

Developing an Updated Playbook for Adjudicating Self-Represented Litigants

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NAPCO Monthly Webinar Series



Presenters



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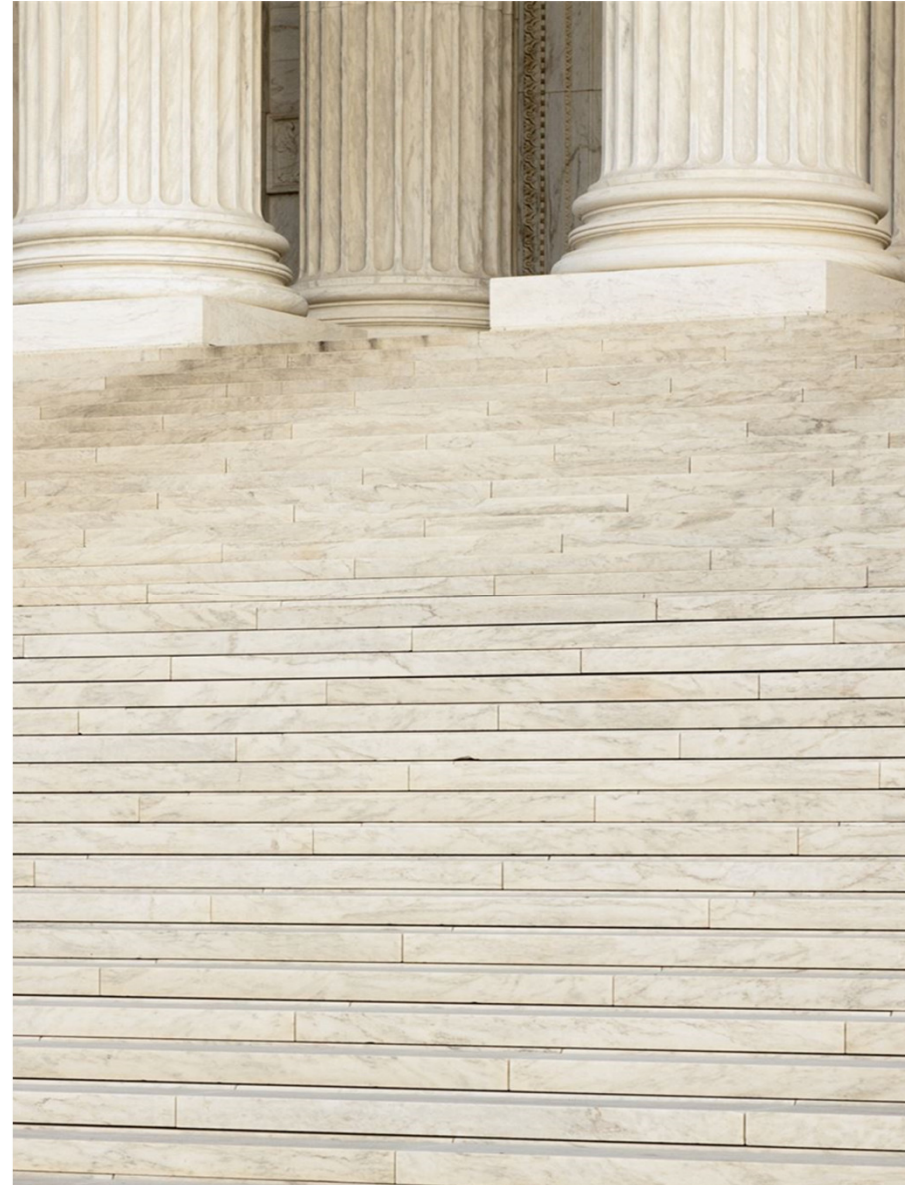
Hon. Mark Juhas, Judge
Family Division, Superior Court of California
Los Angeles County, CA

“Because self-represented litigants do not have attorneys to interpret the “foreign” language of the courtroom, to explain the process and to screen for and remedy problems that may occur, judges are faced with special challenges.”

*Handling Cases Involving Self-Represented Litigants
A Bench Guide for Judicial Officers, April 2019
California Judicial Council*

Agenda

1. The Challenge: Lawyerless Litigants
2. The Research: A Tale of Two Studies
 - 2008: Courtroom Communications involving Two Self-Represented Litigants [Greacen Associates}
 - 2022: Judges in Lawyerless Courts [Georgetown Law Journal]
3. Discussion of the Research
4. What can Court Leaders Do?
5. Audience Q & A





The Challenge

- NCSC “Civil Justice Landscape” (2015)
 - 76% of all civil cases involve one or more self-represented litigants
- NCSC “Family Justice Landscape” (2018)
 - 72% of all family cases involve one or more self-represented litigants
- Maricopa County, Arizona (2007)
 - 60% no lawyers, 25% one lawyer, 15% two lawyers
- IAALS/HiiL Access to Justice Survey (2021)

The Primary Business of State Civil Courts Is Dealing With Cases Involving Self-Represented Litigants

Greacen's Previous Playbooks

- *Ensuring the Right to Be Heard* (IAALS, November 2019)
https://iaals.du.edu/sites/default/files/documents/publications/ensuring_the_right_to_be_heard_guidance_for_trial_judges.pdf
- *Eighteen Ways Courts Should Use Technology to Better Serve Their Customers* (IAALS, October 2018)
https://iaals.du.edu/sites/default/files/documents/publications/eighteen_ways_courts_should_use_technology.pdf

Ensuring the Right to Be Heard
A Tale of Two Studies

“It was the best of times. It was the worst of times.”

Charles Dickens



John Greacen, Greacen Associates, LLC

Effectiveness of Courtroom
Communication in Hearings
Involving Two Self-Represented
Litigants –
An Exploratory Study (2008)

Context of the Study

- Purpose – to test the hypothesis that SLRs do not understand what goes on during their court hearings
- Method – videotaping hearings and debriefings in family court; short surveys; non-verbal communications experts
- Courts – four of the very best in the nation in three states
- Observations –
 - 160 hours
 - 15 family law hearings with two SRLs
 - none were first hearings in the case
 - 29 of 30 SRLs were minority
 - 10 judges

Findings

- Average comprehension score – 8.7 on a 10 point scale.
- Litigants' scores on fairness all above the mid-point, including for litigants who reported that they lost.
- No apparent difference in comprehension as a result of the gender, race or ethnicity of the judges or SRLs nor the non-verbal communication skill level of the judges
- Some SRL behavior was quite sophisticated.

10 Best Practice Techniques for Use by Judges

Frame the SUBJECT MATTER of the hearing

Explain the process to be followed

Elicit needed information from litigants

INVOLVE LITIGANTS in decision-making

Articulate the decision from the bench

EXPLAIN the DECISION & summarize the terms of the ORDER

Anticipate & Resolve Issues with Compliance

Provide a written order at the close of the hearing

Use nonverbal communication effectively

Set litigant expectations for next steps



Adoption of These Approaches by State Courts

- 2010 ABA amendment to the commentary to Rule 2.2 of the Model Code of Judicial Conduct
 - It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.**
- State adoption varies: 30 adoptions; 6 expansions; 15 silent
- Every state – accommodations discretionary.



Anna E. Carpenter, University of Utah Law
Colleen Shanahan, Columbia Law
Jessica K. Steinberg, George Washington Law
Alyx Mark, Wesleyan University

Judges in Lawyerless Courts,
forthcoming in 110 Georgetown Law
Journal (2022)

Context of the Study

- Purpose – To understand whether and how judges are altering the traditional judicial role to assist SRLs across diverse jurisdictions
- Method – In-person court observations and verbatim transcripts of protective order hearings
- Courts – three in different states; differing Justice Index scores, statewide policies on judicial accommodation of the needs of SRLs and different levels of trial court autonomy.
- Observations
 - 200 hours
 - 357 hearings involving at least one SRL
 - 11 judges, 4 of whom participated in interviews

Findings

- No meaningful variations across judges or the jurisdictions studied.
- Judges approached *pro se* hearings in similar ways and consistently offered little assistance to *pro se* litigants.
- Judges maintained legal and procedural complexity.
 - They did not explain terms or processes, used legal jargon, and often criticized parties for asking questions or expressing confusion.
- Judges tightly controlled the presentation of evidence, relying heavily on the allegations in the petition to establish the facts
 - They discouraged party narratives and did not seek out evidence through asking questions.

Examples

- Opening explanations
 - Canned presentations that focused on expectations for litigant behavior and did not explain the legal issues or possible defenses. Introductory statements were laced with legal jargon.
- Presentation of evidence
 - The judge focused on eliciting support for the factual allegations in the petition. Neither petitioners nor respondents were afforded an opportunity to tell their stories.
- Questions from the litigants
 - Were ignored for the most part. Judges reverted to statements such as “I am not your lawyer.”

Examples

- Explanation of rulings
 - Judges did not explain the basis for their decisions. They made no effort to explain the contents of the restraining orders. They declined to answer questions about the terms of their orders.
- Resolving conflicts concerning the terms of existing orders
 - Judges refused to even allow the presentation of evidence concerning compliance with the terms of orders – such as the right to supervised visitation, how visitation exchanges were to be conducted, or the details concerning restrictions on communication with the protected person.

Inconsistency with Expressed Judicial Values

- The behavior of the judges in the courtroom bore little relationship to the values the judges expressed during their interviews.

Why?

“Why did the judges in our study behave in similar ways? Why did they resist offering explanations and information to litigants and refuse to answer questions? Why did they use so much jargon? Why did they limit the evidence they were willing to hear and consistently use leading questions to shape testimony? Why did they rely so heavily on petitions to drive information gathering? “

The Researchers' Conclusions

1. The structure of the American civil justice system
 - Assumes an adversary process
 - Parties define the issues to be resolved
 - Judge is passive
 - Policy guidance is discretionary; judge reverts to the traditional role.
2. Time pressure
 - From court leadership and from large number of persons in the courtroom
 - Statistical reports on docket currency
 - No feedback on courtroom performance or SRL experience
3. Imbalance of court-sanctioned assistance for parties in protective order cases

The Researchers' Recommendations

- Address “the fundamental disconnect between what state civil courts were designed to do – solve legal disputes through lawyer-driven, adversarial litigation – and what they are asked to do -- help people without lawyers navigate complex social, economic, and interpersonal challenges, most of which are deeply tied to systemic inequality.”
- Explore “questions about how best to influence and shape the future of judging,” including the role of non-judge actors in supporting a changed role for judges.
- Rethink “state civil courts’ role, including which problems belong in courts, which should be prevented through upstream solutions and interventions, and which require new institutions of remedy and problem-solving processes.”

Questions

- Are protective order cases inherently different from other family law cases?
 - Ex parte temporary orders
 - Stigmatized defendants
- Is the data representative for the nation as a whole?
- What options are there for limiting judicial discretion to disregard the guidance?
 - Judicial discipline
 - Appellate review
 - Systematic feedback for judges



The Challenge for Court Leaders



- Our business in handling civil cases is SRLs, not represented cases.
- Public trust and confidence in the court system is at stake.
- We cannot disregard the Carpenter, Shanahan, Steinberg and Mark findings.

Next NAPCO Webinar:
Thursday, November 18, 2021 – 3 p.m. EDT

*Arizona's Groundbreaking Venture
Eliminating Peremptory Challenges in Jury Selection*

<https://napco4courtleaders.org/>

