

TYL Practice Areas & Settings

A Guide for Attorneys Litigating Against Self-Represented Individuals

[M Blair Hlinka](#) and [Conor P Desmond](#)

Oct 11, 2024  7 min read

Summary

- Self-represented individuals, sometimes referred to as people proceeding pro se, can sometimes create ethical and practical challenges for the zealous licensed advocate.
- Your opponent may not understand procedural rules, how service of documents works, what is allowable in discovery, or even where the courthouse is.
- Courts will generally give self-represented litigants some leeway on procedural matters, which can make timely resolution of matters difficult to achieve.
- While [ABA Model Rule 4.3](#) is straightforward, the realities of meeting the ethical duties described in it can be challenging if its meaning is not taken to heart. It is incumbent on the lawyer to ensure that their ethical obligations are met throughout the litigation.



iStock.com/VAWiley

Individuals have been allowed to represent themselves in court since Congress passed the [Judiciary Act of 1789](#), one of the first laws passed in our nation's history. Today, the ancient right to represent yourself in court remains strong and is codified at [28 U.S.C. § 1654](#). Self-representation does not occur in just one area of the law and litigation. Self-represented individuals, sometimes referred to as people proceeding *pro se*, can sometimes create some challenges for the zealous licensed advocate. The following recommendations highlight situations in which you may come across a self-represented litigant and offer considerations for effectively managing these unique situations.



Don't miss out! ABA Members save up to 30% on base rates.*

Book with CDP 13000 & PC 211561.

*Discount applies to Pay Later base rate only. Taxes, fees, & options are excluded. Additional terms & exclusions apply.

Book now

Hertz ABA

Self-Representation Is Common

Self-representation is prevalent in the United States. According to [one statistic from the Federal Rules of Pro Se Procedure](#), around one in four non-prisoner civil cases filed in district courts are filed by self-represented individuals. For prisoners, it is estimated that around 90 percent of civil suits are filed by the prisoners themselves. In state courts, [self-representation is significantly more prevalent](#) than at the federal level, particularly in small claims, family, and traffic courts. In bankruptcy, individuals self-represent and file 10 to 45 percent of their own petitions. [In the US Tax Court, the proportion of self-represented individuals skyrockets to 84 percent!](#)

While individuals may represent themselves, corporations or other entities cannot be represented by non-attorneys. ([Rowland v. California Men's Colony](#), 506 U.S. 194 (1993)). The same applies in probate matters, as well as class actions. While some courts may permit self-represented individuals to argue orally, some appellate courts and the Supreme Court have blocked the practice.

Why Would So Many Folks Choose to Represent Themselves?

The reasons vary and may even concern a combination of reasons. For some individuals, it is the cost. Perhaps they cannot afford to hire an attorney, or they balk at the cost. For example, in the famous case of [Gideon v. Wainwright](#) in 1963, Clarence Earl Gideon defended himself when he was accused of a misdemeanor because he couldn't afford an attorney. For other individuals, they may feel like they are better positioned to defend themselves and hiring an attorney may not be necessary. Further, some individuals simply don't trust lawyers to have their best interests at heart.

With large numbers of self-represented litigants entering the court system, attorneys should be aware of the challenges, both ethical and practical, they could encounter. Cases against self-represented individuals differ from the "traditional" lawyer vs. lawyer setup. Your opponent likely may not understand procedural rules, how service of documents works, what is allowable in discovery, or even where the courthouse is. Further, courts will generally give self-represented litigants some leeway on procedural matters, which can make timely resolution of matters difficult to achieve. With that in mind, considering the following concepts can facilitate a more straightforward resolution of the case.

Ethical Considerations: Communicating with an Unrepresented Party

Lawyers need to balance their duty to zealously represent their client's interest and balancing the ethical challenges in dealing with an unrepresented person. As noted in the [ABA Model Rule 4.3](#):

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of

such person are or have a reasonable possibility of being in conflict with the interest of the client.

While the rule is straightforward, the realities of meeting the ethical duties described in the model rule can be challenging if its meaning is not taken to heart. It is incumbent on the lawyer to ensure that their ethical obligations are met throughout the litigation.

At all times, it is appropriate to direct the litigant to community and court resources. Examples include the [US Tax Court's guide](#), [local court resources](#), or even [ABA resources](#).

Act Professional

The simplest way to meet your ethical obligations is to be professional with the other side, just as you would be with another lawyer. Treating the self-represented person with dignity and respect will further your representation of your own case while also meeting your ethical obligations. Indeed, many self-represented individuals in courts may have never interacted with the justice system. There is a reasonable chance you may be the only person that they interact with directly.

Put yourself in the shoes of the other side. For example, in a federal tax case, think of a self-represented individual who has received several letters and phone calls and has attempted to resolve their tax dispute administratively. They tried to solve their issue with the Internal Revenue Service, but now they have been drawn into a court battle. They are likely a little frustrated, confused, and maybe even slightly scared at the thought of appearing before a judge to argue their position. Ensuring that you continue to act professionally and treat your opponent with the respect they deserve will keep the case civil, both literally and figuratively, and likely will put you on the right path toward resolution.

Furthermore, the court is likely to expect you, as a trained and experienced attorney, to uphold high standards of professionalism and, at times, provide additional assistance to self-represented litigants. To be clear, that does not mean a court will want you not to do your job. Rather, the court would expect you to provide basic assistance with nonlegal issues, such as pointing the other side to the local rules, court orders, or other resources. While the self-represented litigant will likely get the benefit of the doubt on procedural matters, the court may hold you to a more stringent standard, enhancing the need to remain professional and courteous with your opponent.

Clear Communication: Clarity, Plain Language, and In Writing

Always Make Your Role in the Proceeding Clear

Many self-represented litigants have never interacted with an attorney, much less a court. If you are the first attorney they meet in their case, they may have some fair questions: Are you my attorney? Do you work for the court? Can I talk to you about my case?

When approached with questions like this, you should be careful and consider your responses in line with [ABA Model Rule 4.3](#). It is good practice to consider, from the beginning of the litigation, to delineate your role in the matter. State that you represent your client and that the lawsuit is a dispute between the self-represented individual and your client.

Admittedly, there is an art to ensuring there is no confusion about your role in the litigation. If done indelicately, it can lead to filings that focus on personal attacks on the attorney rather than focusing on the case, which helps no one, including your client. Instead, consider asking the self-represented litigant what their understanding of your role is and seek to ensure they understand your role. Be prepared to have this discussion multiple times, but keep in mind that you are not unnecessarily antagonizing the self-represented litigant.

Avoid Unnecessary Legal Jargon

Next, you want to also avoid unnecessary legal jargon during your conversations with the self-represented litigant. Generally, self-represented litigants have no legal training and are not used to hearing legal phrases. However, a portion of self-represented litigants will have researched their dispute and may be comfortable with legal phrases. Instead, consider using plain language terms when articulating your client's position or dealing with legal issues. Bryan Garner, noted plain language advocate and legal writing guru, would approve!

Reduce Conversations to Writing

Finally, consider reducing conversations to writing and emailing the self-represented litigant after discussions or having a paralegal or secretary present on phone calls to take notes. This is always good advice for any litigation setting, and utilizing this in your practice with self-represented litigants does not suggest that a self-represented litigant is dishonest or would seek to twist your words. Instead, this practice may reduce possible confusion if the self-represented litigant does not understand the significance of certain details or comments from your discussion. A follow-up email summarizing what was discussed will ensure neither party takes a litigation step based on a flawed understanding.

Protect Your Client; Protect Yourself

Ultimately, you need to advocate for your client, and your priority is to protect your client's interests. Simply because your opponent is a self-represented litigant does not mean that you can ignore your duty of loyalty or advocate for your client. Making sure that all your filings are formally served and timely disclosed and that you conduct discovery in line with the rules ensures that you continue to protect your client and yourself.

To conclude, litigating against self-represented individuals poses some unique challenges that are not normally seen in lawyer-versus-lawyer cases. Importantly, you can still vigorously advocate for your client's interests while upholding your ethical responsibilities as an attorney when litigating against self-represented individuals by heeding some of these key considerations in the formulation and execution of your litigation strategy.

The views expressed are the author's and do not represent the official position of the Tax Division, the Department of Justice, or any other Government agency.

Authors



M Blair Hlinka

Blair Hlinka is an Associate in Caplin & Drysdale's Tax Disputes & Tax Litigation practice group. Ms. Hlinka assists individuals and corporations in all types of tax controversies and litigation with the Internal...



Conor P Desmond

...

Published by the American Bar Association ©2024. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

 American Bar Association |

https://www.americanbar.org/groups/young_lawyers/resources/tyl/practice-areas/guide-for-attorneys-litigating-against-self-represented-individuals/