ATTACHMENT

Arizona Supreme Court No. R-24-0006

Reply in Support of Petition to Amend Arizona Code of Judicial Conduct Rule 2.6 (Ensuring the Right to be Heard)

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**Feature**
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# THE SELF-REPRESENTED PARTY
## The Most Unique Party of Them All

***25** Most litigants in Arizona state court cases are not represented by an attorney--not by choice but given financial and other considerations. These self-represented parties create challenges for all involved, including opposing parties, counsel, witnesses, jurors and the courts. Self-represented parties have been a feature of Arizona's state courts since before statehood. Given the right to counsel recognized in criminal and juvenile cases, the percentage of self-represented parties in Arizona's courts may be smaller than decades ago. As the population and case numbers have grown, however, the number of self-represented parties also has increased.

***26** Critical matters often involve self-represented parties. Child custody proceedings in family court, eviction and collection matters in justice courts, and unemployment benefit administrative and judicial proceedings provide a few important examples. Although the law seems to get more and more complex over time, the stated approach courts use in dealing with self-represented parties has remained the same: treat those parties the same as lawyers. In other words, laypeople representing themselves are expected to know the law just as well as law school graduates who have honed their craft for years. This directive also suggests that self-represented parties are left to try to crack the procedural and legal code, language and custom that comes from centuries of evolution and squads of legislative and judicial writers.

This article focuses on this phenomenon in Arizona. It begins with some background of what types of cases typically involve self-represented parties. The article then describes the textual approach courts take in dealing with self-represented parties, showing how that approach lacks vigor in application and traces its origin in Arizona to a case that does not withstand scrutiny. The article ends with suggesting some modest alternatives to this textual approach that would advance efforts to provide access to civil justice by furthering procedural equity without altering the substantive law applicable to resolve disputes involving self-represented parties.

### Who Are Self-Represented Parties in Arizona's Courts?

When Arizona became a state in 1912, almost no litigant had a right to appointed counsel. So Arizona's courts have been

dealing with self-represented parties, sometimes called pro se or pro per parties, since before statehood. The right to appointed counsel has changed over time, but only in certain case types. To help focus the inquiry, this article divides cases into five types: (1) criminal; (2) juvenile; (3) family; (4) civil and (5) administrative.

In criminal matters, the State as the prosecuting entity is not indigent and is represented by counsel. For serious (felony) criminal matters, nearly 60 years ago, *Gideon v. Wainwright*[1] held that a defendant who could not afford an attorney had a constitutional right to appointed counsel. Today in Arizona, defendants charged with felony offenses who cannot afford an attorney have a right to appointed counsel, and for less serious criminal charges, the court has discretion to appoint counsel for an indigent defendant "if required by the interests of justice."[2]

In juvenile proceedings, almost all indigent participants have a right to appointed counsel. *In re Gault*, a landmark case from Arizona, provides this right to juveniles facing delinquency charges.[3] Indigent parents in dependency (abuse or neglect) and termination of parental rights and permanent guardianship proceedings have a right to appointed counsel, as do children involved in such proceedings (either through an attorney or a guardian ad litem, who typically is an attorney, representing the child's interests).[4] There are some exceptions in juvenile proceedings where indigent parties do not have a right to appointed counsel,[5] but most parties in juvenile proceedings today have a right to appointed counsel.

With few exceptions, in Arizona, the right to appointed counsel begins and ends with criminal and juvenile proceedings. There is no right to appointed counsel in most family, civil and administrative proceedings. And although corporations and similar entities generally cannot appear in court as self-represented parties,[6] that prohibition does not apply to individuals. Nationwide, estimates provide that "more than 70 percent of civil and family cases involve at least one self-represented party. Many of these litigants encounter great difficulty in understanding what to do and when to do it."[7]

In Arizona, the percentages may be even higher. For Maricopa County Superior Court cases closed during the 12 months ending June 30, 2021 (FY 2021), more than 90 percent of family court cases had at least one self-represented party, and more than 70 percent of the cases involved both parties being self-represented. In only 8.4 percent (less than 1 in 10) of these cases were both parties represented by an attorney. In civil proceedings broadly, nearly 85 percent of cases terminated during FY 2021 had one self-represented party.[8] In Arizona's Justice and Municipal Courts, the percentages may be even higher. And the same likely is true in administrative proceedings.

In recent years, there have been nearly 200,000 cases filed annually in Arizona Superior Court, far more than half of which are non-criminal, non-juvenile cases. In the 12 months ending June 30, 2022 (FY 2022), more than 186,000 cases were filed in Arizona Superior Court, with more than 132,000 being non-criminal, non-juvenile cases.[9] In FY 2022, more than 1,315,000 cases were filed in Arizona's Justice and Municipal Courts. Of that total, more than ***28** 980,000 were non-criminal, non-juvenile cases, including nearly 70,000 eviction actions.[10] Collectively, there are easily hundreds of thousands, and perhaps more than a million, self-represented parties in cases filed in Arizona courts every year.

**How Arizona Courts Treat (Or Say They Treat) Self-Represented Parties**

Many Arizona appellate court decisions declare that courts treat self-represented litigants the same as attorneys. That statement comes in various forms, such as "It is well-established ... that a party who conducts a case without an attorney is entitled to no more consideration from the court than a party represented by counsel, and is held to the same standards expected of a lawyer."[11] Or, "Parties who choose to represent themselves 'are entitled to no more consideration than if they had been represented by counsel' and are held to the same standards as attorneys with respect to 'familiarity with required procedures and ... notice of statutes and local rules.'"[12] Or a self-represented party "is entitled to no more consideration than if he had been represented by counsel, and he is held to the same familiarity with required procedures and the same notice of statutes and local rules as would be attributed to a qualified member of the bar."[13] The directive is similar and unchanging. The foundation for this directive, however, traces to an old but dubious source.

Arizona cases stating courts treat self-represented parties the same as attorneys often trace, like links in a chain, to *Higgins v. Higgins*, 194 Ariz. 266 (App. 1999), then to *Homecraft Corp. v. Fimbres*, 119 Ariz. 299 (App. 1978), then to *Smith v. Rabb*, 95 Ariz. 49 (1963), and then to the origin: *Ackerman v. S. Ariz. Bank & Tr. Co.,* 39 Ariz. 484 (1932). *Ackerman* affirmed the grant of defendant's motion to strike a civil complaint after a self-represented plaintiff had tried, but failed, several times to cure claimed defects. In doing so, *Ackerman* stated, "Under the law one may be his own attorney if he wants to be. A layman

with resources who insists upon exercising the privilege of representing himself must expect and receive the same treatment as if represented by an attorney--no different, no better, no worse."[14] This declaration in *Ackerman* has become the mantra in Arizona for how to treat self-represented parties. But it is significant for what it says, and what it does not say.

The *Ackerman* court was not impressed with plaintiff's complaint, stating, "In all our experience we have never seen a pleading like this," noting it included disparate concerns "without help or guidance from either education or experience to relate, not any too coherently, a lot of grievances" that were "bungled and cluttered together, covering forty-three single-spaced typewritten pages." To be sure, that's a lot. And apparently ***29** there was even more.[15]

Although plaintiff claimed he represented himself "on the ground of poverty," the opinion specified that "statement was accepted 'with a grain of salt,"' given "[t]he record shows [Ackerman] is a very thrifty man and possessed of considerable means." *Ackerman* quickly added "[w]e have no doubt, however, that if [plaintiff] had submitted his troubles to a lawyer, and the facts had shown he had a good cause of action, the lawyer would have gladly and willingly helped him." In other words, a lawyer would have taken the case if Ackerman had a claim with merit, implying that because no lawyer represented him, the claim lacked merit. It is hard to square that with *Ackerman'*s declaration that "[u]nder the law one may be his own attorney if he wants to be."[16] It is also hard to square that with the thought that it is the claim made, not who makes the claim or whether the claimant is represented by an attorney, that matters.

But *Ackerman'*s suggestion that lawyers, but perhaps not self-represented parties, file valid claims assumes a choice: that the plaintiff could afford to hire a lawyer if she wanted to do so. What, then, does *Ackerman* say about litigants who cannot afford an attorney? "A layman with [out] resources?" *Ackerman* says nothing in that situation. But that distinction is overlooked in the cases citing *Ackerman*; those cases do not look at whether a litigant could afford to hire an attorney in stating that self-represented parties should be treated like lawyers. Instead, *Ackerman* has been quoted broadly, without regard to whether a self-represented party could afford an attorney.

Beyond that important but overlooked detail, cases citing *Ackerman*, or *Higgins, Homecraft* or *Rabb*, typically ignore the broad directive to treat self-represented ***30** litigants the same as attorneys. Right after quoting or noting that directive, Arizona appellate court decisions often recite significant qualifiers. Examples include, "Nevertheless, because we generally prefer to decide each case on its merits rather than to dismiss summarily on procedural grounds, we exercise our discretion and address the merits."[17] Or, "We also note that self-represented litigants are provided additional materials to assist them in complying with Arizona law and procedure."[18] Or a self-represented "litigant's lack of legal knowledge, however, may be relevant when assessing whether the plaintiff made a deliberate strategic decision rather than a mistake concerning the identity of the proper party."[19] So along with having an odd and dubious origin undercutting doctrinal validity, the *Ackerman* directive often is not followed in practice.

The origin of the *Ackerman* directive in 1932, built on the thought that only a position taken by an attorney representing a party would have merit, may justify not following the directive. And broadly, the *Ackerman* directive does not reflect current concepts of access to justice for various reasons, including that far less than everyone can afford to hire their own attorney. But apart from the appellate court decision qualifiers, do other materials show that courts are following the directive that self-represented parties should be treated the same as attorneys? The answer--particularly for trial courts--is no.

**Are Courts Generally Treating Self-Represented Parties the Same as Attorneys?**

If courts generally are treating self-represented parties the same as attorneys, there would be no need for special guidance on dealing with self-represented parties. Although there is a good deal of ethical guidance and training on how courts deal with parties generally, if the *Ackerman* directive about treating self-represented parties the same as attorneys holds, there would be no need to have specialized directives, literature or training on dealing with self-represented parties. But the reality is exactly the opposite: There are a large number of directives, publications and training programs specifically addressing how to deal with self-represented parties.

The American Bar Association Code of Judicial Conduct, adopted in many jurisdictions, provides in Rule 2.2 ("Impartiality and Fairness") the commonsense directive that "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment 4 to Rule 2.2 adds that "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se [self-represented] litigants the opportunity to have their matters fairly heard."

  

Arizona's Code of Judicial Conduct has a similar Rule 2.2, with a similar Comment 4.

Apart from ethical guidance for judges, manuals and books have been written to help courts deal with self-represented parties.[20] Apart from these tomes, a broad Westlaw search for "self represented" yielded nearly 6,500 secondary sources, including more than 2,600 law review articles.

Along with these books, manuals and articles, training for judicial officers further suggests courts are not treating self-represented parties like attorneys. There are a finite number of broad-based national judicial training entities, with the National Judicial College in Reno, Nevada, being a leader. In 2023 alone, the NJC is offering "Best Practices in Handling Cases with Self-Represented Litigants," a four-day class in October 2023; "Self-Represented Litigant Issues in [Commercial Motor Vehicle] Cases" (Parts I and 2) in July 2023, and week-long "General Jurisdiction" classes, offered both in April 2023 and then in October 2023, discussing case management by trial courts, "including cases involving self-represented litigants."[21]

None of this suggests that, in fact, courts are treating self-represented parties the same as attorneys. But what about attorneys? Are they treating self-represented parties the same as attorneys? If the *Ackerman* directive is followed, the answer should be yes. But it's not.

**Are Attorneys Treating Self-Represented Parties the Same as Attorneys?**

The Ethical Rules governing lawyers provide boundaries across which lawyers should not stray to avoid ethical discipline against their licenses. Many jurisdictions have adopted ethical rules based on the American Bar Association Rules of Professional Conduct. Arizona has adopted, in large part, these Ethical Rules in Arizona Supreme Court Rule 42 ("Arizona Rules of Professional Conduct").

If attorneys are treating self-represented parties the same as attorneys, the Ethical Rules should be silent on how attorneys deal with self-represented parties. They are not. In fact, Arizona Supreme Court Ethical Rule (ER) 4.3 is titled "Dealing with Unrepresented Person." ER 4.3 sets forth specific directives for how an attorney may interact with an unrepresented person, including self-represented litigants. Comment 1 to ER 4.3 sets forth a protective ***32** approach for such interactions, beginning with the directive that "[a]n unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person." Comment 2 to ER 4.3 softens this directive a bit, stating, "Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur." Not surprisingly, as with judges, there are many related written resources, and training, for attorneys dealing with self-represented parties, reaffirming that attorneys are not treating self-represented parties like attorneys.[22]

**What Could This Mean for Access to Civil Justice?**

If judges and attorneys are, in fact, treating self-represented parties differently than attorneys, and are being directed to do so by ethical standards, training and education, what should that mean? It is perhaps easiest to suggest what that cannot mean: It cannot mean that self-represented parties are subject to softer, more forgiving substantive law. The rule of law, a foundational cornerstone of the United States legal system, mandates that no person is above the law and that the law applies equally to all. So, no, the substantive law is the same for all. Judges and attorneys cannot waiver from that bedrock principle.

But what, then, could it mean? How about looking at process and procedure, rather than substantive law? What if it means that courts take a bit more care in explaining what is required, prohibited and expected when dealing with a self-represented party than they would when dealing with an attorney? What if it means that courts unpack acronyms used by those experienced in the law, and the area of the law, to try to understand requirements, rulings and conclusions? What if it means that there is more flexibility in discretionary non-substantive rulings to account for a self-represented party struggling to learn, in a very short time, knowledge that an attorney and the court have gained over years or decades of training and experience? What if it means that courts make available to a self-represented party information about legal and other

  

resources available in the community, again without putting a thumb on the scale substantively?

Nationwide, there have been calls for such action already. In 2020, the Council of Chief Justices of the State Supreme Courts and the Conference of State Court Administrators passed a resolution to "[e] nsure that self-help information and services ***33** are available both in person and remotely so that all litigants can access the full range of court self-help in the manner that is most appropriate for their needs." And that call for action followed a 2015 Resolution by the same groups, "Reaffirming the Commitment to Meaningful Access to Justice for All," by "support[ing] the aspirational goal of 100 percent access to effective assistance for essential civil legal needs" and urging "the National Center for State Courts and other national organizations to develop tools and provide assistance to states in achieving the goal of 100 percent access through a continuum of meaningful and appropriate services."[23]

There are already in place some analogues to these calls for action applicable in Arizona. In family law, for example, the Arizona Supreme Court has made plain that where the best interests of children are involved, the rigid application of procedural rules should be more flexible. "We have repeatedly stressed that the child's best interest is paramount in custody determinations," and that sanctions imposed for rule violations must not "unnecessarily interfere[] with [the court's] duty to consider the child's best interests in determining custody."[24] More recently, in reaffirming that an indigent party facing incarceration for civil contempt had no due process right to counsel, the United States Supreme Court noted "substitute procedural safeguards" that could be employed to "significantly reduce the risk of an erroneous deprivation of liberty." Those procedural safeguards, which left the substantive law unchanged, included providing notice to self-represented parties of critical issues; using court forms to obtain relevant information; an opportunity for the self-represented party to respond to statements, questions and allegations ***34** and express court findings. Such alternatives, it would seem, could help "ensure the 'fundamental fairness' of the proceeding even where the State does not pay for counsel for an indigent" litigant.[25]

There are many other ways that could further access to justice while not altering the equal application of substantive law required by the rule of law. One COVID-based possibility is allowing for remote appearances, which allowed litigants to access the court in an alternative means without needing to take time off work, secure transportation, find child care and other complicating factors created by an in-person court appearance. The data shows the power of making this one change in court procedures. In the 26 Maricopa County Justice Courts, when remote appearances were allowed given the need to socially distance, failure to appear rates in initial eviction hearings decreased from nearly 40 percent (39.17 percent) in July 2019 to less than 23 percent (22.98 percent) in August 2020, and seldom above 30 percent throughout 2021.[26] In 2022, the failure to appear rate for those hearings averaged 24.4 percent.[27] Those, and other alternatives, deserve much significant thought.

For now, perhaps, a good next step in the civil access to justice journey would be for Arizona's courts to acknowledge, expressly, that they procedurally treat self-represented parties differently than parties represented by attorneys, but that it is fair and reasonable to do so. Expressly recognizing what is already happening seems like a small but good next step. And the steps after that could include more concrete efforts to answer "what if" statements suggested above, and elsewhere. These efforts can properly further the goal of enhancing access to civil justice by helping to better provide procedural equity to self-represented parties without altering the equal application of substantive law required by the rule of law.

## Footnotes

a1 **JUDGE SAMUEL A. THUMMA** has served as a Judge on the Arizona Court of Appeals since 2012 and is Chair of the Arizona Commission on Access to Justice. **JACQUELINE E. MARZOCCA** served as a law clerk for Judge Thumma through August 2022 and is an associate at Gammage & Burnham, P.L.C. The views expressed are solely those of the authors.

1 372 U.S. 335 (1963).

2 *See* ARIZ.R.CRIM.P. 6.1(b); *see also* ARIZ.R.CRIM. P. 6.1(g) (defining "indigent" as "a person who is not financially able to retain counsel"). An indigent defendant filing a timely first notice of post-conviction relief also has a right to counsel for such proceedings. *See* ARIZ.R.CRIM.P. 32.5 & 33.5.

  

[3] 387 U.S. 1 (1967); *see also* A.R.S. § 8-221(A) (codifying the right).

[4] *See* A.R.S. §§ 8-824(D)(1) (dependencies); 8-843(B)(1) (dependencies); 8-872(D) (guardianships); 8-221 (generally).

[5] For example, a petitioner who files a private dependency or termination petition does not have a right to appointed counsel. Similarly, a victim in juvenile or criminal court does not have a right to appointed counsel.

[6] *See Mohr, Hackett, Pederson, Blakley, Randolph & Haga, P.C., v. Superior Court*, 155 Ariz. 150, 151 (App. 1987) (noting, with limited exceptions, "a corporation can only appear in court through an attorney") (citing cases).

[7] www.ncsc.org/services-and-experts/areas-of-expertise/children-and-families/fji-up-date/self-help

[8] August 3, 2022 data from Jennifer Ferguson, Ph.D., Data Integrity & Analytics Administrator, Judicial Branch of Arizona in Maricopa County, on file with authors. *See also Arizona Task Force on the Delivery of Legal Services Report and Recommendations* at 7 & n.9 (Oct. 4, 2019) ("And according to a report issued by the National Center for State Courts, 76% of 900,000 civil cases examined from July 1, 2012 through June 30, 2013 involved at least one self-represented party.") (citing National Center for State Courts, *The Landscape of Civil Litigation in State Courts*, 31-33 (2015)).

[9] www.azcourts.gov/statistics/Interactive-Data-Dashboards/Superior-Court-Filings-and-Terminations

[10] www.azcourts.gov/statistics/Interactive-Data-Dashboards/Limited-Jurisdiction-Filings-and-Terminations

[11] *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287 ¶ 16 (App. 2000).

[12] *In re Marriage of Williams*, 219 Ariz. 546, 549 ¶ 13 (App. 2008) (citations omitted).

[13] *Copper State Bank v. Saggio*, 139 Ariz. 438, 441 (App. 1983) (citations omitted).

[14] *Id.* at 486.

[15] The same day this *Ackerman* opinion issued, the Arizona Supreme Court ruled against Mr. Ackerman in two other opinions, expressing similar concerns about his filings in one of those cases. *See Ackerman v. S. Ariz. Bank & Tr. Co.,* 39 Ariz. 488, 489 (1932) (stating Mr. Ackerman's answer "is eighty-five single-space pages in length" listing "a great jumble of complaints against plaintiff and others extending over a long period of time"); *Ackerman v. Kaufman*, 39 Ariz. 490, 491 (1932) (noting the case "must abide the decision" in the *Ackerman* opinion quoted in text).

[16] *Ackerman v. S. Ariz. Bank & Tr. Co.,* 39 Ariz. 484, 485-86 (1932).

[17] *Jaffe v. JP Morgan Chase & Co.*, 2013 WL 2389825, *2 ¶ 6 (App. 2013).

[18] *In re Marriage of Hughes and Maldonado*, 2017 WL 2533336, *1 ¶ 3 n. 1 (App. 2017).

[19] *Flynn v. Campbell*, 243 Ariz. 76, 84 ¶ 25 (2017).

  

[20] *See, e.g.,* John M. Greacen & Michael Houlberg, *Ensuring the Right to Be Heard: Guidance for Trial Judges in Cases Involving Self-Represented Litigants*, Institute for the Advancement of the American Legal System, Nov. 2019; Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, American Judicature Society State Justice Institute, 2005; *American Code of Conduct for Trial Lawyers and Judges Involved in Civil Cases with Self-Represented Parties*, American College of Trial Lawyers, Oct. 2011; *Best Practices in Court-Based Programs for the Self-Represented: Concepts, Attributes, Issues for Exploration, Examples, Contacts, and Resources*, Self-Represented Litigation Network, State Justice Initiative and the National Center for State Courts (2008 ed.); *Handling Cases Involving Self-Represented Litigants--A National Bench Guide for Judges*, Self-Represented Litigation Network, National Judicial College, National Center for State Courts and American Judicature Society, 2008.

[21] www.judges.org/wp-content/up-loads/2022/12/2023-at-a-glance-Nov22.pdf

[22] *See, e.g.*, Annette Burns, *A Practical Guide for Attorneys Opposing Self-Represented Litigants in Family Court* (July 2017); *American Code of Conduct for Trial Lawyers and Judges Involved in Civil Cases with Self-Represented Parties*, American College of Trial Lawyers, Oct. 2011; Jona Goldschmidt, *Strategies for Dealing with Self-Represented Litigants*, 30 N.C.C.L. REV. 130 (2008).

[23] https://ccj.ncsc.org/__data/assets/pdf_file/0013/23602/07252015-reaffirming-commitment-meaningful-access-to-justice-for-all.pdf

[24] *Hays v. Gama*, 205 Ariz. 99, 102-13 ¶ 18 (2003).

[25] *Turner v. Rogers*, 564 U.S. 431, 448 (2011).

[26] *The Cost of Delayed Justice: A metaanalytic-driven study into the problems and solutions surrounding court backlogs* at 29 (ABA E-book).

[27] Data from Scott Davis, Communications/Public Information, Justice Courts. Maricopa.Gov (Mar. 6, 2023) (copy on file with the authors).

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