



THE BENCH, THE BAR AND THE UNREPRESENTED: ONE JUDGE'S VIEW

BY HON. NATHAN "TOD" YOUNG

As a relatively new district court judge, I am often asked about my perspective from the bench. Older judges (well, longer-sitting judges) usually only ask how I am doing, do I like it or can they help? Easy questions to answer: I'm fine, yes I do and, I'll let you know. Interestingly, it's the public, former clients and attorneys who tend to ask more probing questions: *How is the adjustment from private practice?* Fairly easy. *Do you miss your practice?* No, not really. *What is the part of being a judge that you least expected?* Ahh, well, the answer to that one is the subject of this article.

I anticipated the caseload, the hours, the skilled (and sometimes less so) advocacy and the difficult decisions. What I had not anticipated was the great volume of self-represented litigants. The number of people who appear before the court without counsel is remarkable and consistently rising. In criminal cases, those defendants who cannot afford an attorney are, by Constitutional mandate, provided with one at public expense, but in civil litigation there is no equal measure. The various legal services provide some degree of assistance, but for a myriad of reasons, including limited fields of practice and resources, there is only so much that they can do. That leaves a very large pool of people with legal problems and issues without counsel. These are almost always people living under severe financial strain: yes, the poor. They often lack an understanding of the legal

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system in general and, in particular, the laws and rules concerning their specific problems. One more feature applies to many of the unrepresented: they are anxious, sometimes flat-out scared.

Most of the district court cases with unrepresented litigants involve family law issues: divorce, custody, visitation and guardianships. Sometimes it is a mortgage or debt issue, sometimes something as simple as a name change. The issues are many, but most individuals share the same frailties, and nearly all share the goal of being treated fairly and getting their matters settled and over with.

Presiding over a case with self-represented litigants often presents a judge with special problems. Pleadings and service may not conform with the Nevada Rules of Civil Procedure (NRCP) or local court rules. There is often no citation to authority and sometimes not even a clear indication of what the litigant wants. Once the trial or hearing begins, matters can get more complicated. The litigants don't know what evidence they need, how to present that evidence or how to test the other side's case. They almost never possess a clear understanding of the burdens of proof or the standards by which a court makes its decision. The judge, in the midst of this exhibition, must maintain order and civility, and must be very cautious about creating an appearance of bias by assisting a party who does not understand the process or procedure. Hearings take longer, as the court attempts to guide the parties to the real issues. In some cases, the hearings merge into some kind of mediation. Just results and the appearance of impartiality can be threatened.

It is easy to see how these problems are exacerbated when one side has counsel and the other does not. Does the judge sit back and merely "call balls and strikes" while an experienced attorney runs roughshod over a litigant who has no idea how to try a case? Clearly the judge cannot assist the unrepresented, but is there some point at which a just result requires intervention? If so, when?

So that, briefly, is the problem. How do we address it? I have seen many instances in which the unrepresented use the services of a paralegal or document preparation service. That solution may very well create additional problems, as those entities are, with good reason, prohibited from practicing law. They cannot give advice or guidance on the proper use of their products.

Courts throughout the country have addressed the problem of unrepresented litigants with the creation of form banks, whereby members of the public are able to access fill-in-the-blank pleadings. That solution, while

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inexpensive, is troubling to me. There is a reason we don't have do-it-yourself surgery centers. Without adequate training, it is difficult to know where to point the knife and how to stem the resultant bleeding.

And so, the best solution is the one most difficult to arrange: an attorney for every civil litigant — a real attorney, with a real knowledge of the law and procedure. A real attorney with a real attorney-client relationship. How do we get there, especially with the knowledge that these potential clients are self-represented because they are unable to pay an attorney? The answer is not really as difficult as it seems. The answer is: you, the attorney reading this, the licensed member of the bar who has taken an oath to uphold the laws and constitution of our federal and state governments, the practicing lawyer who has a vested interest in maintaining respect for, and confidence in, our courts. You are the answer.

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By volunteering to represent an indigent litigant, you serve the client, the bar and the public as a whole, while at the same time serving yourself.

I have had the privilege of watching volunteer attorneys practice in my courtroom many times, maybe more than I know, because on each occasion the attorney has brought the same level of professional and skilled advocacy that they bring to retained clients. Lawyers who work in the public sector and those with private firms have volunteered. The Attorney General has established a policy that allows and encourages the deputies in that office to serve the public through pro bono representation. Those attorneys have done an excellent job representing indigents. Likewise, attorneys in private practice, including partners in significant and well-known law firms, have donated their skills and time to represent people in need of counsel. Those exhibitions of service are moments that all members of the bar can be proud of and should participate in creating.

One recent example of pro bono representation occurred in my court. The litigant was a man who spoke very little English. He was a hard worker and managed to feed and clothe his children, keeping them in school despite tough circumstances. He was not familiar with our court system and was not certain what to expect from it. All he knew for certain was that his wife had died and her parents sought to take control of his daughter by seeking a guardianship and challenging his parentage. His in-laws had an attorney representing them. That attorney, an experienced litigator, had filed numerous pleadings that this father was incapable of reading or responding to. He contacted Volunteer Attorneys for Rural Nevada and had the good fortune to be referred to a local attorney, who gave freely of his time, experience and skill set in order to even the playing field. Ultimately the issues were resolved and the man retained custody of his daughter. Without the volunteer service of his attorney, the result could have been much different.

Service to others is a joy within itself. Yes, we as attorneys have worked hard and made sacrifices to get to where we are. Our education, office, staff and resources are expensive; they don't come to us free. Also, it is fair and realistic to expect a return on the investment we have made in ourselves. This solicitation for volunteer work makes no case for having it any other way. What I would suggest, however, is that, in addition to the joy of helping others, volunteering to represent someone in need is an additional investment in ourselves and our practices. First, because we, as attorneys, must strive to maintain respect for the system of dispute resolution that is our profession. Let us not forget that it is, for the most part, lawyers who make the rules of practice, rules of court and rules of the game. We control the discipline of ourselves through our exclusive club: the bar association. We even write and grade the tests that determine who can join the club. When you make the rules and then make a living off the rules, you had better be prepared to share the benefits of those rules with others who are subject to, but not part of, the rule-making system. Representation of the poor makes for an inclusive system of justice, and inclusion begets respect. Exclusion begets the opposite.

Secondly, taking on the job of volunteer representation makes your community and courts better. The community becomes better because more

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reliable results come from the courts; the law itself gains respect. The courts are better for the same reasons. Cases are presented in an organized and thorough fashion. The inevitable emotions of litigation are given legal argument, backed with citation to statutory and case authority.

Finally, there is this: when you take up the sword for a stranger, you will make a new friend. That person may not ever have the resources to pay you, but they will always remember you. You will become the family lawyer, and who knows, maybe someday they, or a relative, will have money and be in need of an attorney. If that happens, you will be the first one they think of. If that should never happen, it's still okay, because you will have done the right thing. ■

*Do the right thing.
Take on a pro bono case this year.*



JUDGE NATHAN "TOD" YOUNG was appointed to the Ninth Judicial District Court, Douglas County in 2012. Prior to this appointment, he practiced law in Minden and served as arbitrator in the First, Second and Ninth Judicial Districts in Nevada. Young currently serves on the Nevada Supreme Court Access to Justice Commission.