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American Judges Association

January 2002

Court Review: Volume 38, Issue 4 - President's Column

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Sudderth, Bonnie, "Court Review: Volume 38, Issue 4 - President's Column" (2002). *Court Review: The Journal of the American Judges Association*. 170.

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President's Column

Bonnie Sudderth

We've often heard the remark, "A lawyer who represents himself has a fool for a client." And any judge who has had the misfortune of presiding over a matter in which an attorney is self-representing knows all too well the truth of this statement.

It's not so much that bad lawyers are the ones who make the (bad) choice to represent themselves, although I have long suspected a correlation. What I have observed is that even good lawyers lose their ability to perform well when they become distracted by their own self-interests. Lawyers who represent themselves in court quite often lose that degree of objectivity and dispassion necessary to make sound legal decisions.

Zeal and tunnel vision replace the cool detachment that law school instills. Just as a doctor should never self-diagnose, a lawyer, too, should not self-represent. This point was never driven home more for me than when, at the end of a lengthy jury trial of a boring commercial dispute involving a self-represented attorney, a juror asked me, "Does he beat his wife?" Not only had the attorney done a poor job in representing himself (he lost), but his over-passionate arguments and extreme positions left the jurors with the distinct impression that he was emotionally unstable, perhaps even dangerous.

If we all know that, generally speaking, even a law-trained attorney will do a poor job in representing himself in court, why do we persist in this notion that the justice system should do more to assist non-law-trained pro se litigants to represent themselves in court?

Throughout the country, courts are being encouraged to do more to assist pro se litigants. From kiosks to how-to manuals, from case managers to preprinted pleadings and orders, courts across our country are bending over backwards, oftentimes at considerable taxpayer expense, to assist pro se litigants as they maneuver their way through the legal system. We continue to ask ourselves how we can do more to help pro se litigants represent themselves, yet there is virtually no dialogue on a more fundamental question—why should we?

The answer most often given is because all citizens have the absolute right to represent themselves in the court system. Certainly that is true. But, except in the context of very simple, noncomplex legal proceedings, this "right to self-representation" is euphemistic at best, an oxymoron at worst, because the "right to self-representation," in practical effect, is simply the right to commit legal malpractice.

In recognition of this basic "right to self-representation," the Constitution of the United States could have provided that all

persons accused of crimes have the right to represent themselves. Instead, the Founding Fathers gave us the Sixth Amendment, which gives every person accused of a crime the right to have the assistance of counsel. Even 200 years ago, the Founding Fathers recognized that as between the concepts of right to self-representation and right to counsel, the latter is the one worthy of inclusion in our Bill of Rights.

The second most common answer is because they're going to do it anyway. In other words, the train has left the station, so we'd better quickly lay some tracks before it derails. Since pro se litigants are going to appear in our courts anyway, it is argued, it is in their best interest and ours alike to make the process go as smoothly as possible.

But this analysis begs a bigger question. Do we need to lay some tracks to prevent derailment? Or are we actually encouraging self-represented train travel by laying the tracks for them to use? By making the legal system more easily maneuverable for pro se litigants, are we encouraging more self-representation than would otherwise occur in the system?

Who among us would actually encourage an attorney to represent himself or herself in court? If we would not encourage a law-trained individual to self-represent, then why are we racking our brains

trying to develop new and innovative ways of encouraging laypersons to undertake self-representation?

Instead of blindly accepting the premise that we need to ease the burden of self-represented individuals in our justice system, the court community needs to examine a more fundamental issue. We need to decide whether justice is best served by self-representation or legal representation. And if we choose the latter, the justice system needs to concentrate its efforts on providing legal assistance, not legal malpractice assistance.

Aside from isolated horror stories, including some about bad lawyers who slept through trials, most judges would agree that legal representation is the safest and surest route to justice. If that's the case, instead of figuring out how to make it easier to self-represent, why don't we spend some time discussing the more difficult issue of how to make attorneys accessible and affordable to all persons who seek justice?

A dialogue along those lines would go a long way toward improving our system of justice—not to mention making our jobs as judges a little easier. In my next column, I'll discuss some ideas and programs that are being instituted across our country in the attempt to provide quality and affordable legal representation to individuals in need.

