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## Dealing With Pro Se Adversaries in Family Law Matters

In this Family Law column, Toby Kleinman and Daniel Pollack discusses challenges that arise in cases with a pro se litigant, writing: Caution should be used by counsel when dealing with a pro se litigant. Pro se litigants must also be cautious. This thoughtfulness will help a family case move forward more effectively to a successful conclusion for all.

By **Toby Kleinman and Daniel Pollack** | *New York Law Journal*, April 15, 2020



Toby Kleinman and Daniel Pollack

At some point in their careers, most family law attorneys have dealt with adversaries representing themselves in a family matter. Many of us will react skeptically,

worrying about the potential for difficult or increased litigation as a result of dealing with someone who is not necessarily knowledgeable in law, evidence and procedures.

There seems to be an unwritten understanding that litigants are represented by attorneys. In actuality, litigants often decide to represent themselves. In choosing to do so, they face obstacles they may be unaware of as they try to move their cases forward. These obstacles may eventually limit their effectiveness. Some of the fundamental barriers include not knowing where to find reliable information, resources and advice; not having the ability or time to understand some of the more complex legal issues; and, being psychologically ill-prepared for courtroom combat when in the middle of a difficult and emotional family law matter.

A court must have the interests of justice in mind. It must allow pro se litigants to represent themselves. Nevertheless, the court must follow the law and court rules, which are substantial in every state. Judges and other court staff maintain a neutral stance when interacting with litigants. They may give litigants information, but not advice. What is the difference? Legal information may include answering specific questions regarding court procedures and forms. Legal advice is subtly or

proactively assisting a litigant in choosing a particular legal strategy.

There are some things an attorney can do to make the process with a pro se litigant move more easily. They can request that a judge instruct a pro se litigant to be apprised of the court rules, rules of evidence, and the necessary elements to prove their particular case. Even if the pro se litigant does not fully understand these rules, having the litigant instructed that these rules exist and must be followed may be instructive, especially if issues arise during the course of litigation. In a similar vein, the court must alert the pro se litigant that, while it will be patient about certain procedural matters, the litigant is obligated to prove its case according to the law, without expecting any private assistance from the court.

While instructing pro se litigants of some things they must do, judges should also be careful not to:

- Instruct a pro se litigant how to phrase arguments in their documents or in court.
- Provide information to a pro se litigant that it would not to provide to the opponent represented by an attorney.

- Indicate to a pro se litigant that he or she overlooked something critical in the file.
- Instruct the pro se litigant what he or she should do.
- Cross the line between providing permissible procedural information and offering advice.

Litigation, by its very nature, can engender high emotions. Family law litigation may pique these emotions, especially where children are involved. Since the emotional circumstances surrounding this litigation may engender additional fervor and intensity, pro se litigants must be able to separate their emotions from the legal proceedings. Attorneys are trained to be able to differentiate opinions from facts.

Pro se litigants may want to express their opinions as facts or they may not fully understand the nature of facts as they occur in a courtroom. Notwithstanding their lack of formal legal training, the pro se litigant must be held to the same objective standards as any attorney.

Attorneys must always conduct themselves with dignity and propriety. This applies to how they behave with pro se litigants as well.

This means that regardless of what the pro se litigant argues or how they argue their case, the attorney must maintain appropriate decorum. A pro se adversary may be angry regarding any number of things. For instance, they may be angry because their spouse is spending marital funds before or during litigation. This anger may increase if there are issues of child custody. Regardless of how a pro se expresses himself/herself, the attorney must maintain dignity.

A pro se litigant who is the victim of domestic abuse arguing a case for custody may show authentic anger. Nevertheless, this anger may not be appropriate to display in the courtroom. An opposing attorney can take advantage of such inappropriate displays of anger with regard to custody of children. On a related note, attorneys dealing with pro se litigants may need to take extra precautions, as some pro se litigants may appear belligerent, or even combative. Pro se litigants may not realize when it is wise to back down on certain issues and that sometimes attorneys deliberately express anger as a strategy.

Negotiating with a pro se litigant can be arduous. Family law cases

can take a long time to move forward, whether at the pretrial or trial stage. To help move the case forward it may be best to communicate with a pro se adversary in writing, thus avoiding misunderstanding. Doing so will also help pro se litigants from making misstatements in court about things that were said, especially since lawyers tend to use easily misinterpreted legalese. When this occurs, it may appear as an attack by the pro se litigant about the attorney for saying something inappropriate.

**As all trial attorneys know, a judge's** chamber is often used to conference a case. These conferences are not on the record and there is no transcript, even though sometimes a judge will summarize a conference afterwards and place that summary on the record. With a pro se litigant it is a good idea to stay on the record rather than having in-chamber discussions. This can avoid future misunderstandings and/or misinterpretations of what may have been discussed or agreed to. However, pro se litigants and **attorneys can "correct" a record if** they disagree with what a judge places on the record if there is an off the record conference.

Finally, pro se litigants may get to tell their own story in court under oath if there are testimonial hearings. However, this will also give opposing counsel the opportunity to cross-examine the pro se party about things he or she has said or done or argued in court as an adversary.

Essentially, caution should be used by counsel when dealing with a pro se litigant. Pro se litigants must also be cautious. This thoughtfulness will help a family case move forward more effectively to a successful conclusion for all.

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