The critical consideration is defendant's knowledge at the point in time when he first waived his right to counsel, and his waiver then was not knowing, intelligent and voluntary.

It remains as true today as it was in 1974 that "the multifaceted problems generated by a motion to proceed *pro se* [make] the task of the trial court ... exceedingly difficult" (*McIntyre,* 36 N.Y.2d at 14, 364 N.Y.S.2d 837, 324 N.E.2d 322). A checklist might be helpful as a memory aid, but there is simply no one-size-fits-all format for a searching inquiry. And while the inquiry conducted by the trial judge in *Wingate* was exemplary, we do not mean to suggest that the colloquy there has created a template to be followed in every instance where a defendant seeks to proceed pro se.

[11] As the United States Supreme Court suggested in *Tovar,* the scope of a searching inquiry turns on the context in which the right to counsel is waived. Justice Ginsburg explained that in *Patterson v. Illinois,* 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), the Court "elaborated ***484** on 'the dangers and disadvantages of self-representation' to which *Faretta* referred" by observing that at trial, " 'counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire,* examine and cross-examine witnesses effectively ..., object to improper prosecution questions, and much more' " (*Tovar,* 541 U.S. at 89, 124 S.Ct. 1379, quoting *Patterson,* at 300 n. 13, 108 S.Ct. 2389); and that warnings of the pitfalls of going to trial without counsel must therefore be " 'rigorous[ly]' conveyed ... [while] at earlier stages of the

criminal process, a less searching or formal colloquy may suffice" (*id.,* quoting *Patterson,* at 298, 108 S.Ct. 2389). Thus,

> "*Patterson* describes a 'pragmatic approach to the waiver question,' one that asks '*what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage,*' in order 'to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized' " (*id.* at 90, 124 S.Ct. 1379 [emphasis added], quoting ****265** *Patterson,* at 298, 108 S.Ct. 2389).*

*****775** Accordingly, in *People v. Crampe*, the order of the Appellate Term should be reversed and a new trial ordered; and in *People v. Wingate*, the order of the Appellate Division should be modified by remitting to Supreme Court for a new suppression hearing. In the event defendant prevails at the suppression hearing, a new trial should be held; alternatively, in the event the People prevail, the judgment should be amended to reflect that result ***485** (*Slaughter,* 78 N.Y.2d at 493, 577 N.Y.S.2d 206, 583 N.E.2d 919; *People v. Millan,* 69 N.Y.2d 514, 521–522, 516 N.Y.S.2d 168, 508 N.E.2d 903 [1987]). As so modified, the order in *People v. Wingate* should be affirmed.

Chief Judge LIPPMAN and Judges CIPARICK, GRAFFEO, SMITH, PIGOTT and JONES concur.
In *People v. Crampe:* Order reversed, etc.

In *People v. Wingate:* Order modified, etc.

All Citations

17 N.Y.3d 469, 957 N.E.2d 255, 932 N.Y.S.2d 765, 2011 N.Y. Slip Op. 07148

Footnotes

* *Tovar* resolved a conflict among federal courts of appeals concerning the proper application and interpretation of the *Faretta* decision. Specifically, some courts had interpreted *Faretta* to require a trial judge to conduct a searching inquiry or special hearing to insure that the accused understood the dangers and disadvantages of defending himself before allowing self-representation (essentially, the same way we interpreted the right-to-counsel provision in the state constitution), while other courts took the position that no searching inquiry or special hearing was required in order for an accused's exercise of the right of self-representation to be considered knowing and intelligent (see *McDowell v. United States,* 484 U.S. 980, 980–981, 108 S.Ct. 478, 98 L.Ed.2d 492 [1987] [two-Justice dissent from the denial of a writ of certiorari]). For example, before *Tovar* the Second Circuit did not take *Faretta* to mean that a searching inquiry was constitutionally mandated (*see Dallio v. Spitzer,* 343 F.3d 553, 564–565 [2d Cir.2003] [court concludes in a habeas corpus proceeding that "neither *Faretta's* holding nor its *dictum* clearly establishes that explicit warnings about the dangers and disadvantages of self-representation are a minimum constitutional prerequisite to every valid waiver of the right to counsel," although such warnings are desirable to insure knowing and intelligent waivers]).

324 N.E.2d 322, 364 N.Y.S.2d 837

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by People v. Crespo, N.Y., October 16, 2018

36 N.Y.2d 10
Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,
v.
John A. McINTYRE, Appellant.

Dec. 20, 1974.

Synopsis

Defendant was convicted in the Supreme Court, Kings County, Michael Kern, J., of murder in the first degree and robbery in the first degree and the Supreme Court, Appellate Division, 41 A.D.2d 776, 341 N.Y.S.2d 943, affirmed and appeal was taken. The Court of Appeals, Wachtler, J., held that disruptive behavior which is a direct reaction to denial of defendant's motion to defend pro se, or which results from trial court's conducting its inquiry in an abusive manner calculated to belittle a legitimate application, will not justify forfeiture of the right of self-representation.

Reversed and remanded.

Gabrielli, J., filed dissenting opinion in which Jasen, J., concurred.

West Headnotes (19)

[1] **Criminal Law** In General; Right to Appear Pro Se

A defendant has a right under the State Constitution, criminal procedure statute and common law to defend pro se, but right is not absolute. 28 U.S.C.A. § 1654; Const. art. 1, § 6; Code Cr.Proc. § 8, subd. 2; CPL 170.10, subd. 6, 180.10, subd. 5, 210.15, subd. 5.

1 Cases that cite this headnote

[2] **Criminal Law** In General; Right to Appear Pro Se

Limitations on right of defendant to defend pro se must be implemented in order to promote the orderly administration of justice and to prevent subsequent attack on a verdict claiming a denial of fundamental fairness.

6 Cases that cite this headnote

[3] **Criminal Law** Capacity and Requisites in General

A defendant in a criminal case may invoke the right to defend pro se provided the request is unequivocal and timely asserted, there has been a knowing and intelligent waiver of the right to counsel, and the defendant has not engaged in conduct which would prevent the fair and orderly disposition of the issues.

140 Cases that cite this headnote

[4] **Criminal Law** Capacity and Requisites in General

So that convicted defendants may not pervert the system by subsequently claiming a denial of their right to defend pro se, the pro se request has to be clear and unconditionally presented to the trial court.

67 Cases that cite this headnote

[5] **Criminal Law** Duty of Inquiry, Warning, and Advice

The right to defend pro se lacks the force and urgency of the right to counsel and there is no necessity to inform every defendant of his right to conduct his own defense.

10 Cases that cite this headnote

[6] **Criminal Law** Capacity and Requisites in

General

An application to defend pro se is timely interposed when it is asserted before the trial commences.

18 Cases that cite this headnote

[7] **Criminal Law**Delay or Misuse of Waiver or Right of Self-Representation

Once the trial has begun, the right of defendant to defend pro se is severely constricted and will be granted in the trial court's discretion and only in compelling circumstances.

22 Cases that cite this headnote

[8] **Criminal Law**Capacity and Requisites in General

For waiver of right to counsel to be effective, trial court must be satisfied that it has been made competently, intelligently and voluntarily.

17 Cases that cite this headnote

[9] **Criminal Law**Age
Criminal Law Education and Experience

In determining the defendant's competency to waive right to counsel the court may properly inquire into the defendant's age, education, occupation and previous exposure to legal procedures.

16 Cases that cite this headnote

[10] **Criminal Law**Capacity and Requisites in General

Mere ignorance of the law cannot vitiate an effective waiver of counsel as long as defendant was cognizant of the dangers of waiving counsel at the time it was made.

5 Cases that cite this headnote

[11] **Constitutional Law**Waiver of Counsel; Self-Representation

Where there has been a pro se defense after waiver of counsel, the defendant may only claim that the proceedings were so unfair as to deny him due process when the trial viewed as a whole amounts to a travesty of justice.

6 Cases that cite this headnote

[12] **Criminal Law**Delay or Misuse of Waiver or Right of Self-Representation

A defendant may lose his right to represent himself by engaging in disruptive or obstreperous conduct.

14 Cases that cite this headnote

[13] **Criminal Law**Delay or Misuse of Waiver or Right of Self-Representation

When a defendant's conduct is calculated to undermine, upset or unreasonably delay the progress of the trial he forfeits his right to self-representation.

20 Cases that cite this headnote

[14] **Criminal Law**Procedure and Affirmative Duties by Court in Protection of Right to Counsel and Right to Self-Representation

In declaring forfeiture of right to self-representation by reason of a defendant's disruptive or obstreperous conduct, trial judge must proceed by skill and suasion to insure the fair and efficient prosecution of the charges and to avoid trammeling the essential rights of the accused.

9 Cases that cite this headnote

[15] **Criminal Law**Order, Decorum, and Efficiency of Proceedings

Trial court is afforded wide latitude in maintaining courtroom decorum.

1 Cases that cite this headnote

[16] **Criminal Law**Delay or Misuse of Waiver or Right of Self-Representation

Trial court may not validate an erroneous denial of a motion to defend pro se on the basis of a post-ruling outburst.

6 Cases that cite this headnote

[17] **Criminal Law**Validity and Sufficiency, Particular Cases

Motion to defend pro se, interposed prior to the prosecution's opening statement, was timely. Code Cr.Proc. § 388, subd. 1; CPL 1.120, subd. 11, 260.30.

4 Cases that cite this headnote

[18] **Criminal Law**Delay or Misuse of Waiver or Right of Self-Representation

Denial of unequivocal and timely motion to defend pro se, either on basis of disruptive behavior which was a direct reaction to the denial or because of an outburst provoked by trial court's conducting inquiry in an abusive manner calculated to belittle a legitimate application, would be erroneous.

31 Cases that cite this headnote

[19] **Criminal Law**Duty of Inquiry, Warning, and Advice

Where trial court feels motion to defend pro se is a disingenuous attempt to subvert the overall purpose of the trial, the proper procedure is to conduct a dispassionate inquiry into the pertinent facts.

9 Cases that cite this headnote

Attorneys and Law Firms

***11 ***840 **324** Victor J. Rocco, New York City, for appellant.

Eugene Gold, Dist. Atty. (Richard C. Laskey, Brooklyn, of counsel), for respondent.

Opinion

***12** WACHTLER, Judge.

In connection with a robbery of a Brooklyn grocery store in August, 1966, the defendant John McIntyre, was indicted for murder in the first degree of the proprietress, one Ida Kaplan, and robbery in the first degree. After a jury trial the defendant was convicted and sentenced to serve a term of life imprisonment for murder and a term of from 15 to 30 years on the robbery conviction, both sentences to run concurrently. Prompted by evidence adduced at a posttrial hearing the Appellate Division reversed (People v. McIntyre, 31 A.D.2d 964, 299 N.Y.S.2d 88) and ordered a new trial indicating that the image of justice would be better served. The instant appeal stems from events occurring at the second trial.

After the jury had been drawn but not yet impaneled, the defendant, through counsel, asked that he be permitted to try the case himself and that counsel be permitted to sit with him ***13** as an adviser. The trial court inquired into the defendant's background. Defense counsel responded by noting that the defendant had attended college for one year and was last employed as a furniture designer. Whereupon the court asked the defendant if he thought counsel was incompetent to defend him. After the defendant answered that counsel was very competent, he was ordered to sit down.

The ensuing portion of the colloquy is revealed in the following excerpt from the record:

'The Court: Of course you know exactly what I mean. You know exactly what's going to happen. The defendant will start questions, there will be an objection, objection sustained. The defendant will start looking at the ceiling and looking at the wall, and he won't know what to do.

*****841** 'Defendant: I wouldn't.

'The Court: He thinks he's probably the greatest lawyer and God's gift to the legal profession. That comes after talking

with three or four jailhouse lawyers. But you and I, Mr. Legum (defense counsel) know that he's not a lawyer.

'Mr. Legum: The defendant asks for permission to speak to you himself as to why he wants to represent himself.

'The Court: No, he can talk through you. He can tell you what he intends to do. He doesn't know at the very outset, **325 I'm being asked to permit a man to defend himself when he doesn't know at the very beginning that he's not under any obligation to defend himself. He said to you and I heard him, that he's under an obligation to defend himself.

'Is the jury on the way?

'Defendant: F * * * the jury. I'm not going to trial. (Whereupon the defendant jumped up, knocked the chair over.)

'The Court: All right, all right. Put the handcuffs on the defendant. Tie him to the chair, please.'

After lecturing the defendant on courtroom decorum and eliciting a promise of good behavior from the defendant, the court formally denied the Pro se motion. The record indicates that the denial was based on the defendant's outburst, the defendant's assertion that assigned counsel was very competent and the court's general inquiry.

The motion was subsequently denied for a second time and the case proceeded without further interruption. The jury *14 found McIntyre guilty of murder and robbery, both in the first degree.

On appeal the Appellate Division affirmed, finding that the trial court was justified in denying the Pro se motion in light of the defendant's inability to maintain self-control. Mr. Justice Hopkins interpreted the record differently and dissented on the ground that the defendant's conduct was a direct reaction to the wrongful denial of his request.

The threshold issue presented in this case is the nature and extent of a criminal defendant's right to conduct his own defense.

In the wake of recent landmark decisions in the Supreme Court (e.g., Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158) and the long and uniform recognition of the right to counsel in criminal proceedings by New York courts (e.g., People v. Koch, 299 N.Y. 378, 381, 87 N.E.2d 417, 418; People ex rel. Saunders v. Board of Supervisors, 1 Sheld. 517, 524),People ex rel. Saunders v. Board of Supervisors, 1 Sheld. 517, 524), an assertion of the right to defend Pro se is ironic and ***842 perhaps enigmatic. Nonetheless the right to self-representation embodies one of the most cherished ideals of our culture; the right of an individual to determine his own destiny. This concept was dramatically articulated in United States ex rel. Maldonado v. Denno (2 Cir., 348 F.2d 12, 15): 'Moreover, even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with eyes open'.'

However, we cannot disregard the countervailing interest of society in the equally powerful ideal that our criminal justice system must determine the truth or falsity of the charges in a manner consistent with fundamental fairness. Any attempt to reconcile these ideals which are inherently antagonistic in this context raises grave constitutional (both State and Federal) statutory and decisional issues. In light of the multifaceted problems generated by a motion to proceed Pro se, the task of the trial court is exceedingly difficult.

At the outset we note that the right to defend Pro se is deeply ingrained in our common law. The constitutional dimension of the right to defend Pro se is evidenced by the fact that it has *15 been sustained by various sections of the Federal Constitution (see, e.g., Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (correlative right of the Sixth Amendment right to counsel); United States v. Plattner, 2 Cir., 330 F.2d 271 (implicit in Sixth Amendment rights, and protected under the liberty clause of the Fifth Amendment due process); compare United States ex rel. Maldonado v. Denno, 2 Cir., 348 F.2d 12, Supra (the Sixth **326 Amendment and the Fifth

Amendment due process right to essential fairness); Cappetta v. State, Fla.App., 204 So.2d 913 (Fla.) (Sixth Amendment and Fourteenth Amendment due process clause) with Juelich v. United States, 5 Cir., 342 F.2d 29 (the right to a fair trial demands representation by counsel)). Additionally, the right to self-representation was codified in the Judiciary Act of 1789 (ch. 20, s 35, 1 U.S.Stat. 73, 92) and is presently contained in the United States Code (tit. 28, s 1654). Notwithstanding this plethora of authority, the United States Supreme Court has never specifically determined whether or not the right to conduct one's own defense is constitutionally guaranteed. This question may be resolved shortly in the case of Faretta v. California (No. 73—5773, argued Nov. 19, 1974).

[1] However, our court need not reach the question of whether the right to defend Pro se is founded in the Federal Constitution because the New York State Constitution and criminal procedure statute clearly recognize this right (N.Y.Const., art. I, s 6; Code Crim.Pro., s 8, subd. 2; CPL, Consol.Laws, c. 11A, 170.10, subd. 6 (information or ***843** misdemeanor complaint); 180.10, subd. 5 (felony complaint); 210.15, subd. 5 (indictment)). Furthermore, our court has repeatedly acknowledged the defendant's right to conduct his own defense (see, e.g., People v. Bodie, 16 N.Y.2d 275, 266 N.Y.S.2d 104, 213 N.E.2d 441; People v. Koch, 299 N.Y. 378, 87 N.E.2d 417; People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356; People v. Price, 262 N.Y. 410, 187 N.E. 298).

Unlike the right to counsel which by virtue of judicial scrutiny has been well defined in recent years (see, e.g., People v. Bennett, 29 N.Y.2d 462, 329 N.Y.S.2d 801, 280 N.E.2d 637; People ex rel. Menechino v. Warden, 27 N.Y.2d 376, 318 N.Y.S.2d 449, 267 N.E.2d 238) the limitations, if any, on the right to defend Pro se remain largely undefined. For a variety of reasons we are hesitant to sanction the unfettered exercise of this right. An examination into the factors motivating a defendant to elect to proceed alone will demonstrate some of the dangers inherent in that choice.

***16** Generally, a defendant desires to conduct his own defense for any one or a combination of various reasons. Probably the most common reason is the desire to evoke the jury's sympathy for a lone defendant pitted against the Goliath of the State (see, e.g., People v. Chessman, 38 Cal.2d 166, 238 P.2d 1001; Note, Right of an Accused to Proceed Without Counsel, 49 Minn.L.Rev. 1133). A corollary situation is the Pro se defendant who is influenced by a blind faith belief in his innocence and the infallibility of justice (see, generally, Laub, Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court, 2 Duquesne L.Rev. 245).

Frequently, the Pro se defendant is motivated by dissatisfaction with the trial strategy of defense counsel or a lack of confidence in his attorney (e.g., Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, Supra; Burstein v. United States, 9 Cir., 178 F.2d 665). Disagreement over trial strategy is particularly frustrating to a defendant in light of holdings indorsing counsel's view when a difference of opinion arises (e.g., Nelson v. California, 9 Cir., 346 F.2d 73). Another consideration may be a desire to save legal costs when the defendant is of moderate resources and not eligible for assigned counsel (e.g., United States v. Redfield, 9 Cir., 197 F.Supp. 559, 567—568, affd. 295 F.2d 249, cert. den. 369 U.S. 803, 82 S.Ct. 642, 7 L.Ed.2d 550).

Other defendants, particularly those involved in 'political' trials, view counsel as an extension of the oppressive system which they distrust (see Comment Self Representation in Criminal Trials: Dilemma of the Pro Se Defendant, 59 Cal.L.Rev. 1479) while others seek to secure various tactical advantages. Clearly delay and confusion are foreseeable by-products of Pro se defense. More significantly, a ***844** defendant **327** acting Pro se may thus avoid taking the witness stand yet still influence the jury by his demeanor at trial (see Note, Pro Se Defendant's Right to Counsel, 41 Univ. of Cinn.L.Rev. 927).

While such machinations may conceivably redound to the defendant's disadvantage, the experienced and wily defendant often refuses counsel in order to lay the founation for a mistrial or a later attack of the conviction (Sanchez v. United States, 9 Cir., 311 F.2d 327, cert. den. 373 U.S. 949, 83 S.Ct. 1678, 10 L.Ed.2d 704).

[2] In light of the manifold and conflicting principles permeating the assertion of his right to defend Pro se, we conclude that it ***17** is not absolute but subject to certain restrictions. Such limitations must be implemented in order to promote the orderly administration of justice and to prevent subsequent attack on a verdict claiming a denial of fundamental fairness.

[3] A defendant in a criminal case may invoke the right to defend Pro se provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues.

[4] [5] So that convicted defendants may not pervert the system by subsequently claiming a denial of their Pro se right, the Pro se request must be clearly and unconditionally presented to the trial court. (See United States v. Plattner, 2 Cir., 330 F.2d 271, 276.) Inasmuch as a defendant whose rights have been safeguarded by counsel cannot claim that by having counsel he has been denied a fair trial or due process (cf. Singer v. United States,380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630) the right to defend Pro se lacks the force and urgency of the right to counsel and there is no necessity to inform every defendant of his right to conduct his own defense (see People ex rel. Maldonado v. Denno, 2 Cir., 348 F.2d 12, 17, Supra).

[6] [7] Prior to the commencement of the trial, the potential for obstruction and diversion is minimal. Therefore, we deem a Pro se application to be timely interposed when it is asserted before the trial commences (People v. Spohn, 43 A.D.2d 843, 351 N.Y.S.2d 174). At that juncture the court may conduct a thorough inquiry thereby averting delay and confusion. Once the trial has begun the right is severely constricted and will be granted in the trial court's discretion and only in compelling circumstances.

[8] [9] We turn now to the second requirement. Implicit in a defendant's assertion of his right to defend Pro se is the decision to disavow the constitutional right to counsel. For such a waiver to be effective, the trial court must be satisfied that it has been made competently, intelligently and voluntarily (*****845** Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed 1461). In determining the defendant's competency to waive counsel the court may properly inquire into the defendant's age, education, occupation and previous exposure to legal procedures.

[10] [11] Although the typical defendant Pro se may lack certain legal skills, mere ignorance of the law cannot vitiate an effective ***18** waiver of counsel as long as the defendant was cognizant of the dangers of waiving counsel at the time it was made (cf. United States v. Terranova, 2 Cir., 309 F.2d 365; United States v. Arlen, 2 Cir., 252 F.2d 491; People v. Terry, 224 Cal.App.2d 415, 36 Cal.Rptr. 722). To hold otherwise would render the right to defend Pro se an empty one indeed. Consequently, where there has been a Pro se defense, the defendant may only claim that the proceedings were so unfair as to deny him due process when the trial viewed as a whole amounts to a travesty of justice.

[12] [13] The third requirement concerns the forfeiture of the Pro se right by the defendant. Just as a defendant may lose his right of confrontation (****328** People v. Palermo, 32 N.Y.2d 222, 344 N.Y.S.2d 874, 298 N.E.2d 61) so may he lose his right to represent himself by engaging in disruptive or obstreperous conduct (see Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532; People v. Allen, 37 Ill.2d 167, 226 N.E.2d 1, cert. den. 389 U.S. 907, 88 S.Ct. 226, 19 L.Ed.2d 225). When a defendant's conduct is calculated to undermine, upset or unreasonably delay the progress of the trial he forfeits his right to self-representation.

[14] [15] [16] In declaring such a forfeiture, the Trial Judge 'must proceed by skill and suasion' (United States v. Dougherty, 154 U.S.App.D.C. 76, 473 F.2d 1113, 1126) to insure the fair and efficient prosecution of the charges and to avoid trammeling the essential rights of the accused. Of course, the trial court is afforded wide latitude in maintaining courtroom decorum. Nonetheless the court may not validate an erroneous denial of a Pro se motion on the basis of a postruling outburst (United States v. Dougherty, Supra).

Applying these principles to the instant case, we conclude that it was error for the Trial Judge to deny the defendant's Pro se motion.

[17] Inasmuch as the Pro se motion was unequivocal and timely having been interposed prior to the prosecution's opening statement (Code Crim.Pro., s 388, subd. 1; People ex rel. Steckler v. Warden of City Prison, 259 N.Y. 430, 182 N.E. 73; see CPL 1.20, subd. 11; 260.30) we turn to the contention that the defendant's inability to maintain self-control justified the court's denial. Here the record is susceptible of two interpretations with respect to the sequence of events. The Appellate Division majority considered the outburst to have preceded ***846** the trial court's denial of the motion, while the dissent deemed the disruptive behavior to have been a direct reaction to the denial.

***19** [18] We believe that on the record before us either interpretation renders the denial of the motion erroneous. Just as the court may not rely on a postruling outburst to validate an erroneous denial, the court may not goad the defendant to disruptive behavior by conducting its inquiry in an abusive manner calculated to belittle a legitimate application. An outburst thus provoked will not justify the forfeiture of the right of self-representation.

[19] Where a court feels that the motion is a disingenuous attempt to subvert the overall purpose of the trial (as may well have been the case here), the proper procedure is to conduct a dispassionate inquiry into the pertinent factors. Here the trial court denied the motion without eliciting the information which might have warranted a denial of the motion.

Accordingly, the order of the Appellate Division should be reversed and the matter remanded for a new trial.

GABRIELLI, Judge (dissenting).

The principal issue is whether the defendant's disruptive behavior following the selection of the jury and prior to the denial of his motion to proceed Pro se and as Cocounsel with his attorney, constituted a substantial threat to the orderly conduct of the trial and worked a forfeiture of his right to self-representation, all at a time when, as conceded and stated by the defendant, he was being represented by 'very competent' counsel.

The majority now holds that upon a charge for the 1966 slaying of an 89-year-old proprietress of a grocery store in Brooklyn, the defendant is to be tried a third time. The Appellate Division stated that the conviction upon the first trial was reversed because the evidence adduced at a posttrial hearing led to the court's conclusion 'that the image of justice would be better served by a new trial' (31 A.D.2d 964, 965, 299 N.Y.S.2d 88, 91) and, further, that upon the second trial there was again ample evidence of guilt and that the defendant was not unlawfully deprived of his **329 right to defend himself upon a charge as serious as murder in the circumstances of the case. We agree with the determination of the Appellate Division. While the Trial Judge might (and ought to) have handled the matter with more delicacy we do not feel there to be any reversible error present; and this is so in part because of the abundance of the evidence of guilt *20 CPL 470.05, subd. 1). Certainly, any alleged error, if such there were, would not have contributed to his conviction.

***847** We do not find, as does the majority, that the record substantiates a holding that the defendant's unruly and disruptive behavior resulted either from 'a post-ruling outburst' on his part or that it was the result of goading by the Trial Judge.

Our examination of the colloquy prior to the ruling made by the court does not indicate that the Trial Judge had ruled on defendant's request prior to his unruly outburst and behavior. In fact, the outburst was in reaction to an aside by the court inquiring whether the trial jury was returning to the courtroom, with a desire as we think, to not have the jurors present during the exchange, and also to permit further argument by defendant. The disruption and outburst, depicted in the majority opinion, occurred following completion of the jury selection and prior to the prosecutor's opening statement. The Trial Judge, as also found by the Appellate Division, properly exercised the discretion which the law reposed in him.

The Trial Judge was faced with the serious obligation of affording defendant with an adequate defense upon such a serious charge and, in addressing himself to that responsibility, he made inquiry and a statement regarding defendant's ability to represent himself and, further, had assured himself of defense counsel's knowledge of and familiarity with the records and proceedings of the first trial.

We recognize, of course, that a defendant possesses the right to defend In person or by counsel of his own choosing (N.Y.Const., art. I, s 6; People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356; People v. Price, 262 N.Y. 410, 187 N.E. 298; People v. Pitman, 25 A.D.2d 637, 268 N.Y.S.2d 83) but it is required that the court be satisfied that there be no serious impediment to a satisfactory or proper defense and, of course, that there be no impediment to the orderly course of the trial.

Even if defendant's request had been to proceed Pro se and not, as here, to permit him to act as cocounsel with his attorney, with all the problems attendant to such a situation, we hold that he had waived such a right by his disruptive behavior (cf. United States v. Dougherty, 154 U.S.App.D.C. 76, 473 F.2d 1113, 1123).

The order of the Appellate Division, affirming the judgment of conviction, should be affirmed.

***21** BREITEL, C.J., and JONES, SAMUEL RABIN and STEVENS, JJ., concur with WACHTLER, J.

GABRIELLI, J., dissents and votes to affirm in a separate opinion in which JASEN, J., concurs.

Order reversed, etc.

All Citations

36 N.Y.2d 10, 324 N.E.2d 322, 364 N.Y.S.2d 837

People v. McIntyre, 36 N.Y.2d 10 (1974)

324 N.E.2d 322, 364 N.Y.S.2d 837

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People v. Rogers, 186 A.D.3d 1046 (2020)
129 N.Y.S.3d 227, 2020 N.Y. Slip Op. 04658

186 A.D.3d 1046
Supreme Court, Appellate Division, Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Fuzell ROGERS, III, Defendant-Appellant.

346
|
KA 15-01687
|
Entered: August 20, 2020

Synopsis

Background: Defendant was convicted in the County Court, Monroe County, Christopher S. Ciaccio, J., of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the seventh degree, and criminally using drug paraphernalia in the second degree. Defendant appealed.

[Holding:] The Supreme Court, Appellate Division held that trial court's failure to discuss defendant's potential maximum sentences did not invalidate his waiver of right to counsel.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (8)

[1] **Criminal Law**🔑Capacity and requisites in general
Criminal Law🔑Duty of Inquiry, Warning, and Advice

An application to proceed pro se must be denied unless defendant effectuates a knowing, voluntary, and intelligent waiver of the right to counsel; to this end, trial courts must conduct a searching inquiry to clarify that defendant understands the ramifications of such a decision. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[2] **Criminal Law**🔑Duty of Inquiry, Warning, and Advice

The purpose of the requisite searching inquiry into defendant's waiver of the right to counsel is to warn the defendant of the risks inherent in representing himself or herself and to apprise him or her of the value of counsel. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[3] **Criminal Law**🔑Duty of Inquiry, Warning, and Advice

A searching inquiry into defendant's waiver of the right to counsel operates to ensure that the defendant is made aware of the dangers and disadvantages of self-representation, so that the record will establish that he or she knows what he or she is doing and his or her choice is made with eyes open. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[4] **Criminal Law**🔑Duty of Inquiry, Warning, and Advice

A defendant's waiver of the right to counsel will not be deemed ineffective simply because a trial judge does not ask questions designed to interrogate the defendant about each topic relevant to self-representation; it is only when the whole record shows that the trial court failed to adequately discharge its obligation to warn the defendant of the risks inherent in self-representation and to apprise him or her of the value of counsel in a criminal proceeding will the

resulting waiver be invalidated. U.S. Const. Amend. 6.

[5] **Criminal Law**Duty of Inquiry, Warning, and Advice

When the whole record memorializes the trial court's compliance with its core advisory function, then a defendant's choice to waive counsel must be respected, even if that decision is rash. U.S. Const. Amend. 6.

[6] **Criminal Law**Capacity and requisites in general

The State and Federal Constitutions do not protect a criminal defendant from making a bad decision to proceed pro se, rather they only protect him or her from making an uninformed decision to proceed pro se; indeed, respect for individual autonomy requires that he or she be allowed to go to jail under his or her own banner if he or she so desires and if he or she makes the choice with eyes open. U.S. Const. Amend. 6.

[7] **Criminal Law**Waiver of right to counsel

Trial court's failure to specifically discuss, during *Faretta* colloquy, defendant's potential maximum sentences and nature of crimes charged did not automatically invalidate his waiver of right to counsel in prosecution for third-degree criminal possession of a controlled substance, where court adequately appraised defendant of dangers and pitfalls of self-representation. U.S. Const. Amend. 6; N.Y. Penal Law § 220.16(1).

[8] **Criminal Law**In general; right to appear pro se

Every criminal defendant is constitutionally entitled to proceed pro se notwithstanding the well-recognized risks of that course. U.S. Const. Amend. 6.

****228** Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered July 22, 2015. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the seventh degree and criminally using drug paraphernalia in the second degree.

Attorneys and Law Firms

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SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

****229** MEMORANDUM AND ORDER

***1047** It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16[1]), defendant contends that County Court erred in granting his request to proceed pro se for a portion of the pretrial proceedings. We affirm.

[1] [2] [3] "It is well-settled that an application to proceed pro se must be denied unless [the] defendant effectuates a knowing, voluntary and intelligent waiver of the right to counsel ... To this end, trial courts must conduct a *searching inquiry* to clarify that [the] defendant understands the ramifications of such a decision" (*People v. Stone*, 22 N.Y.3d 520, 525, 983 N.Y.S.2d 454, 6 N.E.3d 572 [2014] [internal quotation marks omitted and emphasis added]). The purpose of the requisite "searching inquiry" is to "warn

[the] defendant of the risks inherent in representing himself [or herself]" and to "apprise him [or her] of the value of counsel" (*People v. Crampe*, 17 N.Y.3d 469, 481, 932 N.Y.S.2d 765, 957 N.E.2d 255 [2011], *cert denied* 565 U.S. 1261, 132 S.Ct. 1746, 182 L.Ed.2d 531 [2012] [internal quotation marks omitted]; *see* *People v. Kaltenbach*, 60 N.Y.2d 797, 799, 469 N.Y.S.2d 685, 457 N.E.2d 791 [1983]). As the United States Supreme Court has explained, such an inquiry operates to ensure that the defendant is "*made aware* of the dangers and disadvantages of self-representation, so that the record will establish that he [or she] knows what he [or she] is doing and his [or her] choice is made with eyes open" (*Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 [1975] [internal quotation marks omitted and emphasis added]; *see also* *People v. Arroyo*, 98 N.Y.2d 101, 104, 745 N.Y.S.2d 796, 772 N.E.2d 1154 [2002]; *People v. Slaughter*, 78 N.Y.2d 485, 492, 577 N.Y.S.2d 206, 583 N.E.2d 919 [1991]).

[4] [5] The Court of Appeals has consistently " 'eschewed application of any rigid formula and endorsed the use of a nonformalistic, flexible inquiry' " to ensure the voluntariness of a defendant's decision to forgo counsel (*People v. Providence*, 2 N.Y.3d 579, 583, 780 N.Y.S.2d 552, 813 N.E.2d 632 [2004], quoting *Arroyo*, 98 N.Y.2d at 104, 745 N.Y.S.2d 796, 772 N.E.2d 1154; *see* *People v. Smith*, 92 N.Y.2d 516, 520-521, 683 N.Y.S.2d 164, 705 N.E.2d 1205 [1998]). Thus, although the "better practice" is for the trial judge to interrogate the defendant ***1048** about various topics relevant to self-representation in a criminal case—such as the defendant's age, education, occupation, and prior experience with the criminal justice system—the ****230** Court of Appeals in *Providence* nevertheless reiterated that "a waiver of the right to counsel will *not* be deemed ineffective simply because a trial judge does not ask questions designed to elicit each of the [various] specific items of information" (2 N.Y.3d at 583, 780 N.Y.S.2d 552, 813 N.E.2d 632 [emphasis added]). Only when the "whole record" shows that the trial court failed to adequately discharge its obligation to *warn* the defendant of the risks inherent in self-representation and to *apprise* him or her of the value of counsel in a criminal proceeding will the resulting waiver be invalidated (*id.*). Conversely, when the "whole record" memorializes the court's compliance with its core advisory function (*id.*), then the defendant's choice to waive counsel must be respected—even if that decision is "rash[ ]" (*People v. Vivenzio*, 62 N.Y.2d 775, 776, 477 N.Y.S.2d 318, 465 N.E.2d 1254 [1984]), " 'foolish[ ]' " (*People v. Henriquez*, 3 N.Y.3d 210, 213, 785 N.Y.S.2d 384, 818 N.E.2d 1125 [2004]), or potentially lethal (*see* *People v. Gordon*, 179 Misc. 2d 940, 941-945, 688 N.Y.S.2d 380 [Sup. Ct., Queens County 1999]).

[6] Ultimately, as the above discussion demonstrates, the State and Federal Constitutions do not protect a criminal defendant from making a *bad* decision to proceed pro se; it only protects him or her from making an *uninformed* decision to proceed pro se. Indeed, as the Court of Appeals emphasized in *Vivenzio*, a "criminal defendant is entitled to be master of his [or her] own fate and respect for individual autonomy requires that he [or she] be allowed to go to jail under his [or her] own banner if he [or she] so desires and if he [or she] makes the choice with eyes open" (62 N.Y.2d at 776, 477 N.Y.S.2d 318, 465 N.E.2d 1254 [internal quotation marks omitted]).

[7] In light of the foregoing, we reject defendant's assertion that his waiver of the right to counsel is automatically invalid given the court's failure to specifically discuss, during the *Faretta* colloquy, the potential maximum sentences and the "nature" of the crimes charged. As noted above, the Court of Appeals in *Providence* explicitly held that the trial judge's failure to mention any specific piece of information was not dispositive of the sufficiency of the requisite searching inquiry, and that a trial court's failure to perfectly align its colloquy with best practices would not invalidate the subsequent waiver so long as the court adequately discharged its core obligation to warn and apprise the defendant of the dangers and pitfalls of self-representation. We respectfully decline to follow the First Department's contrary holding in *People v. Rodriguez*, 158 A.D.3d 143, 152-153, 66 N.Y.S.3d 488 (1st Dept. 2018), *lv denied* 31 N.Y.3d 1017, 78 N.Y.S.3d 287, 102 N.E.3d 1068 (2018).

***1049** Defendant further contends that, by insisting upon his own superior ability to defend his case, he failed to "[a]ccept" or "[u]nderstand" the risks of self-representation that the court articulated during the *Faretta* colloquy. Notably, defendant does not argue that the court failed to adequately apprise him of the risks of proceeding pro se; rather, defendant argues that his refusal to *heed* those warnings—i.e., his refusal to abandon his request to proceed without counsel—demonstrates that he did not "[u]nderstand [o]r [a]ccept" the risks of that course.

[8] We reject defendant's contention. As explained above, the trial court's duty is to apprise the defendant of the risks and drawbacks of self-representation. The trial court's duty is not, as defendant argues here, to ensure that the defendant accepts the weight afforded those risks by the trial court, or by the legal establishment in general. Every criminal defendant is constitutionally entitled to proceed pro se notwithstanding ****231** the well-recognized risks of that course, and creating a judicial duty to ensure the defendant's "acceptance" of the risks of self-representation would effectively obligate every trial judge to compel the defendant to proceed with counsel whenever he or she expresses any interest in proceeding pro se, and that would violate the defendant's right to self-representation and require reversal in itself (*see People v. Daly*, 98 A.D.2d 803, 807, 470 N.Y.S.2d 165 [2d Dept. 1983], *affd* 64 N.Y.2d 970, 489 N.Y.S.2d 35, 478 N.E.2d 176 [1985]).

So long as the trial court fulfills its duty to ensure that the defendant is "made aware" of the risks of self-representation (*Faretta*, 422 U.S. at 835, 95 S.Ct. 2525)—and there is no dispute that the court did so here—then the constitutionally protected "respect for individual autonomy requires that [the defendant] be allowed to go to jail under his [or her] own banner," even when he or she is "harming himself [or herself] by insisting on conducting his [or her] own defense" (*People v. McIntyre*, 36 N.Y.2d 10, 14, 364 N.Y.S.2d 837, 324 N.E.2d 322 [1974] [internal quotation marks omitted]). Defendant, in short, cannot fault the court for refusing to violate his right to self-representation in the name of honoring his right to counsel.

Finally, defendant's contention that he was denied a fair trial by prosecutorial misconduct on summation is unpreserved for appellate review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see People v. Lathrop*, 171 A.D.3d 1473, 1475, 99 N.Y.S.3d 152 [4th Dept. 2019], *lv denied* 33 N.Y.3d 1106, 106 N.Y.S.3d 668, 130 N.E.3d 1278 [2019]).

All Citations

186 A.D.3d 1046, 129 N.Y.S.3d 227, 2020 N.Y. Slip Op. 04658

People v. Rogers, 186 A.D.3d 1046 (2020)

129 N.Y.S.3d 227, 2020 N.Y. Slip Op. 04658

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ACCUSED RIGHT TO SELF REPRESENTATION IN CRIMINAL PROCEEDINGS

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1

MATERIALS

JUDICIAL TECHNIQUES FOR CASES INVOLVING SELF-REPRESENTED LITIGANTS 42 NO.1 JUDGES' J. 16

PRO SE COLLOQUY SCRIPT

PEOPLE V. CRAMPE 17 NY3d 469 (2011)

PEOPLE V. MCINTYRE 36 NY2d 10 (1974)

PEOPLE V. ROGERS 186 AD3d 1046 (3d Dep't 2020)

2

PRO SE REPRESENTATION IS A GROWING PHENOMENON IN AMERICAN COURTS ABOUT WHICH WE KNOW LITTLE.

WE DO KNOW THAT SUCH REPRESENTATION RESULTS IN INCREASED DEMANDS ON THE COURT AND ITS STAFF.

3

U.S. CONSTITUTION SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right .....to have the assistance of counsel for his defense.

4

NYS CONSTITUTION ARTICLE 1 § 6

In any trial in any court whatever the party accused *shall be allowed to appear and defend in person and with counsel as in civil actions....*

PEOPLE V. DAVIS, 49 N.Y.2d 114 (1979)

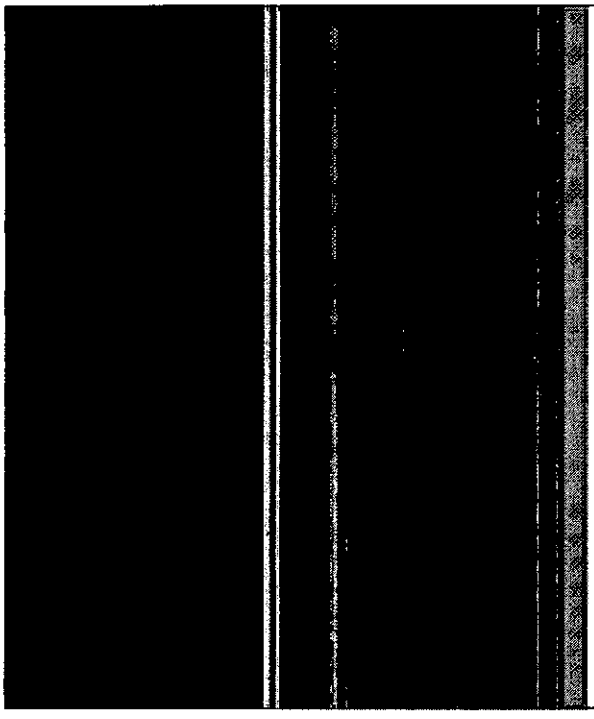
PEOPLE V. McINTYRE, 36 N.Y.2d 10 (1974)

5

EXCEPTIONS TO SELF REPRESENTATION

1. CORPORATIONS AND VOLUNTARY ASSOCIATIONS
2. INFANTS AND INCOMPETENTS
3. WHERE PARTY ALREADY HAS AN ATTORNEY MUST GET CONSENT OF COURT

6



PROVIDES THAT A ***PRO SE*** "PARTY" IS GENERALLY TREATED AS AN "**ATTORNEY**" FOR PURPOSES OF THE RULES OF CIVIL PROCEDURE.

HOWEVER, A ***PRO SE*** **LITIGANT** IS NOT ENTITLED TO :

1. SERVE PROCESS - CPLR 2103 (a) (bars service of papers by parties)
2. ISSUE A SUBPOENA WITHOUT COURT ORDER – CPLR 2302 (a)
3. CERTIFYING PAPERS - SEE CPLR 2105 (affirmation in lieu of an affidavit)
4. NON- ATTORNEY ASSISTANCE *MALDONADO V. NYS Bd. OF PAROLE 102 Misc. 2d 880 (Sup 1979)*

7

PRO SE REPRESENTAION IN CRIMINAL MATTERS

FOUR SCENERIOS

1. THE ACCUSED IS CHARGED WITH AN OFFENSE THAT **IS NOT ELIGIBLE** FOR ASSIGNMENT OF GOVERNMENT PAID COUNSEL AND THE ACCUSED IS UNABLE TO AFFORD RETAINED COUNSEL.
2. *THE ACCUSED IS CHARGED WITH AN OFFENSE THAT **IS NOT ELIGIBLE** FOR ASSIGNMENT OF GOVERNMENT PAID AND THE ACCUSED CHOSES NOT TO RETAIN COUNSEL THOUGH ABLE TO DO SO.*
3. *THE ACCUSED IS CHARGES WITH AN OFFENSE THAT **IS ELIGIBLE** FOR ASSIGNED COUNSEL AND THE ACCUSED **DOES QUALIFY FOR ASSIGNED COUNSEL BUT CHOSES NOT TO BE REPRESENTED** BY ASSIGNED COUNSEL OR RETAIN COUNSEL.*
4. THE ACCUSED IS CHARGES WITH AN OFFENSE THAT **IS ELIGIBLE** FOR ASSIGNED COUNSEL BUT DOES NOT QUALIFY FOR ASSIGNED COUNSEL AND CHOSES NOT TO RETAIN COUNSEL THOUGH ABLE TO DO SO.

8

REQUIREMENTS OF A REQUEST FOR *PRO SE* REPRESENTATION

THE COURT UPON A REQUEST OF AN ACCUSED TO APPEAR *PRO SE* MUST SATISFY ITSELF THAT THE REQUEST IS:

1. UNEQUIVOCAL
2. TIMELY ASSERTED
3. KNOWING AND INTELLIGENTLY MADE
4. NOT MADE TO PREVENT OR DELAY THE ORDERLY ADMINISTRATION OF JUSTICE

PEOPLE V. McINTYRE 36 NY2d 10 (1974)

9

1. REQUEST MUST BE UNEQUIVOCAL

THE ACCUSED'S REQUEST MUST BE CLEAR AND UNEQUIVOCAL WITH NO CONTRARY INDICATIONS.

ACCUSED REQUEST TO REPRESENT HIMSELF WHILE ALSO ASKING FOR THE APPOINTMENT OF COUNSEL IS NOT AN EFFECTIVE ASSERTION OF RIGHT TO SELF REPRESENTATION.

PEOPLE V. LAVALLE 3 NY3d 88 (2004)

PEOPLE V. GILLIAN 8 NY3d 85 (2006)

10

2. TIMELY ASSERTED

REQUEST IS TIMELY WHEN MADE *BEFORE* TRIAL OR JURY SELECTION COMMENCES.

ONCE TRIAL COMMENCES RIGHT IS "SEVERLY CONSTRICTED".

REQUEST GRANTED ONLY IN COMPELLING CIRCUMSTANCES.

PEOPLE V. CRESPO 32 NY3d 176 (2018)

PEOPLE V. BARKSDALE 191 AD3d 1370 (4th Dept. 2021)

11

3. REQUEST MUST BE KNOWING AND INTELLIGENT

"SEARCHING INQUIRY"

colloquy in materials

COURT MUST:

- ON THE RECORD
- ENGAGE IN A "SEARCHING INQUIRY" OF THE RISKS INHERENT IN PROCEEDING *PRO SE*

THE COURT MUST ASSURE ITSELF THAT:

THE DEFENDANT UNDERSTANDS THE VALUE OF COUNSEL, AND

THE DANGER AND DISADVANTAGES OF GIVING UP THE FUNDAMENTAL RIGHT TO COUNSEL

PEOPLE V. CRAMPE 17 NY3d 469 (2011) cert.denied 132 S.Ct 1746 (2012)

12

SEARCHING INQUIRY INTO MENTAL HEALTH OF ACCUSED

COURT CAN INSISIT ON REPRESENTATION BY COUNSEL WHERE THE ***COURT IS AWARE OR SUSPECTS*** THE ACCUSED SUFFERS FROM MENTAL ILLNESS TO A POINT THAT THEY ARE NOT COMPETENT TO CONDUCT THEIR DEFENSE BY THEMSELVES.

A defendant's mental capacity may be considered on an application to proceed pro se, although the trial court need not conduct a formal competency hearing prior to adjudicating a self-representation request

INDIANA V. EDWARDS 554 U.S. 164 (2008)

PEOPLE V. STONE 22 NY3d 520 (2014)

PEOPLE V. TAFARI 68 AD3d 1540 (3rd Dept. 2009)

13

OTHER AREAS OF SEARCHING INQUIRY

THE ACCUSED:

1. AGE
2. EDUCATION
3. OCCUPATION
4. PREVIOUS EXPOSURE TO LEGAL PROCEDURES, AND
5. *OTHER RELEVANT FACTORS BEARING ON KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER.*

14

"SEARCHING INQUIRY" MEASURED BY ENTIRE RECORD

WAIVER WILL NOT BE DEEMED INEFFECTIVE SIMPLY BECAUSE A TRIAL JUDGE DOES NOT ASK QUESTIONS DESIGNED TO INTERROGATE THE ACCUSED ABOUT EACH TOPIC RELEVANT TO SELF-REPRESENTATION.

THE *WHOLE RECORD MUST SHOW* THAT THE TRIAL COURT ADEQUATELY WARNED THE ACCUSED OF THE RISKS INHERENT IN SELF-REPRESENTATION AND THE VALUE OF COUNSEL.

People v. Rogers, 186 A.D.3d 1046 (4th Dep't 2020).

15

4. NOT MADE TO PREVENT OR DELAY THE ORDERLY ADMINISTRATION OF JUSTICE

ACCUSED MUST NOT BE ENGAGING IN CONDUCT THAT MIGHT PREVENT THE ORDERLY DISPOSITION OF THE CASE.

DISRUPTIVE BEHAVIOR CAN FORFEIT THE RIGHT TO PROCEED *PRO SE.*

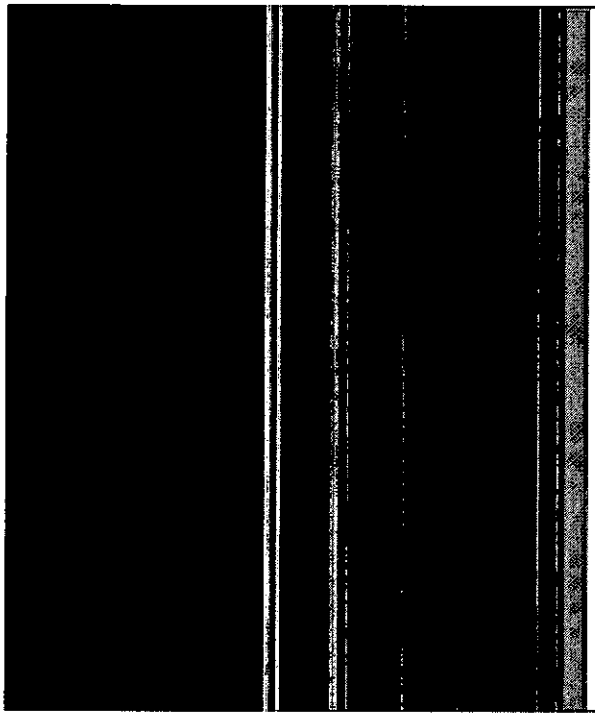
16

1. DO NOT BE PATERNALISTIC.
2. APPOINT COUNSEL FOR THE SOLE PURPOSE OF DISCUSSING THE ISSUE OF REPRESENTATION.
3. OFFER OPTION OF STAND-BY OR HYBRID COUNSEL. (Will Discuss in a Minute)

17

4. REMIND ACCUSED THAT WHILE SHE CAN BE HER OWN ATTORNEY THERE ARE STILL THINGS *ONLY* A LICENSED ATTORNEY CAN DO. (SLIDE 8 ABOVE)
5. INFORM ACCUSED THAT ARGUING INEFFECTIVE REPRESENTAION ON APPEAL NOT ALLOWED IF CONVICTED. *PEOPLE V. LOTT 23 AD3d 1088 (4th Dept. 2005)*

18



A. *PRO SE* HYBRID REPRESENTATION

B. SELF-REPRESENTATION AT HEARINGS AND TRIAL

C. *PRO SE* STAND-BY COUNSEL REPRESENTATION

19

A. HYBRID *PRO SE* REPRESENTATION AS A FORM OF STANDBY COUNSEL

20

A. HYBRID *PRO SE* REPRESENTATION AS A FORM OF STANDBY COUNSEL

THE 6TH AMENDMENT DOES NOT RECOGNIZE THE RIGHT TO HYBRID REPRESENTATION WHEREBY STANDBY COUNSEL BECOMES CO-COUNSEL BY PARTICIPATION IN PRESENTATION OF THE CASE.

AN ACCUSED DOES NOT HAVE A RIGHT TO CHOREOGRAPH APPEARANCE OF COUNSEL.

WHETHER TO ALLOW IS IN THE DISCRETION OF THE COURT.

PEOPLE V. FERGUSION 67 NY 2d 383 (1986)

21

A. HYBRID *PRO SE* REPRESENTATION AS A FORM OF STANDBY COUNSEL

PRO SE MOTIONS:

THE COURT HAS DISCRETION WHETHER TO ENTERTAIN *PRO SE* MOTIONS WHEN THE ACCUSED IS REPRESENTED BY COUNSEL.

COURT CAN REFUSE TO ENTERTAIN THE MOTION

PEOPLE V. RODRIQUEZ 95 NY2d 497 (2000)

22

A. HYBRID *PRO SE* REPRESENTATION AS A FORM OF STANDBY COUNSEL

PRO SE MOTIONS

BEST PRACTICE

IS TO INQUIRE WHETHER COUNSEL IS AWARE OF THE MOTION AND HAS DISCUSED IT WITH THE CLIENT

ASK IF COUNSEL ADOPTS IT

WARNING:

APPELLATE COURTS HAVE RULED THAT IT CAN BE IMPROPER TO REFUSE TO HEAR A *PRO SE* MOTION

PEOPLE V. DELGADO 281 A.D.2d 556 (2d Dep't 2001)

23

A. HYBRID *PRO SE* REPRESENTATION AS A FORM OF STANDBY COUNSEL

MOTION TO WITHDRAW GUILTY PLEA

DEFENSE COUNSEL IS NOT REQUIRED TO JOIN IN MOTION

FAILURE TO JOIN IN MOTION DOES NOT REQUIRE ASSIGNMENT OF NERW COUNSEL

PEOPLE V. ARNOLD 102 AD3d 1061 (3d Dep't 2013)

24

A. HYBRID *PRO SE* REPRESENTATION AS A FORM OF STANDBY COUNSEL

HEARINGS AND TRIAL

INVOLVES AT LEAST A PARTIAL WAIVER OF RIGHT TO SELF REPRESENTATION WOULD LOGICALLY REQUIRE:

1. COLLOQUY INFORMING THE ACCUSED OF THE CONSEQUENCES OF SUCH REPRESENTATION*
2. CONSENT OF BOTH ACCUSED AND COUNSEL

* COURT NOT ALLOWING THE ACCUSED TO OPEN AND CLOSE ARE TWO THAT COME TO MIND

25

B. SELF-RERPRSENTATION AT HEARINGS AND TRIAL

26

WHILE IT IS WELL ESTABLISHED THAT *PRO SE* LITIGANTS ARE BOUND BY THE SAME PROCEDERAL AND EVIDENTIARY RULES AS REPRESENTED LITIGANTS

NONETHELESS THE COURT'S ESSENTIAL CORE FUNCTION – *TO SERVE AS IMPARTIAL REFEREE* – COMES INTO DIRECT CONFLICT WHEN A LITIGENT CHOOSES TO REPRESENT THEMSELVES.

27

B. SELF-REPRESENTATION AT HEARINGS AND TRIAL

HOWEVER:

IT IS COMMON (ENCOURAGED) THAT COURTS GRANT *PRO SE* LITIGANTS *"CERTAIN LATITUDE"* IN PRESENTING THEIR CASE.

THIS IS TO PROVIDE THE *PRO SE* LITIGENT WITH AN OPPORTUNITY TO MAKE A FULL PESENTATION OF THEIR CASE.

MOSSO V. MOSSO 6 AD3d 827 (3d Dep't 2004)

VILL. OF ATTICA V. NUTTY 184 AD2d 1057 (4th Dep't 1992)

28

29

B. *SELF*-REPRESENTATION AT HEARINGS AND TRIAL

A TRIAL COURT HAS A DUTY TO ENSURE FAIRNESS TO A PRO SE LITIGANT BY ALLOWING ***REASONABLE ACCOMODATIONS (CERTAIN LATITUDE)*** *SO LONG AS THERE IS NO PREJUDICE TO THE ADVERSRE PARTY*

THE TRICK IS HOW DO YOU ACCOMPLISH THIS!

HERE IS HOW

30

B. *SELF*-REPRESENTATION AT HEARINGS AND TRIAL

SUBSTANTIVE LAW

UNREPRESENTED PARTIES MUST MEET THE SAME LEGAL STANDARDS ANS REQUIREMENTS OF THE SUBSTANTIVE LAW TO BE ENTITLED TO RELIEF AS A REPRESENTED PARTY.

EXAMPLE:

ELEMENTS OF A DEFENSE TO CRIMINAL LIABILITY – JUSTIFICATION AS A DEFENSE *PENAL LAW ARTICLE 35*

31

B. *SELF*-REPRESENTATION AT HEARINGS AND TRIAL

PROCEDERAL LAW

1. HARD PROCEDURAL RULES

PROCEDURAL RULES THAT REPRESENT FUNDAMENTAL RULES GOVERNING THE LEGAL PROCESS.

EXAMPLE:

TESTIMONY OF A WITNESS ONLY UNDER OATH *CPL § 60.20 (2)*

32

B. *SELF*-REPRESENTATION AT HEARINGS AND TRIAL

2. SOFT PROCEDURAL RULES

PROCEDURAL RULES DESIGNED TO PRIMARLIY PREVENT LAY FACTFINDERSFROM RELYING ON UNRELIABLE OR OTHERWISE INADMISSIBLE EVIDENCE IN MAKING THEIR DECISION.

EXAMPLE:

LEADING QUESTIONS, FORM OF THE QUESTION, CONTEMPORANOUS OBJECTIONS. *CPL § 60.10*

33

B. *SELF*-REPRESENTATION AT HEARINGS AND TRIAL

3. LEGAL TECHNICALITIES

RULES/PROCEDURES THAT ARE REQUIRED BUT DO NOT DIRECTLY BEAR ON THE SUBSTANTIVE MERITS OF THE CASE.

SHOULD BE OVERLOOKED IN THE INTEREST OF DECIDING THE CASE ON THE MERITS.

EXAMPLES:

FORM OF DOCUMENTS, FAILURE TO OFFER DOCUMENT INTO EVIDENCE, RE-OPENING WITNESS EXAMINATION.

34

B. *SELF*-REPRESENTATION AT HEARINGS AND TRIAL

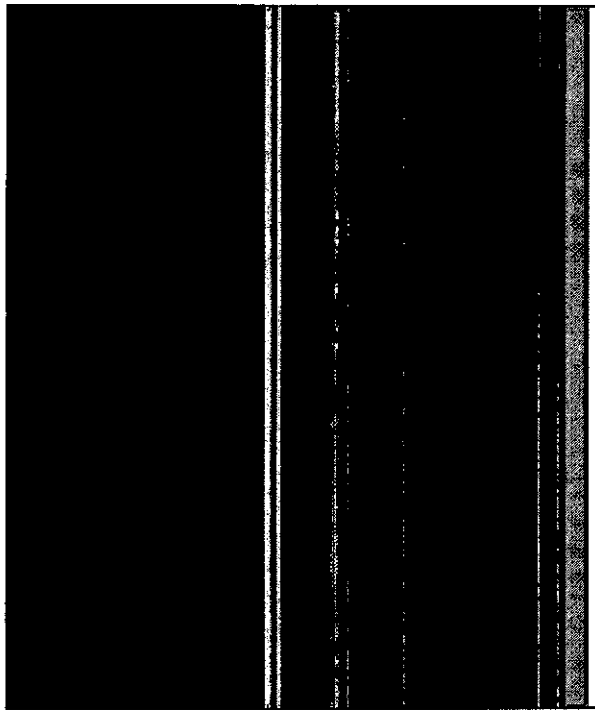
4. LEGAL STRATEGY

THE TACTICAL AND STRATIGIC (LEGAL THEORY) OF HOW THE LITIGENT IS GOING TO PRESENT THEIR CASE. HOW THEY PLAN TO PRESENT THEIR CASE

EXAMPLE:

WHAT WITNESSES TO CALL OR CROSS EXAMINE , CHOICE OF DEFENSES, ARGUMENTS TO MAKE IN CLOSING,

35



- PREPARE,PREPARE,PREPARE
- DRAW A DISTINCTON BETWEEN SOFT AND HARD PROCEDURAL BARS AND EVIDENTURAY RULES
- OVERLOOK RULES/PROCEDURES THAT ARE MERE TECHNICALITIES
- DO NOT GET INVOLVED IN STRATEGY, TACTICAL AND STRATIGIC DECISIONS

36

DO THE FOLLOWING WITH *ALL PARTIES* INVOLVED IN THE PROCEEDING:

- PROVIDE GUIDELINES AS TO APPLICABLE SUBSTANTIVE AND PROCEDURAL PRINCIPALS
- GO OVER COURTROOM PROTOCALS (STEPS IN THE TRIAL OR HEARING) REVIEW BASIC RULES OF EVIDENCE PRESENTATION
- REVIEW ELEMENTS OF THE OFFENSE(S) AND THE BURDENS OF PROOF

37

C. STAND-BY COUNSEL *PRO SE* REPRESENTATION

38

C. STAND-BY COUNSEL *PRO SE* REPRESENTATION

DIFFERENT THEN HYBRID REPRESENTATION*

STANDBY COUNSEL ACTS AS A SAFETY NETY TO ENSURE THE ACCUSED RECEIVES A FAIR TRIAL AND TO ALLOW THE TRIAL TO PROCEED WITHOUT UNDUE DELAY.

APPOINTMENT OF STANDBY COUNSEL IS TO RELIEVE THE COURT OF THE NEED TO EXPLAIN BASIC RULES AND TO ASSIST THE ACCUSED WITH THE OVERCOMING OF ROUTINE OBSTACLES DURING THE PROCEEDING.

PEOPLE V. SILBURN 312 NY3d 144 (2018)

39

C. STAND-BY COUNSEL *PRO SE* REPRESENTATION

THERE IS NO CONSTITUTIONAL OR STATUTORY RIGHT TO SUCH REPRESENTATION.

COURT DOES HAVE DISCRETION TO GRANT SUCH REPRESENTATION *EVEN WITHOUT CONSENT* OF THE ACCUSED

SO LONG AS COUNSEL'S ACTIONS DO NOT SERIOUSLY UNDERMINE THE APPEARANCE AND RIGHT TO SELF- REPRESENTATION

PEOPLE V. MIRENDA 57 NY2d 261 (1982)

40

C. STAND-BY COUNSEL *PRO SE* REPRESENTATION

THE COURT MAY LIMIT THE ROLE OF STAND-BY COUNSEL

PEOPLE V. HILTS 46 AD3D 947 (3d Dep't 2007) aff'd 13 NY3d 895 (2009)

ONCE ASSIGNED THE STANDBY COUNSEL WILL NOT BE REMOVED ABSENT GOOD CAUSE

PEOPLE V. OUTLAW 184 AD2d 665 (2d Dep't 1992)

41

CURBING ABUSIVE OR OVERZEALOUS CONDUCT

MISCONDUCT DEFINED

CONDUCT THAT WASTES COURT TIME, ADDS COSTS TO OPPONENTS OR FRUSTRATES OR ABUSES THE PROCESS.

CRITICAL FACTOR IS WHETHER THERE IS AN ABUSE OF THE JUDICIAL PROCESS, A NEGATIVE IMPACT ON THE OTHER PARTIES, OR HARASSMENT.

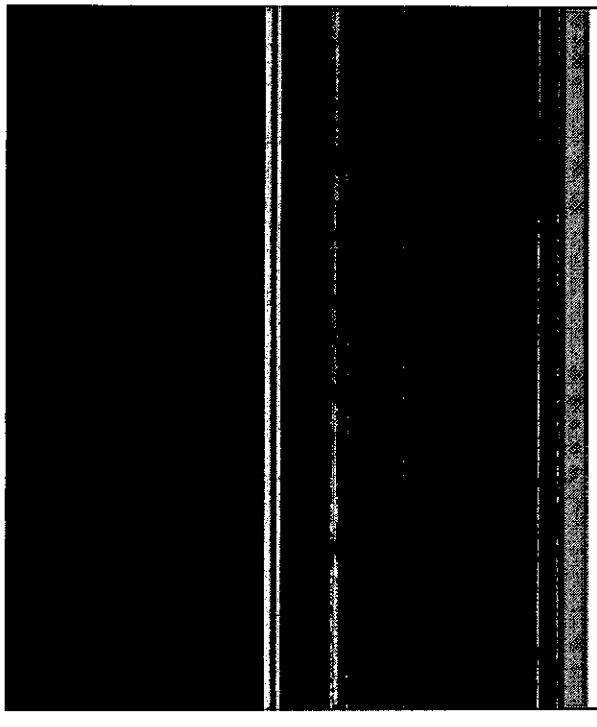
42

CURBING ABUSIVE OR OVERZEALOUS CONDUCT

REMEDIES

1. MONETARY SANCTIONS CIVIL ACTIONS *(NOT IN SMALL CLAIMS)*
2. CONTEMPT ORDER *(BE CAREFUL)*
3. PRECLUSION OF EVIDENCE (*DISCOVERY)*
4. LOSS OF RIGHT TO SELF-REPRESENTATION
5. INJUNCTION AGAINST BRING OTHER CIVIL ACTIONS

43



- PROVIDE CLEAR AND REPEATED WARNINGS REGARDING THE BEHAVIOR
- INFORM THE LITIGANT OF THE POTENTIAL CONSEQUENCES OF CONTIUING THE BEHAVIOR
- MAKE AN EXCEPTIONALLY GOOD RECORD

44

CONCLUSION

CONCEPT OF *IMPARTIAL REFEREE* IS NOT SO INFLEXIBLE AS TO PRECLUDE A JUDGE FROM MAKING REASONABLE ACCOMODATIONS AND GRANTING CERTAIN LATITUDE TO SELF- REPRESENTED LITIGANTS.

45

PRO SE TRIAL SCENARIOS

DISCUSSSION

46

WHAT IF.....

1. ACCUSED SEEKS TO TESTIFY USING NOTES BECAUSE THEY ARE AFRAID, THEY WILL FORGET SOMETHING.
2. DOES NOT CORRECTLY HAVE MARKED AND IDENTIFIED DOCUMENTS BEFORE OFFERING INTO EVIDENCE
3. FAILS TO ESTABLISH A SUFFICIENT FOUNDATION FOR ADMISSION OF AN OBVIOUSLY RELEVANT AND MATERIAL PHOTOGRAPH OR BUSINESS RECORD

47

WHAT IF.....

4. WHEN CLOSING TO THE JURY BEGINS TO TESTIFY ABOUT MATTERS THAT WERE NOT SUBJECT TO CROSS-EXAMINATION DURING THE TRIAL
5. ACCUSED FAILS TO ELICIT FACTS THAT SUPPORT A POTENTIAL DEFENSE TO THE CHARGE.

48

QUESTIONS?

THANK YOU!

49