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How mediators should handle pro per litigants: 3 essential strategies

Mediating cases involving self-represented litigants requires a distinct approach grounded in clear communication, mutual respect and patience from all parties.

By Gary N. Stern

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A private or court appointed mediation assignment may involve one or more litigants acting as their own lawyer. These "pro pers" may be the plaintiff, defendant, cross defendant or cross-complainant. The mediator must take into account a litigant's pro per status when it comes to the single most important priority for the mediator: gaining the trust and confidence of each party and counsel in the litigation.

It is likely self-evident to most lawyer-mediators that an interaction with a pro per must involve communication skills that go well beyond the tendency to (thank you Professor Kingsfield) "think like a lawyer." What I have discovered when presented with the challenge of a pro per participant in mediation is the danger of the pro per believing that the mediator is on the side of the lawyers and that the process is not being carried out in a fair and just manner to the pro per party. Accordingly, my first challenge is to create an atmosphere of fairness and respect.

It does help that the mediator has a basic understanding of how the law addresses the pro per litigant. After all, the driving force throughout the mediation of a civil case is the alternative in court if the case does not settle.

In California, pro per civil litigants are subject to the same procedural rules and standards as attorneys. Pro per litigants must comply with all rules of civil procedure including filing deadlines, discovery obligations and evidentiary standards. Courts may offer some procedural flexibility, but they are not required to provide legal guidance or overlook errors. Local court rules and general judicial discretion can influence how strictly these standards are applied.

There is virtually no statutory guidance regarding a pro per's status in a civil case, except in a few situations. Code of Civil Procedure Sections 391-391.7 govern vexatious litigants, including those who appear in propria persona. Courts may issue prefiling orders to restrict filings by individuals who abuse the legal system. CCP Section 128.5 permits courts to impose sanctions for bad faith or frivolous conduct, including against pro per litigants. The California Civil Discovery Act provides for sanctions for misuse of the discovery process, including by pro pers.

The appellate courts and the California Supreme Court have addressed basic issues of justice involving pro pers.

The Supreme Court in *Rappleyea v. Campbell* (1994) 8 Cal.4th 975 held that pro per litigants are held to the same procedural standards as attorneys. Self-representation is not grounds for "exceptionally lenient treatment," although the facts of a particular case will be scrutinized regarding such matters as excusable neglect and extrinsic mistake, with a view toward basic fairness.

On the subject of recovery of fees and costs (a vital issue in many mediations involving disability access, FEHA and wage/hour cases), *Trope v. Katz* (1995) 11 Cal.4th 274 held that attorneys representing themselves cannot recover attorney's fees under Civil Code §1717.

In *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, the court held that pro per attorneys cannot recover attorney's fees as discovery

sanctions. On the other hand, in *Abandonato v. Coldren* (1995) 41 Cal. App.4th 264, the court stated that pro per attorneys, as defendants, may recover fees as a sanction under CCP Section 128.5.

Knowledge of the above state of the law will aid the mediator in identifying issues that may be relevant to the mediation process. But beyond these limited legal matters, the following are three critical approaches to successful mediation involving a pro per party:

1. Plain English. This is an opportunity for the lawyer-mediator to cast aside even the most

basic language that we take for granted but that in fact constitutes legalese. That is not to say that the mediator should talk down to the pro per. The mediator must never be condescending. In fact, on two occasions in the recent past, I had occasion to mediate cases involving a defendant pro per physician. The doctor was sophisticated in the ways of civil lawsuits and once that became apparent to me, I was less concerned with my language and more concerned with approach No. 2.

2. Respect. It is not helpful to treat a pro per party as a pro per. By that, I mean that

genuine sincerity regarding the pro per's contentions in the case will go a long way toward resolution. The pro per needs time to vent and the mediator should not unfairly limit the pro per's time or suggest that what the pro per has to say is not valid or worthy of consideration. Of course, anything can be taken to extremes, and so the mediator will inevitably have to balance efficient use of time with the powerful tool of listening.

3. Patience. The mediator must not only ramp up his/her own capacity for patience, but must urge the represented parties to likewise not dismiss the pro per out of hand. I have found that the tried and true methods can still work, including the persistent but always true mantra that "control" is something most value and loss of control is something we tend to fear.

The mediation process regarding civil litigation is both an art and a science, and never more so than when one or more parties to that process is a pro per litigant. But all is rarely lost as long as the mediator is prepared both as to the law and as to the intangibles.

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