Essential Techniques for Hearings Involving Self-Represented Litigants

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Professional Development Conference

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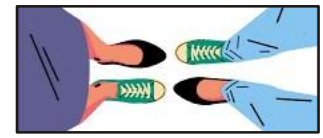
For just a moment, put yourself in the shoes of the self-represented litigant about to enter your hearing room:



What would you be thinking and feeling?

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- I have no idea what I'm supposed to do here.
- Are they going to listen to me?
- It's up to me to get myself out of this.
- I have no idea what to expect.
- What am I going to do if I lose?

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"I'd like to represent myself...though what as, I haven't yet decided."

Why Self-Representation?

- 57% did not have the money to pay an attorney
- 18% could have come up with the money did not want to spend it on an attorney
- 21% thought their case was simple enough that they didn't need an attorney
- 4% other miscellaneous reasons

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Why Self-Representation?

- Lack of Legal Aid for civil matters (administrative hearings)
- Anti-lawyer sentiment – People believe that lawyers will just make the problem worse
- Mistrust of the legal system
- Believes the administrative hearing will do what is right if they can just explain
- Society's trend toward self-help

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About Self-Represented Litigants

(statistics from two-year study in 2018-2019)

- 63% are over 50 years of age
- 45% make less than $30,000 per year
- 68% have hired an attorney to represent them on some civil matter in the past but decided not to for the instant case
- 52% said they'd had negative experiences working with a lawyer previously
- Many expressed a distrust of attorneys or said they had lost faith in their willingness or ability to help them.

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They have a right to represent themselves.

The U.S. Supreme Court determined that the 6th Amendment guarantees the right to defend oneself.

A person is

"entitled to preserve actual control over the case he chooses to present…"

Faretta v. California, 422 U.S. 806 (1975)

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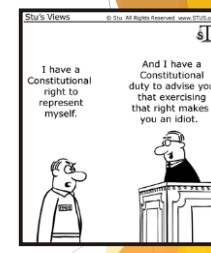
The choice to represent oneself must be made knowingly, voluntarily, and intelligently.

Always verify *on the record* that

- The party is not an attorney;
- Understands they're entitled to have an attorney (at their expense); and
- Chooses to proceed with the hearing without an attorney.

But do it more tactfully than this:



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In 2013, a man's appeal was dismissed by a Pittsburgh judge because he appeared at the correct date and time but was in the wrong courtroom. He had gone to the courtroom where he had filed his appeal, but that was not the same courtroom where the case was being heard.

(In the correct courtroom, the judge had regarded him as a "no show" for his appeal hearing and dismissed his case.

Without explanations of words, phrases, and procedures, the SRL may be handicapped in presenting his/her/their case.

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What do appellate courts say about hearing officials "helping" self-represented litigants?

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Ross v. Fergusson (Cal. 2006)

The Judge cannot rely on the *pro per* to know the procedural steps, raise objections, and ask witnesses relevant questions to protect due process.

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Lewis v. Lakeland Health Care Center, Inc., 685 So.2d 876 (Fla. 1996)

"The hearing is not a model of clarity. Ms. Lewis was not represented by an attorney…Even from reading the transcript, it is clear that Ms. Lewis was nervous or confused…the referee did not ask the questions necessary for Ms. Lewis to prove her burden on the issue, even though it is clear from the record that this layperson was attempting to rely, in part, upon that [family emergency] exception. Given the format of this type of administrative hearing, it is unlikely that an unrepresented claimant such as Ms. Lewis could ever prove the family emergency exception without sufficient questioning by the referee…we conclude that the family emergency exception should be more fully examined in fairness to Ms. Lewis."

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Albrecht, Rebecca A. et al.,
Judicial Techniques for Cases Involving Self-Represented Litigants,
Judges Journal, 42, 44 No. 1 (Winter 2003)

"Judicial efforts to enable SRLs to present their cases should be limited to assistance to the party in accomplishing the party's own strategy…"

"…So long as the judge is merely facilitating the SRL's presentation of his/her own case—as the litigant conceived it—the judge can be seen as giving 'legal information' about how to do in court what the party seeks to accomplish."

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Barriers for Self-Represented Litigants

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Barriers for Self-Represented Litigants

Communications Problems

- May have limited literacy or limited English
- Legal vocabulary includes Latin—*e.g.*, *pro se*, *ex parte*
- Agency acronyms, form abbreviations, and jargon
- Common English words with a different legal meaning
  - Pleading
  - Discovery
  - Issues
  - Sanction
  - Relevant

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Barriers for Self-Represented Litigants

Procedural Barriers

- Complexity of filing necessary documents or meeting deadlines
- Failure to understand relevance to the issues sufficient to determine what witnesses and exhibits will help them
- Providing or receiving discovery
- Requesting subpoenas for witnesses or information
- Other legal requirements that aren't intuitive

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Barriers for Self-Represented Litigants

Lack of familiarity with hearing/court processes

- Understanding what the burden of proof is and what the burden of proof means
- Order of presentation of a case
- How to raise or respond to objections
- Uneven playing field with attorney or experienced agency representative on the other side
- Misunderstanding of issues causes them to present evidence that is inculpatory or irrelevant

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Other Difficulties for Self-Represented Litigants

Frequently found on highly crowded dockets:

- Have limited time to ask questions
- Spend valuable time on irrelevant matters

Have highly elevated anxiety levels:

- Hearing seems very formal and unfamiliar
- Opposing party's tactics and objections cause anxiety
- Anxiety causes short-term memory loss

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Common Misconceptions of *Pro Se* Litigants

- Without a raised bench and black robes they don't understand that the "meeting" is a hearing
- Don't understand they must prove their case with evidence (they think an explanation should suffice)
- Benefit recipients may think primary role of *any* agency employee is to help them meet their needs
- Believes the hearing officer will automatically side with the agency

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Common Misconceptions of *Pro Se* Litigants

Doesn't understand limitations of ALJ's authority:

- Is willing to stipulate that agency's contentions are correct but seeks leniency in penalty by "throwing themselves on the mercy of the court"
- Believes that need—for benefits, license, etc.—should trump everything else
- Thinks ALJ has discretion to excuse bad behavior and allow them to retain benefits, license, etc.

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We Have Ethical Obligations to *Pro Se* Litigants

- *Canon 3 of the ABA Model Code of Judicial Conduct for State Hearing Officials includes*:
  - Duty to hear cases fairly
  - Be patient and courteous
  - Perform duties without bias
  - Dispose of matters fairly
  - Demonstrate due regard for the rights of the parties to be heard.

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What do self-represented litigants expect?

- VOICE: to participate in their case and express their statements
- NEUTRALITY: unbiased decision maker who is transparent about decision making
- RESPECT: courteous, respectful treatment, including respect for their rights
- TRUST: that decisions makers care about people, the process, and doing the right thing
- UNDERSTANDING: ability to understand procedures and decision-making process
- HELPFULNESS: interest in their personal situation to the extent the law allows

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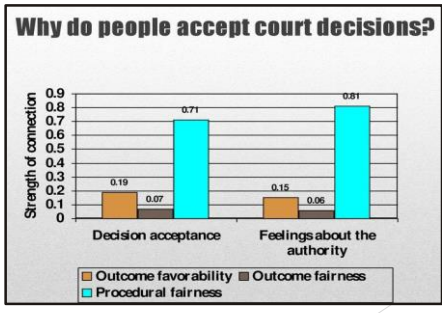

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Rule 2.2 of ABA Model Code for Hearing Officials:

"A judge shall uphold the law and shall decide cases with impartiality and fairness."

Comment 4 of this rule also says:

"It is not a violation of this rule, however, for a judge to make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard."

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Permissible (Neutral) Assistance to SRL

- May be flexible about the form of pleadings or briefs
- May provide brief information about proceedings and evidentiary and foundational requirements
- May modify the traditional order of taking evidence
- May address SRL's concerns even if not raised in compliance with normal court procedural rules
- May allow postponement or continuance to hire attorney or prepare case
- Explain basis for your rulings

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Permissible (Neutral) Assistance to SRL

- Do not dismiss based on technical rules
- Advise on efforts to compromise, settle, mediate
- Before approving settlement, determine waiver is knowing and voluntary
- Limit assistance to accomplishing party's strategy, not suggesting a different or better strategy
- Facilitate SRL's presentation of their case as they conceived it; explain how to do what they seek to accomplish

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Results of Post-Hearing Exit Poll of SRLs

Was the judge biased against you for not understanding the law or courtroom procedure?

- *47% Yes. The judge turned against me for not knowing the proper procedures.*
- *32% Yes. The judge seemed annoyed with me.*
- *16% Yes. In fact, the judge told me to hire a lawyer.*
- *5% No. The judge was helpful and patient.*

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Thoughts on how an Agency could help the SRL

- Train staff on *how* to assist SRL
- Easy-to-use forms
- Simplified instructions
- Provide info on substantive and procedural law and hearing processes
- Telephone hotline number for questions
- Electronic filing of documents via internet or easy alternative
- Attend a hearing or see a video of a hearing

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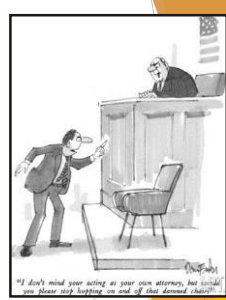
Protocol for Hearings Involving Self-Represented Litigants



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Prehearing Protocol

>May conduct an (on-the-record) preliminary conference to discuss procedure, deadlines, and how to organize and prepare for hearing.

>Raise possibility of settlement or mediation, if available.

>Provide a reasonable time and opportunity to obtain evidence.

>Give clear written notice of pre-hearing orders and obligations, including consequences of failure to comply (*e.g.* discovery).

>Identify and resolve obstacles to compliance with orders (*e.g.* relieve obligation to file forms electronically if SRL has no computer).

>Construe pleadings liberally (look at substance rather than form), notify SRL of substantive defects, and allow amendments

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Immediately Prior to the Hearing

Explain:

1. The process or procedure of the administrative hearing.
2. Hearing officer is an unbiased neutral
3. Hearing officer's discretion is limited—must follow statutes and regulations
4. If possible explain any exhibits or assist in marking the exhibits to be presented
5. Acknowledge impact of emotions: "I can see you're feeling _____, which is understandable. I know this is important to you."
6. SRL may ask questions regarding procedure/process as they arise
7. Make SRL feel at ease
8. Create good listening environment

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As the Hearing Begins

Explain, using simple words, on the record:

1. Scope of the hearing/issues (providing a printed excerpt from the controlling statute defining the scope of the hearing in simple words is helpful);
2. Testimony/evidence presented is limited to what is relevant to the issues within the hearing scope;
3. How to lay foundation for evidence; and
4. What the standard or burden of proof is for the hearing and what that standard means.

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As the Hearing Begins

Explain, if needed:

Decorum and Demeanor:

- Be on time
- Be polite and respectful of everyone
- Objections: that they are allowed
- Order of Presentation—stress that both sides get their turn
- Testimony will be sworn in and witnesses may be cross-examined

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As the Hearing Begins

Explain, If needed:

Process and procedures

- What "the record" is, how it is kept and why it's important
- ALJ may ask questions to clear up misunderstandings, develop facts
- SRL may ask questions regarding procedures to be followed but cannot seek advice on strategy of presenting case
- Clarify each party's position if SRL seems confused about it
- List/describe exhibits; ascertain both parties have copies with them

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During the Hearing

Don't ignore	Don't ignore a basis for claim or apparent defense suggested by the facts alleged in the pleading or raised by the SRL simply because the litigant doesn't expressly refer to that theory.
Consider	Consider information in other, atypical documents filed by the SRL (letters).
Determine	Determine that any waiver made by the SRL is knowingly and voluntarily made.

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During the Hearing

- Allow narrative testimony of SRL and SRL's witnesses.
- Actively question regarding necessary foundational elements.
- Raise *sua sponte* objections when appropriate.
- Call breaks when SRL is confused, when tempers flare, or when your patience runs low.

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During the Hearing

>If you relax a rule (of evidence or civil procedure) for an SRL, relax the same rule for the other side, too.

>Provide confirmation to SRL that he/she/they were heard by restating their position/contentions

>Dispose of cases based on the merits without regard to technical rules or procedure.

>Issue a decision that is readily understood by a *pro se* party.

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What type of ALJ are you?

- Non-Neutral ALJ: always leans one direction or the other—too rigid or too helpful.
- Neutral Passive ALJ: doesn't impose restraint when needed—the hearing runs long, the record is muddled.
- Neutral Engaged ALJ is
  - Cordial
  - Informative
  - Authoritative (not authoritarian)

	Engaged	Passive
Non-Neutral	Too rigid	Too helpful
Neutral	"Just right"	Pushover

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Engaged Neutrality

- Ethics and fairness require us, as triers of fact, to be neutral.
- Hearings with self-represented litigants require more attention and involvement—they require us to be "engaged."

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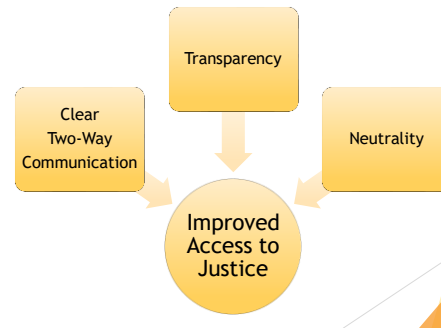

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Questions?

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