THE COMMONWEALTH OF MASSACHUSETTS
ADMINISTRATIVE OFFICE OF THE TRIAL COURT

Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants

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JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS

Introduction

The Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants (Guidelines) were approved by the Justices of the Supreme Judicial Court in April, 2006. The Guidelines were developed by a Subcommittee on Judicial Guidelines (Subcommittee) established by the Supreme Judicial Court Steering Committee on Self-Represented Litigants (Steering Committee).[1] The Subcommittee explained the purpose of the Guidelines as follows:

> While the legal and ethical constraints upon the courts and the judiciary, such as those contained in the Code of Judicial Conduct, apply with equal force to cases involving self-represented litigants, judges have broad discretion within these boundaries. These guidelines have been developed to assist judges in recognizing the areas in which they have discretion and to assist them in the exercise of that discretion.

The Guidelines are reproduced here by themselves and with Commentary that was developed by the Subcommittee and endorsed by the Steering Committee.[2] The Commentary contains suggestions and references for judges who wish to exercise their discretion consistent with the Guidelines.

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[1] The members of the Steering Committee are: Hon. Cynthia J. Cohen, Chair, Associate Justice, Appeals Court; Marlene M. Ayash, Title Examiner II/Administrative Attorney, Land Court; Hon. Thomas P. Billings, Associate Justice, Superior Court; Maura S. Doyle, Clerk, Supreme Judicial Court for Suffolk County; Hon. Peter F. Doyle, Presiding Justice, Newburyport District Court; Hon. Diana H. Horan, First Justice, Worcester Housing Court; Hon. Thomas C. Horgan, Associate Justice, Boston Municipal Court; Thomas R. Lebach, Clerk Magistrate, Plymouth Juvenile Court; Marnie Warner, Law Library Coordinator, Trial Court Law Libraries.

The members of the Subcommittee are: Hon. Elaine M. Moriarty, Chair, Associate Justice, Suffolk Probate and Family Court; Hon. Thomas P. Billings; Hon. Peter F. Doyle; Hon. Diana H. Horan; Hon. Thomas C. Horgan. The late Lawrence J. Wernick, Associate Justice, Superior Court, was a member of the Steering Committee and the Subcommittee until February, 2003.

[2] The Commentary has not been reviewed by the Justices of the Supreme Judicial Court.

JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS

1. General Practices.

   1.1 Plain English. Judges should[3] use plain English and minimize the use of complex legal terms when conducting court proceedings.

   1.2 Language barriers. Judges should be attentive to language barriers experienced by self-represented litigants. Judges should take the necessary steps to provide qualified interpreters to self-represented litigants who are not fully conversant in English or who are hearing impaired.

   1.3 Legal representation. Judges should inform litigants that they have the right to retain counsel and the right to be represented by counsel throughout the course of the proceedings. Judges should also acknowledge that parties have a right to represent themselves. Judges should confirm that the self-represented litigant is not an attorney, understands the right to retain counsel, and will proceed without an attorney. Judges also may inquire into factors relevant to an understanding of self-representation.

   1.4 Application of the law. Judges shall apply the law without regard to the litigant's status as a self-represented party and shall neither favor nor penalize the litigant because that litigant is self-represented.

   1.5 Materials and services for self-represented litigants. Judges should encourage the provision of information and services to better enable self-represented litigants to use the courts. Judges also should encourage self-represented litigants to use these resources.

2. Guidelines for Pre-Hearing Interaction.

   2.1 Trial process. Judges should make a reasonable effort to ensure that self-represented litigants understand the trial process. Judges should inform litigants that the trial will be conducted in accordance with applicable evidentiary and court rules.

   2.2 Settlement. In cases in which settlement may be appropriate, judges may discuss the possibility of settlement. This may occur at any stage in the litigation, but particularly at a case management, pretrial, or status conference.

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[3] The term "should" is used throughout the Guidelines to indicate that the conduct referenced is recommended but not mandatory.

2.3 Alternative dispute resolution (ADR). When a case is appropriate for ADR, judges should discuss the availability and benefits of such services. S.J.C. Rule 1:18, Uniform Rules on Dispute Resolution, Rule 6, 427 Mass. 1309 (1999). This may occur at any stage in litigation, but particularly at a case management, pretrial, or status conference.

3. Guidelines for Conducting Hearings.

3.1 Courtroom decorum. Judges should maintain courtroom decorum cognizant of the effect it will have on everyone in the courtroom, including self-represented litigants. Judges should ensure that proceedings are conducted in a manner that is respectful to all participants, including self-represented litigants.

3.2 Evidence. Judges shall adhere to the applicable rules of evidence, but may use their discretion, when permissible, to provide self-represented litigants the opportunity to meaningfully present their cases. Judges may ask questions to elicit general information and to obtain clarification. Judges should explain why the questions are being asked and that they should not be taken as any indication of the judge's opinion of the case.

3.3 Right of self-representation. In jury trials, judges should ask self-represented litigants whether they want a right to self-representation instruction.

3.4 Approval of settlement agreements. Judges should review the terms of settlement agreements, even those resulting from ADR, with the parties. Judges should determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent possible, whether the waiver is knowing and voluntary.

4. Guidelines for Post-Hearing Interaction.

4.1 Issuing the decision. Judges should exercise discretion in deciding whether to issue a decision at the close of the hearing while both parties are present, or to inform the parties that the matter will be taken under advisement and that a written decision will be mailed to them. In cases where there is no immediate need to enter an order, the judge may inform the parties that the judge wishes to consider their evidence and arguments before making a decision. If possible, the judge should give a time frame within which the case will be decided.

4.2 Appeals. If asked about the appellate process, judges may refer the litigant to the appropriate authority.

JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS WITH COMMENTARY[1]

Introduction

The Guidelines were developed specifically for interactions with self-represented litigants in civil cases in which there is no right to counsel. Although the Guidelines may be a helpful resource in criminal cases and civil cases in which there is a right to counsel, they must be applied in light of the special considerations those cases present.

The Guidelines are advisory. The issues and challenges presented by self-represented litigants may vary in different court departments. Judges, therefore, are encouraged to use the Guidelines in a way that best suits the needs of their court and the litigants before them. To the extent that there is any conflict between the Guidelines and the Code of Judicial Conduct, the Code governs.

1. General Practices.

1.1 Plain English. Judges should use plain English and minimize the use of complex legal terms when conducting court proceedings.

Commentary

Most self-represented litigants are unfamiliar with complicated legal terms. The use of such terms can delay proceedings and necessitate lengthy explanations of concepts that are more readily understood if stated in plain English.

1.2 Language barriers. Judges should be attentive to language barriers experienced by self-represented litigants. Judges should take the necessary steps to provide qualified interpreters to self-represented litigants who are not fully conversant in English or who are hearing impaired.

[1] This Commentary is intended to supply suggestions and resources for judges who wish to exercise their discretion consistent with the Guidelines. It was authored by the Subcommittee on Judicial Guidelines of the Supreme Judicial Court Steering Committee on Self-Represented Litigants, and endorsed by the full Committee. It has not been reviewed by the Justices of the Supreme Judicial Court.

Commentary

Judges should not require any litigant who is not fully conversant in English or any hearing-impaired litigant to go forward at trial or any other significant event without a qualified interpreter. Judges should not assume that friends or family members accompanying the litigant are proficient enough in English or sign language to serve as translators or interpreters. When, during court proceedings, judges become aware of the need for an interpreter, judges should grant a continuance and order an interpreter for the next scheduled date.

1.3 Legal representation. Judges should inform litigants that they have the right to retain counsel and the right to be represented by counsel throughout the course of the proceedings. Judges should also acknowledge that parties have a right to represent themselves. Judges should confirm that the self-represented litigant is not an attorney, understands the right to retain counsel, and will proceed without an attorney. Judges also may inquire into factors relevant to an understanding of self-representation.

Commentary

Judges should make self-represented litigants aware of the consequences of proceeding without an attorney. Judges should explain that self-represented litigants have no right to a relaxation of the standards that apply to litigants who are represented by counsel. See International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 847 (1983); Burnham v. Clerk of Peabody Div. of Dist. Ct. Dept., 432 Mass. 1014 (2000). Judges may point out the complexities of the case and the advisability of obtaining or at least consulting with counsel.

Judges should explain that counsel for the opposing party does not represent the self-represented litigant and that opposing counsel may not advise the self-represented litigant, other than to suggest that the self-represented litigant secure independent counsel. See generally, Kaufman, Can We Talk: Communicating with Unrepresented Persons, http:www.mass.gov/obcbbo/talk.htm (last visited Oct. 11, 2004) (discussing communication between counsel for a represented party and an unrepresented party in light of Mass.R.Prof.C. 4.3[a] & 4.3[b]).

Judges should encourage litigants who proceed without counsel to consult resources developed specifically for self-represented litigants and inform self-represented litigants that they have the responsibility to become familiar with and to comply with the rules of procedure. Litigants also should be made award that referral and pro bono services and alternative forms of dispute resolution are available. (See Guideline 2.3, infra.) If a self-represented litigant appears to be mentally disabled, judges should take additional steps to involve counsel, support

services, and court-connected programs.

1.4 Application of the law. Judges shall apply the law without regard to the litigant's status as a self-represented party and shall neither favor nor penalize the litigant because that litigant is self-represented.

Commentary

Although self-represented litigants may not be treated more severely than other litigants, they are not entitled, because of their status, to be excused from relevant rules of procedural and substantive law. Pandey v. Roulston, 419 Mass.1010, 1011 (1995). See, e.g., Lamoureux v. Superintendent, Mass. Correctional Inst., Walpole, 390 Mass. 409, 410 n.4 (1983) ("While pro se complaints may be excused for demonstrating a lack of expertise and knowledge, the court will not advance legal theories neglected to be presented"); Mmoe v. Commonwealth, 393 Mass. 617, 619-620 (1985) (judge erred in ruling on motion to dismiss pro se complaint by considering oral statements and written materials, in addition to the complaint; while judges have broad power to adopt procedures to promote justice, they do not have power to fashion procedures in disregard of court rules); Commonwealth v. Jackson, 419 Mass. 716, 721 (1995) (trial judge did not err in limiting introduction of cumulative evidence and excluding improper questions by pro se defendant); Frullo v. Landenberger, 61 Mass. App. Ct. 814, 820 (2004) (rejecting argument that motion judge should have granted pro se plaintiffs additional time in which to obtain other testimony if expert's affidavit was insufficient to withstand summary judgment, even though pro se plaintiffs did not request it).

1.5 Materials and services for self-represented litigants. Judges should encourage the provision of information and services to better enable self-represented litigants to use the courts. Judges also should encourage self-represented litigants to use these resources.

Commentary

While, at first glance, this role seems more appropriately assigned to court staff, it is important that judges support this function. Many courts have informational handouts that can be made available in the courtroom, as well as in the Clerk's Office, Registry of Probate, and Probation Office. Judges should encourage the use of such materials. These handouts may include the phone numbers of lawyer referral services and may contain language that explains the advisability of retaining counsel. They also may include frequently asked questions and court specific information, such as information on alternative dispute resolution services, lawyer-for-a-day programs, housing specialists, and crisis centers.

It is important that judges support the provision of services, as well as information, to self-represented litigants. Judges should encourage and work with bar associations, law schools, legal services providers, and other organizations on programs that will provide in-person assistance to self-represented litigants in their courts. These may include, for example, lawyer-for-a-day programs and programs in which attorneys and those working under their supervision meet with litigants in the court and provide advice, assistance, and appropriate referrals. Judges also should endeavor to manage cases involving self-represented litigants in coordination with other services that may be used by or provided to litigants (e.g., mental health and substance abuse services).

2. Guidelines for Pre-Hearing Interaction.

2.1 Trial process. Judges should make a reasonable effort to ensure that self-represented litigants understand the trial process. Judges should inform litigants that the trial will be conducted in accordance with applicable evidentiary and court rules.

Commentary

When explaining the trial process, it is proper to do so in the same manner that a judge would explain it to a jury. Although judges may explain rulings, court policies and procedures, judges may not tell litigants what legal action to take. The following are examples of specific explanations that judges may wish to give:

Burden of production and proof.

- Parties bringing the action are responsible for presenting evidence to support their claims. A self-represented litigant must adhere to the essential requirements of presenting a case; a judge will not assume anything in support of the case if it has not been properly presented.
- The parties, not the court, are responsible for subpoenaing witnesses and records.
- There are limits on the kinds of evidence that may be admitted.
- The evidence admitted by the court must prove the elements of the plaintiff's claim according to the required legal standard.
- In the judge's discretion, the elements of claims and defenses, as well as the burden of proof may be explained in the same manner that they would be explained to a jury. See, e.g., Massachusetts Superior Court Civil Jury Instructions § 14.1.19 (Mass. Continuing Legal Educ. 1997 & 2003 supp.) (elements of a breach of contract claim); Massachusetts Superior Court Civil Jury Instructions §§ 1.18, 1.19 (Mass. Continuing Legal Educ. 1997 & 2003 supp.) (preponderance of the evidence standard).

Ex parte communication.

- The parties may not communicate about the case with the judge outside formal court proceedings.
- The judge, as a general rule, is prohibited from communicating with a party unless all parties are aware of the communication and have an opportunity to respond or be present.
- The parties must file all communications to the judge (complaints, motions, affidavits) with the clerk's office along with a notice that copies of those materials also have been given to the opposing party.

Judge as fact finder.

- In some proceedings the case will be heard without a jury; in such proceedings, the judge is the fact finder and the facts are determined by the judge from the evidence presented. For example, if A presents a witness who testifies the light is red and B presents a witness who testifies the light is green, it is the judge's responsibility to determine the color of the light and that determination becomes a fact of the case.

Courtroom conduct.

- Except when examining or cross-examining witnesses, litigants should address their remarks and questions to the judge. They should not direct comments to the opposing party or counsel for the opposing party.

2.2 Settlement. In cases in which settlement may be appropriate, judges may discuss the possibility of settlement. This may occur at any stage in the litigation, but particularly at a case management, pretrial, or status conference.

Many cases can be settled equitably with the involvement of the judge; however, to avoid later misunderstandings, **JUDGES ARE STRONGLY URGED TO RECORD ALL SETTLEMENT CONFERENCES.**

It may be particularly helpful for the judge to provide the opportunity for the parties to discuss settlement in the presence of the judge in cases where one party is self-represented and the other party has an attorney. In such cases, the self-represented litigant may be afraid to deal with the attorney for the opposing party outside of court, and the attorney for the opposing party may be reluctant to negotiate with the self-represented litigant for fear of being accused of overreaching or misleading the self-represented litigant.

Judges must keep in mind that "[i]t is inappropriate for [judges] in c. 209A proceedings to attempt to reconcile the parties or mediate disputes." Guidelines for Judicial Practice: Abuse Prevention Proceedings § 1:01 & commentary (Dec. 2000). Additionally, judges should not ask a self-represented litigant who is alleged to be the victim of domestic abuse to engage in settlement negotiations with an alleged abuser present. See Guidelines for Judicial Practice: Abuse Prevention Proceedings § 5:01 commentary (Dec. 2000).

At settlement conferences, judges should explain that the conference is an opportunity for the parties to resolve the issues themselves without the formality and expense of a trial; that they have the ability to reach their own resolution of the issues and to "write the judgment" through an agreement which is tailored to their needs. In addition to explaining that the judge is there to listen to both parties and ensure that the proceedings are conducted fairly, judges also should tell the parties that, if they are unable to settle, they have a right to a trial at which a judge or jury will make the decision based on the evidence admitted and the applicable law, and that this result may differ from what each of the parties is seeking. Judges may point out the complexities of the case and the advisability of obtaining or at least consulting with counsel.

In cases involving self-represented litigants, just as in cases where all parties are represented, judges may encourage settlement, but they may not require parties to reach a settlement. See Furtado v. Furtado, 380 Mass. 137, 151-152 (1980) (judge must show restraint in urging settlement on the parties); Slaughter v. McVey, 20 Mass. App. Ct. 768, 770 (1985) (judge who required parties to reach a definitive settlement before they left the courthouse over-exercised his privilege of intervention by placing excessive pressure on the parties to settle); Graizzaro v. Graizzaro, 36 Mass. App. Ct. 911, 912 (1994) (judges may appropriately urge settlement, but must avoid using their power to coerce settlements from recalcitrant parties, must maintain the appearance and substance of open-mindedness, and may not penalize a party for insisting on the right to have the court resolve the dispute). See also S.J.C. Rule 3.09, Canon 3 (B) (7) (d) & commentary (2003) (canon states that "[a] judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle civil matters pending before the judge," implicitly acknowledging that judges can play an important role in the settlement process).

"Where the judge is the trier of fact, he must be most scrupulous both to avoid losing his impartiality and to maintain his unfamiliarity with disputed matter which may come before him and with extraneous matters which should not be known by him." Furtado v. Furtado, 380 Mass. 137, 151-152 (1980). See also Allen v. Kidd, 197 Mass. 256, 261 (1908) (judge exceeded judicial authority by informing jury he suggested the parties settle and plaintiff rejected his suggestion); Harris v. Board of Trustees of State Colleges, 405 Mass. 515, 528

(1989) (judge's intimations as to probable disposition of case made during pretrial conference not improper and did not support a claim of bias); Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 13 (1997) (university not entitled to new trial based on judge's refusal to recuse himself, notwithstanding comments judge made during settlement conferences and jury selection that university perceived as negative).

If the parties do not settle, a judge's participation in settlement discussions may disqualify the judge from sitting as fact finder in the trial of that matter. See Furtado v. Furtado, supra. Whether the judge's participation in settlement discussions requires his disqualification depends on the circumstances of the case. Ibid. See generally J. Goldschmidt & L. Milord, Judicial Settlement Ethics: Judges Guide 21-29 (American Judicature Society 1996); Agnes, Some Observations and Suggestions Regarding the Settlement Activities of Trial Judges, 31 Suffolk U. L. Rev. 263 (1997).

2.3 Alternative dispute resolution (ADR). When a case is appropriate for ADR, judges should discuss the availability and benefits of such services. S.J.C. Rule 1:18, Uniform Rules on Dispute Resolution, Rule 6, 427 Mass. 1309 (1999). This may occur at any stage in litigation, but particularly at a case management, pretrial, or status conference.

Commentary

In cases involving self-represented litigants, just as in cases where all parties are represented, the parties may be able to settle their disputes early and effectively using mediation, case evaluation, arbitration, or another form of alternative dispute resolution. ADR often helps parties maintain their ongoing family or business relationships after the stress of litigation, and can be an effective case management tool, eliminating many months of litigation.

It is important to note that judges may not order ADR in abuse prevention proceedings, see G. L. c. 209A, § 3 (sixth par.) ("No court shall compel parties to mediate any aspect of their case."). Additionally, "[i]t is inappropriate for [judges] in c. 209A proceedings to attempt to reconcile the parties or mediate disputes." Guidelines for Judicial Practice: Abuse Prevention Proceedings § 1:01 & commentary (Dec. 2000). Judges also should not order ADR in cases in which there are issues of domestic violence.

Judges should inform the parties that: (1) the decision to participate in a dispute resolution process is voluntary; (2) they are not required to make offers and concessions or to settle; (3) if the parties do not settle the matter through ADR, they still may have the matter tried in court; (4) courts cannot impose sanctions if the parties do not settle, but courts may impose sanctions for failure,

without good cause, to attend a scheduled dispute resolution session; (5) the court will give particular attention to the issues presented by unrepresented parties, such as the need for the neutral to memorialize the agreement and the danger of coerced settlement in cases involving an imbalance of power between the parties; (6) in cases in which one or more of the parties is not represented by counsel, a neutral has the responsibility, while maintaining impartiality, to ask the parties to consider whether they have the information needed to reach a fair and fully informed settlement of the case; (7) the court may establish a deadline for the completion of a court-connected dispute resolution process, which may be extended by the court upon a showing that continuation is likely to assist in reaching resolution; (8) communication with the court during the dispute resolution process is conducted only by the parties or with their consent; and (9) unless the parties agree otherwise, the ADR program or neutral will provide the court only with: a request by the parties for additional time to complete dispute resolution, the neutral's assessment that the case is inappropriate for dispute resolution, or the fact that the dispute resolution process has concluded without parties having reached agreement. See S.J.C. Rule 1:18, Uniform Rules on Dispute Resolution, Rule 6, 427 Mass. 1312-1314 (1999). See generally Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution, A Guide to Court-Connected Alternative Dispute Resolution Services.

Judges may require parties and/or their attorneys to attend a screening session or an early intervention event regarding court-connected dispute resolution services. S.J.C. Rule 1:18, Uniform Rules on Dispute Resolution, Rule 6 (b), 427 Mass. 1312 (1999). In addition, judges may impose sanctions for failure without good cause to attend a mandatory screening session. Id.

3. Guidelines for Conducting Hearings.

3.1 Courtroom decorum. Judges should maintain courtroom decorum cognizant of the effect it will have on everyone in the courtroom, including self-represented litigants. Judges should ensure that proceedings are conducted in a manner that is respectful to all participants, including self-represented litigants.

Commentary

Judges, as role models in the courtroom, should provide a positive environment for those who represent themselves. See, e.g., Commonwealth v. Jackson, 419 Mass. 716, 721 (1995) (self-represented litigants should be addressed with titles connoting equal respect to that afforded opposing counsel); Commonwealth v. Stokes, 11 Mass. App. Ct. 949, 949-950 (1981) (requiring self-represented defendant to conduct trial from prisoner's dock, not counsel table, was improper, absent showing of necessity). A positive environment may be achieved, in part, by following the principles outlined in "Within Our Reach: Gender, Racial and Ethnic Equality in the Courts"[2] and by providing self-represented litigants with an explanation of relevant procedures.

3.2 Evidence. Judges shall adhere to the applicable rules of evidence, but may use their discretion, when permissible, to provide self-represented litigants the opportunity to meaningfully present their cases. Judges may ask questions to elicit general information and to obtain clarification. Judges should explain why the questions are being asked and that they should not be taken as any indication of the judge's opinion of the case.

Commentary

In Commonwealth v. Sapoznik, 28 Mass. App. Ct. 236 (1990), the role of the judge in a trial involving a self-represented litigant was discussed at some length. That case recognized that,"[w]hether a party is represented by counsel at a trial or represents himself, the judge's role remains the same. The judge's function at any trial is to be 'the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings.' Commonwealth v. Wilson, 381 Mass. 90, 118 (1980), quoting from Commonwealth v. Lewis, 346 Mass. 373, 379 (1963), cert. denied, 376 U.S. 933 (1964), and Whitney v. Wellesley & Boston St. Ry., 197 Mass. 495, 502 (1908)." Commonwealth v. Sapoznik, supra at 241-242 n.4 (1990).

"At times during the course of any trial, even when a party is represented by counsel, it may become necessary for a judge to intervene although there has been no objection to the admissibility of certain evidence." Id. at 242 n.4. "'[T]he judge is not required to sit idly by while counsel for either side questions a witness in an effort to obtain an answer which could be the basis of either a motion for mistrial or a claim on appeal that prejudicial matters were brought to the attention of the jurors.'" Ibid., quoting from Commonwealth v. Wilson, supra.

[2] This publication, produced by the Trial Court's Gender Equality Advisory Board and Racial and Ethnic Access and Fairness Advisory Board, is available at http://www.mass.gov/courts/admin/hr/withinourreach.html (last visited Nov. 18, 2004).

"That observation is equally true where the defendant represents himself." Commonwealth v. Sapoznik, supra at 242 n.4.

This does not mean that a judge must become a lawyer for a self-represented litigant; however, the judge should recognize when opposing counsel is "engaging in improper tactics and taking advantage of the [self-represented litigant's] unrepresented status" and "promptly intervene[ ], not to be of assistance to the [self-represented litigant], but to assert a judge's traditional role of making sure that all the parties receive a fair trial." Ibid. citing to Grubbs v. State, 255 Ind. 411, 413-416 (1970). "A pro se [party] is not entitled to any greater protection than a [party] represented by counsel – but he is not entitled to any less protection either." Commonwealth v. Sapoznik, supra at 242 n.4.

For additional cases indicating that a judge may take a proactive role in evidentiary matters, see Commonwealth v. Haley, 363 Mass. 513, 518-519 (1973) (discussing judge's ability to exclude evidence sua sponte), S.C. 413 Mass. 770 (1992); Commonwealth v. Jackson, 419 Mass. 716, 722 (1995) (rejecting defendant's contention that he was prejudiced by trial judge's interruptions where they were an attempt to assist defendant by explaining how to show that witness made a prior inconsistent statement, and also concluding that judge correctly excluded or curtailed repetitive, argumentative and improperly phrased questions); Griffith v. Griffith, 24 Mass. App. Ct. 943, 945 (1987) (where self-represented litigant tended to stray into considerations not legally relevant, judge warranted in attempting to narrow the issues, asking questions, and directing the course of trial); Adoption of Seth, 29 Mass. App. Ct. 343, 350-351 (1990) (interests of efficiency often require that judges become directly involved in the case; judge did not abuse his discretion by suggesting psychiatrist be called because suggestion was based on impressions formed from participation in the case, not from prejudicial information gleaned from extrajudicial source).

Judges may require counsel to explain objections in detail, and judges should explain their evidentiary rulings. In some proceedings, (e.g., small claims), the applicable rules may permit even greater informality and participation by judges in eliciting facts. See McLaughlin v. Municipal Ct. of the Roxbury Dist. of City of Boston, 308 Mass. 397, 403 (1941) (no error where judge took charge of small claims procedure, because statute governing those procedures was intended to provide a simple, prompt, and informal means of disposing of such claims and gave judge wide discretion to manage case).

Judges have more flexibility in proceeding informally when all the parties to a case are self-represented. In such cases, judges may have the parties stipulate that each can tell the relevant facts uninterrupted for a set time, and the court will ask questions. Cases which are non-adversarial, e.g., name changes, also allow for increased flexibility.

Judges have wide discretion to impose time limits on the length of direct and cross-examination of witnesses. Those limits, however, must be reasonable; they must not prevent a party from presenting the party's entire case to the fact finder. Chandler v. FMC Corp., 35 Mass. App. Ct. 332, 338 (1993).

Judges may properly question witnesses, even where to do so may strengthen one party's case, so long as the examination is not partisan in nature, biased, or displays a belief in one party's case. Commonwealth v. Dias, 373 Mass. 412, 416 (1977). To avoid the appearance of partiality, judges should explain that the questions are being asked to clarify testimony and that they should not be taken as any indication of the judge's opinion of the case. This is particularly important in cases involving one self-represented litigant and one represented party.

In jury cases, judges should instruct the jury that they are not to consider questions asked by the judge as any indication of the judge's opinion as to how the jury should decide the case and that if the jury believes that the judge has expressed or hinted at any opinion about the facts of the case, they should disregard it. See Model Jury Instructions for Use in the District Court § 2.02 (Mass. Continuing Legal Educ. 1995 & 1997 supp.); Massachusetts Superior Court Civil Jury Instructions § 1.3 (Mass. Continuing Legal Educ. 1997 & 2003 supp.).

Judges should use the rule of reason as to the extent of witness-questioning. As illustrated by criminal cases on this topic, there is no quantitative test for determining whether a judge has gone beyond the bounds that the law imposes. See, e.g., Commonwealth v. Sneed, 376 Mass. 867, 869 (1978) (new trial ordered because judge appeared partial when he admonished witness as to perjury and severely eroded her credibility by making clear to jury he did not believe witness); Commonwealth v. Ragonesi, 22 Mass. App. Ct. 320, 323-324 (1986) (judge's questioning was excessive and leading, where it consumed twenty-three pages of transcript, judge asked whether counsel advised witness about contempt and perjury, twice asked whether the witness had lied to police, and questioned witness on minute details); Commonwealth v. Festa, 369 Mass. 419, 422-423 (1976) (where judge asked witness if she was aware she had sworn to tell the truth and that failure to do so would subject her to criminal penalties, then asked witness questions concerning her testimony, judge's questions were not clearly biased or coercive, but were directed toward protecting witness from possible perjury and developing the most trustworthy testimony; even if judge was overzealous, judge's behavior, considered in context of entire trial and charge to jury, did not deprive defendant of fair trial); Commonwealth v. Campbell, 371 Mass. 40, 44-45 (1976) (no error where judge asked one witness eighty-five questions and another witness twenty-five questions, when witnesses were asked a total of 1,810 and 926 questions, respectively, and judge instructed jury to give

his questions no special weight); Commonwealth v. Grogan, 11 Mass. App. Ct. 684, 686 (1981) (no likelihood of miscarriage of justice where judge actively questioned defense witness but gave jury limiting instruction not to draw any inferences from fact he asked questions and not to give answers elicited any special weight); Commonwealth v. Hassey, 40 Mass. App. Ct. 806, 806-08 (1996) (judge exceeded limits on judicial questioning; his questioning was too partisan, foundation required for evidence had not been established, and judge did not neutralize damage done by questions with limiting instruction to jury).

3.3 Right of self-representation. In jury trials, judges should ask self-represented litigants whether they want a right to self-representation instruction.

Commentary

For sample instructions see Model Jury Instructions for Use in the District Court § 2.024 (Mass. Continuing Legal Educ. 1995 & 1997 supp.) ("The defendant has decided to represent himself (herself) in this trial, and not to use a lawyer. He (she) has a perfect right to do that. His (her) decision has no bearing on whether he (she) is guilty or not guilty, and it should have no effect on your consideration of the case.") and Massachusetts Superior Court Civil Jury Instructions § 13.12 (Mass. Continuing Legal Educ. 1997 & 2003 supp.) ("The [plaintiff/defendant] has decided to represent [himself/herself] in this trial, and not to use a lawyer. [He/she] has a perfect right to do that. [His/her] decision has no bearing on the merits of this case, and it should have no effect on your consideration of the case.").

3.4 Approval of settlement agreements. Judges should review the terms of settlement agreements, even those resulting from ADR, with the parties. Judges should determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent possible, whether the waiver is knowing and voluntary.

Commentary

When assessing whether a waiver of substantive rights is "knowing and voluntary," a judge may consider "knowing and voluntary" as that phrase is used in the context of informed consent, i.e., the agreement by a person to a proposed course of conduct after receiving adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct. See ABA Model Rules of Professional Conduct 1.0(e) (2003) ('Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation

about the material risks of and reasonably available alternatives to the proposed course of conduct).

Self-represented parties should be informed that once the agreement is approved it becomes an order of the court; therefore, they should raise any questions that they have about the agreement before it is approved.

If a self-represented litigant has limited ability to understand or speak English, the agreement should be translated verbatim into that individual's primary language by a qualified court interpreter before it is approved. There should be an endorsement on the agreement that it was translated for the non-English speaking party by a qualified court interpreter. The judge may wish to make an affirmative finding that the agreement was reviewed by the court and translated into the self-represented litigant's primary language by a qualified court interpreter. If a qualified court interpreter cannot be obtained, the matter should be continued until one can be present.

Judges are statutorily required or permitted to independently determine that certain types of settlement agreements are fair and reasonable. See, e.g., G. L. c. 231, § 140C ½ (court may review and approve settlement agreement involving a minor or an incompetent); G. L. c. 152, § 15 (judicial approval of tort settlements where workers' compensation insurer has lien); Mass.R.Civ.P. 23(c) (court approval of class action settlements); Knox v. Remick, 371 Mass. 433, 436-437 (1976) (separation agreement must be fair and reasonable and not the product of fraud or coercion). When such a duty is not imposed by law, there is no consensus on the extent to which judges are obligated to ensure that settlement agreements are substantively fair and reasonable. See Goldschmidt & Milord, Judicial Settlement Ethics: Judges' Guide 53 (American Judicature Society 1996).

4. Guidelines for Post-Hearing Interaction.

4.1 Issuing the decision. Judges should exercise discretion in deciding whether to issue a decision at the close of the hearing while both parties are present, or to inform the parties that the matter will be taken under advisement and that a written decision will be mailed to them. In cases where there is no immediate need to enter an order, the judge may inform the parties that the judge wishes to consider their evidence and arguments before making a decision. If possible, the judge should give a time frame within which the case will be decided.

Commentary

Depending upon the circumstances, there may be practical reasons not to issue an immediate order, apart from the judge's need to review the file and the law. In some sessions, the judge may be dealing with a high volume of self-represented litigants unfamiliar with the court system. A self-represented litigant may be angry, volatile, or upset with the court and opposing party or counsel over the "need to be there." A decision issued from the bench, particularly if it is not favorable to the self-represented litigant, may result in an outburst directed to the other side, disruption of the court session, or security concerns. Sometimes the self-represented party will seek to reargue the case to be sure the judge "understands." These problems can cause serious delays in busy sessions. A written decision, issued by mail, allows the parties to receive it privately, away from the stress of the proceedings, and to reflect on how they wish to proceed.

4.2 Appeals. If asked about the appellate process, judges may refer the litigant to the appropriate authority.

Commentary

Each court should have resource material available about the appellate process.


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