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Titanic, Hindenburg, DIY appeals

Americans are hearty souls. In our litigious land of the free and home of the brave, our laws allow — and our grandiose notions of exceptional individualism embolden — self-representation in court. Joe Layman thinks that because no lawyer will ever really understand or care about my case as much as I do, I may as well be my own advocate, and save some greenbacks to boot.

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EXCEPTIONALLY APPEALING

Americans are hearty souls. In our litigious land of the free and home of the brave, our laws allow -- and our grandiose notions of exceptional individualism embolden -- self-representation in court. Joe Layman thinks that because no lawyer will ever really understand or care about my case as much as I do, I may as well be my own advocate, and save some greenbacks to boot. Thus, some pro per litigants proudly don that mantle; many others simply have no economic choice. And by the time the appeal comes along, a litigant very well may have run out of patience with lawyers, run out of money, or both.

Voilà! Enter the "self-represented" appellant acting "in propria persona" -- "pro per" for short, or in federal practice, "pro se."

"In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation." *Faretta v. California*, 422 U.S. 806, 812 (1975); 28 U.S.C. Section 1654. California law similarly allows self-representation. *Board of Commissioners v. Younger*, 29 Cal. 147, 149 (1865) (litigants may appear pro per or via counsel, but not both); *Gray v. Justice's Court of Williams Judicial Township*, 18 Cal. App. 2d 420 (1937). Yet a vast gap exists between having the right to do something and doing it well. Practicing law is complicated, even for lawyers. Pro pers face an education barrier and a language barrier. *See* Handling Cases Involving Self-Represented Litigants (Cal. Jud. Council April 2019) pp. 1-4 to 1-5 (the "mash up of Latin and French that results in 'legalese'" means "many pro pers do not even know that is what they are").

Every day, appellate courts issue decisions with lines like this: "Proceeding pro se, Ms. DIY appeals." (The pro per side is almost always the appellant.) "At the outset, we address the plethora of procedural deficiencies in Ms. DIY's papers." *See, e.g.*, *Paul v. Robertshaw*, A158204 (Aug. 16, 2021); *Kwon v. Zaia*, E072876 (Aug. 25, 2021) (outlining "appellate fundamentals" and pointing out that pro per appellants do not have "carte blanche to ignore basic appellate rules").

Pro pers naturally have a hard time following the rules -- the Rules of Evidence, the Rules of Court, all the rules -- and they make all manner of possible procedural errors. On appeal, they are especially prone to misunderstand what must be included in the record, what may be included (and what may not), and what makes for a valid and minimally comprehensible brief. They also make substantive appellate errors, such as failing to understand what is appealable, what standards of review are (let alone how they function), and what the court of appeal can actually do in terms of analyzing and granting relief. Even when told how to correct their briefing, they often simply cannot. *Stanislaus County v. Clinton G.*, F079308 (Aug. 26, 2021).

What pro pers lack in ability, they make up for in dogged enthusiasm. They generally attack everything and do not relent. After they lose (as they almost always do), they file rehearing petitions, petitions for review, cert petitions, and even rehearing petitions after summary denial of cert. Most of these post-defeat filings can simply be ignored by the prevailing side. But it's the handling of the first appeal of right that can pose challenges.

First of all, on the record front, pro pers often fail to include all relevant and necessary materials. This poses a strategic question for respondents: Should you supply what's missing, or should you proceed on an inadequate record on the assumption that the court will have to affirm based on the anemic record? Appeals are regularly lost by pro pers for not supplying a complete record. Your appeal may be a good candidate for that, and a short brief (or motion to dismiss) arguing that the record alone requires an affirmance

may do the trick. But many lawyers are wary of attempting to win on procedural grounds alone.

Next, assuming that a pro per's appeal gets off the ground, the sort of arguments that pro pers make range from the bafflingly unintelligible to the insanely clever. Some raise points that are so creative yet obviously wrong that finding authority to counter them can be a struggle. Most pro per briefs are loaded with factual and legal arguments that could be disregarded as noncompliant or forfeited. But even when plainly defective appeals could be resolved on procedural grounds, courts often strive to make pro pers feel heard, and thus reach and resolve the merits (absent truly jurisdictional problems). *See Harding v. Collazo*, 177 Cal. App. 3d 1044, 1061 (1986) (dis. opn. of Liu) (policy to resolve cases on the merits rather than dismissing on technicalities).

Even when pro per appeals are dismissed or demolished, courts are loath to pile on by awarding sanctions. *See Barker v. Di Lando*, 2020 WL 6852758 (A159556, Nov. 23, 2020); *Kabbe v. Miller*, 226 Cal. App 3d 93, 98 (1990) (denying sanctions, noting it inappropriate "to hold a propria persona appellant to the standard of what a 'reasonable attorney' should know is frivolous unless and until that appellant becomes a persistent litigant").

Following Supreme Court precedent, courts typically note that "self-representation is not a ground for exceptionally lenient treatment" and "the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation." *Rappleyea v. Campbell*, 8 Cal. 4th 975, 984-85 (1994). The standard formulation is that pro pers are "entitled to the same, but no greater consideration than other litigants and attorneys." *Tanguilig v. Valdez*, 36 Cal. App. 5th 514, 520 (2019). Moreover, courts should not "help" pro pers present their cases or act as counsel for them. *Taylor v. Bell*, 21 Cal. App. 3d 1002, 1008 (1971). In theory, they are to sink or swim on their own. *E.g.*, *Paul*, *supra* ("Harsh as this rule sometimes is for litigants who cannot afford counsel, a person who chooses to represent herself is expected to know the substantive law and to abide by all applicable procedural rules.").

Despite this blackletter law, it may sometimes seem like pro pers do get all possible benefit of the doubt, do get a little help from the courts, and do get away with things that no lawyer could. This can feel unfair, especially to paying clients. For example, in the 9th Circuit, pro se appellants are excused from filing excerpts of record, and thus the rules force a represented appellee to supply the record on appeal. *See* 9th Cir. Rule 30-1.3.

Any annoyance, however, should be tempered by the recognition that: "Providing access to justice for self-represented litigants is a priority for California courts." Cal. Rule 10.960(b). Also, judges have discretion to take reasonable steps, appropriate under the circumstances and consistent with the law, to enable litigants to be heard. Cal. Code Jud. Ethics, Advisory Com. Cannon 3(B)(8). *See Nuño v. Cal. State Univ.*, 47 Cal. App. 5th 799, 810-12 (2020) (also noting a judge's duty to ensure clear and understandable

communications with pro pers). Most importantly, never forget that in the end, the pro per is likely to lose (and keep losing).

Two types of special pro pers deserve mention: vexatious litigants and attorney pro pers (coming in the licensed and disbarred flavors). For obvious reasons, these folks generally do not get the kid-glove treatment that ordinary pro pers might. *See Bank v. Spark Energy, LLC*, 2021 WL 2324950, *1 (2d Cir. 2021) (licensed attorney "not entitled to the special solicitude generally afforded to pro se litigants"); *Tracy v. Freshwater*, 623 F.3d 90, 101-02 (2d Cir. 2010).

Ideally, litigants could hire any counsel they like, and flying pro per would be an eccentric exception. But in reality, pro per appellants are not novelties to either practitioners or appellate courts, which are inundated with pro per appeals. In the 9th Circuit, over 40% of all appeals involve at least one self-represented litigant. *See* 2020 Ninth Circuit Annual Report, p. 60 (44.1% of appeals filed in 2020 were pro se). Back in 2003, Division 1 of the 4th District Court of Appeal created an online manual for pro pers. *See* The California Court of Appeal Step by Step: Civil Appellate Practices and Procedures for the Self-Represented (Revised Feb. 2021) (https://www.courts.ca.gov/8676.htm).

What this means is that you've probably already handled many such appeals, and if you haven't, you will. This is especially true for certain practice areas, like family law (where estimates of self-representation exceed two-thirds of litigants). *See* Statewide Action Plan for Serving Self-Represented Litigants (Cal. Jud. Council Feb. 2004) at 2.

Trial lawyers know that the general lay of the land is that (1) judges have broad discretion to adjust procedures to ensure pro pers are heard; (2) judges who make such adjustments will be affirmed absent any true prejudice to the opposing party to have the case decided on the facts and the law; and (3) judges will usually be affirmed if they refuse to make a specific adjustment, unless such refusal is manifestly unreasonable and unfair. *See* Handling Cases, *supra*, at p. 3-12. Appellate practitioners know that this sort of largess applies to pro pers on appeal as well, but they take comfort in the odds of affirmance. And pro pers who can afford counsel should recall how Justice Blackmun ended his dissent in *Faretta* (442 U.S. at 852): "If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself."

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