



MARICOPA COUNTY JUSTICE COURTS BEST PRACTICES

SUBJECT: Ensuring Access to Justice for Self-Represented Litigants
in Civil Cases

EFFECTIVE: August 26, 2015

- 1.0 RATIONALE: Judges should ensure access to justice by attempting to make sure that people get their day in court by having an opportunity to be heard and by explaining that otherwise admissible evidence should not be excluded due to an insignificant procedural problem. Most self-represented litigants want to trust the process and the judge. Thus, an explanation of questions, descriptions of procedures and of the law, and clarifications of what will happen next are welcomed. If decisions are based upon the merits of a case, and not because a self-represented litigant was unfamiliar with procedural rules, confidence in the judicial branch can be maintained.
- 2.0 PURPOSE: The purpose of any “best practice” is to foster excellence regarding case processing, form development and control, and other operating procedure throughout the Maricopa County Justice Court system (“MCJC”). Implementation of a “best practice” is strongly recommended to promote consistency and efficiency throughout the MCJC but is voluntary by any individual Justice of the Peace (“JP”) Court.
- 3.0 ISSUE: There has been a paradigm shift away from a trial court judge strictly enforcing every court rule against a self-represented litigant (and simply holding them to an identical standard as an attorney) to encouraging judges to inform self-represented litigants of proper procedures. Much of this new judicial philosophy has already been incorporated into the Rules of Procedure for Eviction Actions and into the Justice Court Rules of Civil Procedure. Even so, this type of judicial discretion is especially challenging because it requires the judge to balance competing interests. A judge should ensure that any leniency

Attachment

that compromises the court's impartiality should not occur.

- 4.0 **LEGAL AUTHORITY:** In accordance with the Arizona Code of Judicial Conduct, Rule 2.2, Impartiality and Fairness, a "judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment 4 to that Rule confirms that a judge may "make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard." Judges have the obligation to ensure that all parties are heard and the right to be heard is meaningless unless that right is full and complete. In addition, Rule 2.8(B) of the Code of Judicial Conduct requires that a judge shall be patient, dignified, and courteous to litigants. *See also, Turner v. Rogers*, 131 S.Ct. 2507 (2011)(Held 14th Amendment's due process clause requires state assistance to unrepresented litigants in a child support case when the possible outcome includes incarceration); "Proposed Best Practices for Cases Involving Self-Represented Litigants," American Judicature Society; Goals 1 and 4 of the Arizona Supreme Court's Strategic Plan, "Advancing Justice Together." *See generally*, R. Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 Notre Dame Journal of Law, Ethics & Public Policy 367 (2008).
- 5.0 **SUGGESTED BEST PRACTICES:** When a self-represented litigant appears, a judge should consider implementing the following best practices:

BEGINNING A PROCEEDING:

1. Record all interactions with self-represented litigants.

Note: Rule 1(L) of the Arizona Rules of Protective Order Procedure states that a judge shall, where practicable, record all hearings, including ex parte proceedings. In addition, an audio record would assist a court in determining whether to allow a withdrawal of a guilty plea pursuant to Rule 17.5 of the Arizona Rules of Criminal Procedure.

2. Make sure the parties understand what is to be decided at the current proceeding.

OOP Example: *"Today I have to decide whether to leave in place an Order of Protection that prohibits the defendant from contacting the plaintiff in certain ways and from visiting certain locations. That is all that I am going to decide. [I am not going to determine child custody, parenting time, who is a better parent, or who is a better person.] Do both sides understand that?"*

Civil Pre-trial Conference Example: *"The purpose of a pre-trial conference*

is to check in on the status of a case and see what needs to happen next. We can briefly discuss whether the case can be settled today and if it can, great. If not, I need to explain what a motion for summary judgment is. Did both sides exchange a disclosure statement?"

3. Outline the procedure to be followed at the hearing, including the responsibility for the burden of proof.

Civil Case Example: *"I don't expect that either side is an expert in hearing procedures, so I want to give you a brief overview of what is going to happen today. (1) Both sides will have an opportunity to make an opening statement. An opening statement is a brief overview of what you think the evidence will be. It is not your time to tell me everything you think I need to know about the case. (2) After both sides have made opening statements, the Plaintiff will go first. You can call yourself as a witness and can call other people as witnesses. You can also offer documents and photographs into evidence. (3) After you are through with your initial testimony, the Defendant will have a chance to ask you questions. The same is true for any other witnesses you call. (4) This is called cross-examination. You may be familiar with it from TV police shows. However, when you are asking questions to the other side, you must just ask questions. You cannot argue, debate, start to give your own version of the facts, or do anything you see on afternoon TV judge shows. Nobody is going to yell at each other. You just ask questions. (5) After the Plaintiff is through with her case, the Defendant's case will proceed in the same manner. You can call yourself as a witness, offer documents or photographs into evidence, and then she will ask questions of you and of your witnesses. (6) After both sides have presented their evidence, both sides have a chance to tell me why they think their side should prevail. That is called closing argument. The Plaintiff will go first, followed by the Defendant, and then the plaintiff gets the last word because she has the burden of proof. That's called a rebuttal argument. Does either side have any questions?"*

4. Indicate the time available for the hearing.

Example: *"I will let you know in advance that we have only thirty minutes for this whole hearing. Please understand that, at times, I may have to keep us moving to ensure that we get to everything we need to and to properly hear from both of you."*

5. Explain the governing law or explain the elements of the case in a manner that helps the parties focus their testimony.

Example: *"In order to grant an Injunction against Harassment, I need to find at least two specific examples of harassment that happened within the*

last year. That means behavior that would cause a reasonable person to be seriously alarmed, annoyed, or harassed."

6. Use simple language and invite questions.

Eviction Example: *"Your landlord is claiming that you have not paid rent for July. Is that true? [If tenant says, yes] Why? [Listen for anything that sounds like a potential defense (e.g. It's been really hard since he cut off the electricity, etc.)]. All kinds of people cannot pay their rent for all kinds of reasons that are not their fault. That does not make you a bad person; but it does entitle the landlord to a judgment against you today."*

7. Clarify that the judge's questions and interruptions have no purpose other than getting to the facts.

Example: *"If I ask a question or shape the discussion, it is not to cut you off or to help you. I am just trying to get to the facts we need to decide the issue before us. It does not mean anything about how I feel about the case."*

8. Pay attention and look like you are paying attention.

Note: *If you take notes or refer to books or information on a computer screen during a proceeding, explain what you are doing so that the litigants understand that they have your attention.*

MANAGING EVIDENCE:

1. Permit narrative testimony by a self-represented litigant.

Example: *"You don't have to ask yourself questions and then give answers. Just tell me, what happened from your perspective?"*

2. Ask questions to get to evidence.

OOP Example: *"In order to consider an Order of Protection, I need to find a specific relationship and then an act or threatened act of domestic violence. First, tell me about your relationship with the Defendant."*

3. Ask questions concerning the nature of the evidence and avoid not admitting evidence for overly technical reasons (e.g. foundation or authentication).

Note: This area is especially tricky and what may be appropriate in one context may not be appropriate for another.

Example: *"I see that you are offering a photograph. Can you tell me where the photograph came from, who took it, and what it shows? Is that what the plumbing looked like after the repairs were made?"*

4. Probe for details and for clarification.

Example: *"Can you help me understand what happened by telling me a bit more about that conversation? How did it start? What did he say? How did you respond?"*

5. Maintain control of the courtroom with courtesy and respect, and help litigants stay focused on matters relevant to the judge's decision.

Example: *"Sir, I think you may be telling me things that are not directly relevant to this case, and please stop making disparaging comments about the Defendant. That is not appropriate behavior for a courtroom and it makes it harder for me to listen and to consider the points you are making. It is not helpful to me in deciding the case because I need specific acts of conduct, not generalizations. Please just focus on what happened on that Friday between the two of you."*

6. Clarify the relevance of testimony when it is uncertain.

Example: *"Why do you think the behavior of the Defendant's girlfriend will help me decide whether to issue a Protective Order against the Defendant? Can you tell me instead about the conduct of the Defendant?"*

7. A judge in a bench trial determines the facts and applies the law to those facts. As such, the judge can consider any evidence that does not draw an objection and can either admit or reject evidence. However, there is an additional option. The judge can admit evidence that may not appear to comply with the Rules of Evidence and in so doing, can give that potentially questionable evidence the weight the judge sees fit.

8. When appropriate, tell litigants when they have failed to establish an important element, and then provide an opportunity to fill the gap. In some cases, it may be appropriate for the judge to consider telling litigants when they have failed to establish an important element of their claim or defense, and then, provide an opportunity to fill the gap. For example, it is often appropriate to ask a self-represented landlord whether they provided a five-day notice. Before telling a litigant this type of information there are several factors to consider (e.g. whether the other party is represented by an attorney, whether it is a bench or a jury trial, whether doing so is objectively fair, etc.).

Example: "Sir, the only evidence that you have given about the nature of your injuries is your testimony that when it rains, your knee hurts a little. That is not, itself, very strong evidence. Do you have any other evidence about your injuries?"

9. Provide a final opportunity for litigants to add to their testimony or to present additional evidence.

Example: "You will still have an opportunity to make a closing argument; but is there any additional evidence you would like me to consider? Do you have any additional documents or photographs? Do you have any additional witnesses?"

10. When necessary, the judge should remind the parties that the judge must be neutral and fair.

Example: "I can't help you present your case; but this is a time to ask questions and you need to ask questions. You will have a time to testify and give your own version of these events; but now, you can only ask questions. I am neutral and don't have a stake in the outcome of this case."

CONCLUDING THE PROCEEDING:

1. Announce the decision, if possible, from the bench.

Eviction Example: "I find that the tenant did not pay rent and did not have a valid reason to withhold rent under Arizona law. In some states you can 'rent strike' or just stop paying all of your rent if you are having problems with your landlord. In Arizona, you can't do that. Now let me explain what your options are now that I am granting judgment for the Plaintiff."

2. Explain the decision and consider acknowledging the positions and strengths of both sides.

Example: "Let me explain my decision to you. The Plaintiff did establish that the Defendant was negligent in repairing her car. She did establish that she is entitled to \$1,500.00 for the costs of the additional repairs. However, the Plaintiff did not establish that she was entitled to expenses for the limousine service that she had used while her vehicle was being repaired."

3. Make sure that the litigants understand the decision and what is expected of them, taking the opportunity to encourage the litigants to explain any problems that they might have complying.

OOP Example: *"It is very important that you understand what I have just ordered. Do you understand that you are to have no contact with the Plaintiff except by e-mail or by text message? Now let me emphasize that this order is not something for you two to disregard on your own. Plaintiff, if in the future you want the Defendant to be able to contact you in different ways, then you would need to come in to court to have the order modified or dismissed. Do both of you understand?"*

4. Where relevant, inform the litigants of what will be happening next in the case and what is expected of them.

Eviction Example: *"All kinds of people cannot pay their rent for all kinds of reasons. This does not make you a bad person, but it does mean that the landlord will get a judgment against you today. You may or may not have to move, but you need to know whether the landlord is willing to work with you or not. If not, then you need to immediately start looking for a new place to live because five days from today, the landlord can file what is called a writ of restitution. When I sign it, it is an order for a constable to remove you from the residence. Five days is not very much time to find a new place to live, but it is much better than the five minutes that the constable will give you. So you need to know today, if possible, whether your landlord is willing to work with you. You also have a right to appeal this case and there is a handout available at our front counter that explains those rights. You only have five days to file a notice of appeal. Do you have any questions?"*

5. Thank the parties for their participation and acknowledge their efforts.

Example: *"I want to end by thanking you both for your professionalism. This case had the potential to get very ugly but it didn't."*

- 6.0 IMPLEMENTATION: The above best practice was recommended on August 26, 2015. The practice may be implemented immediately and remain effective until superseded or abolished.