

ESSAYS

THE STATE V. THE SELF-REPRESENTED: A FLORIDA PROSECUTOR'S CONCERNS WHEN LITIGATING AGAINST A *PRO SE* DEFENDANT IN A CRIMINAL TRIAL *

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A prosecutor's mission, as with all litigators, is to competently represent his or her client.¹ In the criminal justice system, the prosecutor's client is the government, whether the government involved is the federal government or a state government.² The apex of the prosecutor's duty is the trial.³ At trial, the prosecutor has the opportunity to sharpen and utilize his or her litigation skills and

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1. See R. REGULATING FLA. BAR Rules 4-1.1, 4-1.3 (1998).

2. In any given case, there may be one or more alleged victims of criminal conduct. Within the criminal justice system, however, the government is technically the aggrieved party and acts as the agent of the victim for purposes of criminal prosecutions. Therefore, the style of a criminal case is captioned, for example, *State of Florida v. Defendant*. Accordingly, the government retains sole discretion and power to proceed with a criminal prosecution, regardless of the wishes of the so-called victim-witness. See *State v. Cain*, 381 So. 2d 1361, 1367 n.8 (Fla. 1980); see also FLA. STAT. § 27.02 (1997). This ability enables the government to proceed in a case where prosecution is warranted, although the victim is reluctant to go forward. This power also enables the government to refuse to proceed where prosecution is not warranted, although the alleged victim may be adamant about prosecuting the offense. Theoretically, frivolous or unwarranted charges may thus be avoided.

3. The practical reality is that a low percentage of prosecuted cases actually proceed to trial. All references in this essay to trials refer to jury trials, although it is possible to proceed to trial before a judge. See FLA. R. CRIM. P. 3.260.

bring the client's case to a successful conclusion. In criminal matters, the intended result is a verdict of guilt, resulting in the conviction of the accused. Litigating before a jury can be both challenging and rewarding for a prosecutor. Many prosecutors welcome the challenges presented in proving up a criminal charge and the opportunity to match skills with competent defense attorneys. However, the landscape and challenges of a criminal case may change dramatically when the accused proceeds *pro se*.⁴

Ethical restrictions and rules regulating attorneys do not apply to *pro se* defendants.⁵ The Florida Bar adopted the American Bar Association's Standard of Criminal Justice Relating to Prosecution Function, and views the prosecutor not only as an advocate, but as a minister of justice.⁶ In this role, the prosecutor is responsible for assuring that an accused is apprised of his right to counsel, as well as the procedures for obtaining counsel.⁷ While usually not recommended, a criminal defendant has the right to self-representation.⁸ Nevertheless, this right is not absolute. The court has the ability (and the duty) to conduct a hearing to determine, by inquiring into the circumstances of the case, whether a defendant will receive a fair trial if he or she proceeds *pro se*.⁹ If the judge determines that the defendant cannot adequately proceed *pro se*, the request may be denied.¹⁰ If the court permits the defendant to proceed *pro se*, the accused is no longer deemed unrepresented and is treated the same as if he were proceeding with an attorney.¹¹ If a defendant *is* represent-

4. A *pro se* defendant is defined as one who represents his or her own interests by appearing for himself or herself in court. *See* BLACK'S LAW DICTIONARY 1221 (6th ed. 1990). For purposes of this essay, the terms "defendant," "*pro se* defendant," and "self-represented" are used interchangeably.

5. *See* R. REGULATING FLA. BAR Rule 1-10.1. Pursuant to this rule, all members of the Florida Bar are subject to its regulations. *See id.* However, membership is limited to all persons admitted to the Bar and practicing law in Florida. *See id.* Rule 1-3.1. Typical *pro se* defendants would not fall into this category, that is to say so long as a Florida Bar member who is arrested does not represent himself or herself.

6. *See id.* Rule 4-3.8 cmt.

7. *See id.*

8. *See* U.S. CONST. amend. VI; *see also* FLA. CONST. art. I, § 16.

9. *See* *Faretta v. California*, 422 U.S. 806, 835 (1975); *Kleinfeld v. State*, 568 So. 2d 937, 939 (Fla. 4th Dist. Ct. App. 1990).

10. *See* *Kleinfeld*, 568 So. 2d at 939. For purposes of this essay, it is assumed that the criminal defendant has been deemed competent to proceed *pro se*.

11. *See* *Faretta*, 422 U.S. at 835-36 (finding that *pro se* defendant is required to follow rules of trial procedure, and his mastery of that procedure is not relevant to exercising the right to defend himself).

ed by an attorney, that defendant may not file *pro se* pleadings,¹² and any such pleadings are a nullity.¹³

At first blush, it would appear that a prosecutor would eagerly greet the opportunity to oppose a *pro se* defendant. After all, trying a case against a presumably untrained, unskilled opponent seems simple, correct? It should be a slam-dunk, right? This is not necessarily the case. In fact, many prosecutors absolutely dread opposing *pro se* litigants. Meeting and opposing the self-represented may involve difficulties that are not present in cases where a defendant is represented by counsel. Most *pro se* defendants are not practiced litigators. Consequently, most have little or no knowledge of or experience with rules of evidence, rules of procedure, or nuances associated with the proper preparation and trial of criminal cases. Because cases do not necessarily begin and end with trial, these concerns range from pretrial matters through closing argument.

I. PRETRIAL CONCERNS REGARDING PRO SE DEFENDANTS

A. The *Pro Se* Defendant's View of the Prosecutor

It is necessary to preface a discussion of trial concerns by addressing some pretrial concerns. Misconceptions of the prosecutor's duties and loyalties can present ethically uncomfortable situations when initially encountering *pro se* defendants. As strange as it may seem, many defendants mistakenly believe that the prosecutor is an appropriate party from whom to obtain counsel or advice on legal tactics that will assist them in having a criminal charge dropped¹⁴ or dismissed.

Generally, a prosecutor may not advise a *pro se* defendant on

12. See *Salser v. State*, 582 So. 2d 12, 14–15 (Fla. 5th Dist. Ct. App. 1991).

13. See *Johnson v. State*, 501 So. 2d 94, 96 (Fla. 1st Dist. Ct. App. 1987). The right to self-representation is not interminable. In *Holmes v. State*, 669 So. 2d 360 (Fla. 5th Dist. Ct. App. 1996), the court ruled that a defendant was barred from filing any further motions for post conviction relief after eleven previous attempts. See *id.* at 361. Likewise, in *Hall v. State*, 698 So. 2d 576 (Fla. 5th Dist. Ct. App. 1997), the court barred a defendant from filing additional appeals after having been warned about filing frivolous motions and appeals. See *id.* at 576–77.

14. To “drop” a charge after an information or indictment has been filed, the prosecutor files a document titled *nolle prosequi*. See BLACK'S LAW DICTIONARY 1048 (6th ed. 1990). This document indicates that the prosecutor shall voluntarily cease prosecution in a particular matter. See *id.*

any matter, as doing so may be a conflict of interests.¹⁵ When dealing with an unrepresented defendant,¹⁶ a prosecutor may never indicate or imply that he is disinterested in the litigation.¹⁷ In fact, the prosecutor has an affirmative duty to make reasonable efforts to correct an unrepresented accused's misunderstanding of the prosecutor's role.¹⁸ A prosecutor's failure to do so could result in sanctions imposed by the state bar association.¹⁹ Arguably, because the *pro se* defendant technically is represented,²⁰ the same standard of prosecutorial conduct should not apply. Nevertheless, it is certainly wise to use caution when dealing with a *pro se* defendant to avoid any potential problem arising from such misconceptions.

In addition to seeking advice from prosecutors regarding legal tactics, some defendants, who are not familiar with rules of procedure or their rights in pretrial matters, may mistakenly or unknowingly waive their rights by failing to assert them in a proper or timely fashion. In this regard, there is no affirmative duty imposed on the prosecutor to apprise the defendant of this information, as the prosecutor is responsible only to his client, the government.²¹ While a prosecutor is specifically precluded from actively seeking to obtain a waiver of pretrial rights from an unrepresented defendant, such a prohibition does not apply when a defendant appears *pro se* with approval of the court.²² The *pro se* defendant is represented, albeit not by a licensed attorney.²³

B. The *Pro Se* Defendant and Pretrial Discovery

15. See generally R. REGULATING FLA. BAR Rule 4-1.7; see also *id.* Rule 4-4.2 (specifying that lawyer shall not discuss the subject of the representation with a represented person).

16. An unrepresented defendant differs from a *pro se* defendant in that an accused is considered unrepresented until he or she either hires an attorney or is deemed competent, through a *Faretta* hearing, to represent himself or herself. See *supra* notes 9–11 and accompanying text.

17. See R. REGULATING FLA. BAR Rule 4-4.3.

18. See *id.*

19. See generally *id.* Rule 4-8.4(a).

20. See *supra* notes 11–13 and accompanying text.

21. See R. REGULATING FLA. BAR Rule 4-1.4(a).

22. See *id.* Rule 4-3.8(b) cmt.

23. See *supra* notes 11–13 and accompanying text.

Discovery rules in Florida are very liberal and require the government, upon timely demand, to provide a defendant with virtually all information pertinent to the charged offense, or any defense thereto.²⁴ Although the rules of discovery are broad, in some instances, acquiring information requires more than a simple demand.²⁵ The rules also impose a reciprocal duty of disclosure on the defense.²⁶ In addition to the rules of discovery, notification and timeliness requirements exist that pertain to the rules of evidence,²⁷ motions,²⁸ and affirmative defenses.²⁹

Because many *pro se* defendants are untrained in these rules, dealing with discovery matters can be a tedious, frustrating, and time-consuming experience for a prosecutor. The thrice-daily phone calls and barrage of informal demand letters can become annoying. Additionally, *pro se* defendants may not understand legal terminology, and they tend to apply lay definitions to legal terms of art. Consequently, they may not really understand what they are requesting, or why they are making the request. They simply know they are entitled to something. Some defendants believe they are entitled to anything they request, including material constituting the prosecutor's work product.³⁰ Likewise, some defendants do not understand their reciprocal obligations, and believe they can surprise the prosecution by failing or refusing to disclose important information and witnesses. Those *pro se* defendants who are diligent enough to read the rules often have a tendency to require strict compliance by the prosecutor, while expecting lenient enforcement of the rules

24. See generally FLA. R. CRIM. P. 3.220.

25. See *id.* 3.220(m)(2) (requiring an *ex parte* showing of good cause before permission is granted by the court to take a deposition of a witness listed as a Category B witness pursuant to Rule 3.220(b)(1)(A)(ii)).

26. See *id.* 3.220(c).

27. See, e.g., FLA. STAT. § 90.404(2)(b) (1997) (requiring at least 10-day notice to accused of State's intent to offer evidence of other offenses); *id.* § 90.803(23) (stating that in a criminal action, the defendant shall be notified at least 10 days before trial if State intends to use a statement under the child victim hearsay exception); *id.* § 90.803(24) (requiring same notice for statement under elderly or disabled person hearsay exception).

28. See, e.g., FLA. R. CRIM. P. 3.190(c) (allocating time for filing a motion to dismiss); *id.* 3.190(g) (allocating time for filing a motion for continuance).

29. See, e.g., FLA. R. CRIM. P. 3.200 (requiring defendant to file and serve a notice of alibi not less than 10 days before trial); *id.* 3.201 (mandating that defendant give at least 30-day notice to the State of intent to rely on battered-spouse defense).

30. See *Williamson v. Dugger*, 651 So. 2d 84, 88 (Fla. 1994) (concluding that a *pro se* defendant is not entitled to a prosecutor's trial preparation notes).

for themselves since they are not as knowledgeable in such matters. While the court will most assuredly inform the defendant that the rules apply with equal force to both sides, the prosecutor may find that attending several hearings on discovery matters is necessary before this point is taken by the defendant. It is usually best, although sometimes difficult, to remain patient, composed, and professional.

There are also potential practical problems with self-represented defendants. For example, how does a prosecutor respond to a *pro se* demand for the deposition of a potentially fragile victim, such as a child or sexual assault victim? The defendant is entitled to depose the victim.³¹ However, the victim may be very frightened of face-to-face contact with the person who allegedly committed the criminal act. Also, the defendant, during the deposition, may seek to examine the victim about matters that are irrelevant or unnecessary, or the defendant may try to intimidate the witness.

The prosecutor must be cautious not to infringe upon the defendant's discovery rights. However, on a showing of good cause, the court may grant a prosecutor's petition for a protective order either restricting, terminating, or limiting the deposition.³² While all pertinent information must be made available to the defendant in time to make beneficial use of it, the court, in its discretion, may limit the time, place, or manner in which the deposition is taken.³³ Two other options are to request the appointment of a guardian ad litem for the victim-witness for purposes of the deposition or to have counsel appointed to sit with a defendant during depositions.

Obviously, the prosecutor is not required to assist opposing counsel in the preparation of the case. This is just as true when the defendant is also the opposing counsel. If difficulties in the discovery process arise, or if the defendant is demanding assistance that is not required, the prosecutor should bring the matter before the court, through the appropriate motion, so that a resolution of the issue may be duly recorded on the record.³⁴

31. See FLA. R. CRIM. P. 3.220(h).

32. See *id.* 3.220(l)(2); *cf.* State v. Dolen, 390 So. 2d 407, 409–10 (Fla. 5th Dist. Ct. App. 1980) (remanding the case to the trial court to determine whether evidence of harm to the victim outweighed the represented defendant's desire to be physically present at a deposition).

33. See FLA. R. CRIM. P. 3.220(l)(2).

34. Given that these difficulties arise in such a variety of situations, the appropri-

C. Statements Made by *Pro Se* Defendants During the Course of Representation

As with any case, at some point, the prosecutor inevitably will engage in pretrial discussions with the *pro se* defendant. Some loquacious defendants seem to feel compelled to tell the prosecutor all about the defense side of the case, and in doing so, the defendant may make inculpatory statements. Such disclosure results in two concerns. First, are the statements admissible? Second, how may they be admitted at trial?

Initially, one may question whether inculpatory statements made by a *pro se* defendant during the course of pretrial discussions implicates the defendant's right to remain silent.³⁵ Arguably, the defendant does not have the right to silence in such situations. *Miranda v. Arizona*³⁶ and its progeny espouse that the right to remain silent is infringed only when the statements are improperly obtained during a custodial interrogation.³⁷ Whether the defendant is in custody or not, voluntary statements made by the defendant are not always subject to the *Miranda* requirements.³⁸ In any event, it is good practice to inform the defendant of his constitutional rights at any time before the defendant may make such statements. Any relevant statement made by the defendant is admissible.³⁹

Once the statements are determined admissible, the inquiry turns to the manner in which the statement may be admitted. Ethically, a lawyer may not advocate in a trial in which the lawyer may be a necessary witness.⁴⁰ Hence, the prosecutor may be forced to withdraw to become a witness. Additionally, the prosecutor must be wary of the danger of misquotes, allegations of coercion, improper comments, or promises. Therefore, two tactics may be used to avoid these potential problems. First, inform the defendant that, for the

ate motion will vary. For example, if the *pro se* defendant refuses to divulge information, rather than attempting to resolve the matter himself, the prosecutor should file a motion to compel.

35. See generally U.S. CONST. amend. V; FLA. CONST. art. I, § 9.

36. 384 U.S. 436 (1966).

37. See *id.* at 467–68.

38. See *id.* at 478.

39. See FLA. STAT. § 90.402 (admissibility of relevant evidence); *id.* § 90.803(18) (admissions of party).

40. See R. REGULATING FLA. BAR Rule 4-3.7(a).

protection of both parties, all discussions regarding the case should be in open court with a court reporter present. This procedure may prove to be time-consuming, but it will eliminate inaccurate reports by the defendant. Second, the prosecutor can set an appointment to meet with the defendant with an investigator and court reporter present. The investigator can later attest to any inculpatory statements, and the court reporter will assure an accurate record of all statements.

II. OPPOSING THE PRO SE DEFENDANT AT TRIAL

Besides encountering many of the problems present in pretrial matters, a prosecutor opposing a *pro se* defendant at trial is likely to face additional considerations pertaining to various stages of the trial. Again, many of these concerns stem from the *pro se* defendant's unfamiliarity or misunderstanding of various rules of procedure and evidence. At trial, particularly after the jury has been selected, sworn, and jeopardy attaches, tension tends to heighten due to the finality inherent in the proceeding. The same pressure may also concern the defendant. Once the jury has been selected and the government commences its case, the court may deny a defendant's request for an attorney and compel the defendant to proceed *pro se*.⁴¹

It is imperative that a prosecutor maintain composure and professionalism during the actual trial. A prosecutor must always remain cognizant that while the law considers a *pro se* defendant as the prosecutor's equal, a juror, and occasionally the judge, may not share the same view. Sympathy for the defendant thus demands that the prosecutor zealously advocate the case while skillfully avoiding the appearance of bullying the *pro se* representative. A prosecutor should not display frustration or aggravation through facial or vocal expressions, nor should he or she ever address or speak about a *pro se* defendant in a manner that is condescending or berating.

41. In *Jones v. State*, 449 So. 2d 253 (Fla. 1984), the Florida Supreme Court ruled that neither the exercise of the right to self-representation nor the right to counsel may be used as a device to frustrate the orderly proceeding of a case. *See id.* at 257. The defendant in *Jones* fired court-appointed counsel and insisted on self-representation until after the trial started, at which time he insisted on the appointment of counsel. *See id.*

A. Selecting the Jury

Engaging the venire during jury selection provides the best opportunity for a prosecutor to educate jurors and dispel misconceptions about *pro se* representation. Also during *voir dire*, a prosecutor may most effectively dissolve any undue sympathy for the defendant. A prosecutor should always use this opportunity advantageously. However, he or she would be wise to refrain from over-emphasizing the issue. Harping on the subject may lead potential jurors to believe that the *pro se* opponent is entitled to such sympathy.

Many judges differ in their approach to jury selection. Some prefer doing the bulk of the questioning, while others permit counsel to conduct most of the examination. The primary objective of the jury selection process is to find jurors who are free from bias and who will fairly and impartially consider the issues in the case. Although some issues involved in a case may be addressed during the examination, many *pro se* defendants believe that the selection process is the appropriate time to try the entire case. The prosecutor should make necessary objections to properly restrict the questioning, while being always mindful that the jury may consider an abundance of objections as harassing.

A defendant's inexperience may inhibit the expediency of the trial, even at the jury selection phase. The danger always exists that a defendant will blurt out information that could result in the recusal of the entire jury panel.⁴² To lessen this risk, a prosecutor may wish to request that the judge caution the defendant prior to the actual examination. This brief education may save much time.

B. Presentation of Evidence Before the Jury

42. Occasionally, a defendant may inadvertently provide potential jurors with information that is helpful to the government's case. For example, a judge once recalled a trial in which a *pro se* defendant began *voir dire* questioning by asking whether "anyone would hold it against him that he has six prior burglary convictions." Interview with the Honorable Frank Quesada, Sixth Judicial Circuit in and for Pinellas County, Florida, in Clearwater, Fla. (Feb. 25, 1999). Although Florida Statute § 90.404(2) ordinarily would bar the prosecutor from mentioning such information, the prosecutor is under no obligation to correct the error made by the *pro se* defendant.

Once the jury is seated, avoiding a mistrial becomes a great concern. While it is true that a defendant who intentionally causes a mistrial may possibly be tried again,⁴³ a prosecutor often finds it difficult to demonstrate this intent when dealing with a *pro se* defendant who does not know what a mistrial is, let alone how to intentionally cause one. Filing the appropriate pretrial motions is an excellent way to prevent the introduction or discussion of objectionable material.⁴⁴ Another effective means of avoiding such a situation is to request that the court appoint counsel to sit with the defendant during the trial.

During the government's case, the prosecutor may encounter a seemingly endless stream of objections. Most defendants unfamiliar with the rules of evidence believe that the court should preclude the admission of any evidence that is detrimental to the defendant. Often, the defendant either fails to state any ground for the objection or puts forth a lengthy speaking objection unrelated to the elicited testimony. It is advisable to put an end to this behavior immediately. Do not wait for the court to address these issues on its own. The prosecutor is responsible for requesting that the judge caution the defendant, as some judges tend to allow greater liberty to *pro se* defendants. A sidebar conference is preferable when the attorney feels uncomfortable discussing the matter in front of the jury.

Pro se defendants often put on a defense case. In many cases, the defendant chose self-representation because he or she believed that defending the charge simply meant getting before the jury to present an explanation of the situation. The defendant may also proffer witness testimony or tangible evidence. Unfortunately, in many situations, the prosecutor has never been notified that such witnesses or evidence exist because the defendant believed that the element of surprise was crucial to defending the case. A situation

43. Ordinarily, when a defendant causes, requests, or consents to a mistrial, double jeopardy will not bar reprosecution. See *Thomason v. State*, 620 So. 2d 1234, 1237 (Fla. 1993). However, when the prosecutor engages in conduct intentionally designed to cause a mistrial, the State is barred from ever retrying the defendant for the same offense. See *State v. T.S.*, 627 So. 2d 1254, 1255 (Fla. 3d Dist. Ct. App. 1993); see also *Luther v. State*, 661 So. 2d 906, 907 (Fla. 2d Dist. Ct. App. 1995).

44. If a prosecutor is concerned about a *pro se* defendant's attempts to introduce inadmissible evidence, that prosecutor may file a motion in limine to preclude such evidence. This motion also provides the judge an opportunity to caution a defendant, outside the presence of the jury, about such evidence. A motion in limine is particularly useful if the evidence at issue is highly inflammatory.

such as this places the prosecutor in a precarious position. Obviously, one cannot simply concede and allow the defendant to proceed unchallenged. However, moving to strike a witness or tangible evidence could lead to one or more hearings, strewn throughout the trial, to determine prejudice to the government.⁴⁵ These hearings may become burdensome, cause tiresome delays in the trial, or even result in a mistrial. Therefore, a prosecutor should address all discovery matters prior to trial so that no such surprises arise in the middle of the trial.

In the event that the defendant chooses to put on a defense case, the prosecutor now faces making, as opposed to meeting, objections. The prosecutor must use discretion in objecting to any proffered evidence. While an objection may be warranted, it is not always necessary where the proffered evidence is harmless. However, evidence may not be harmless when it is irrelevant and tends to confuse the jury or draws attention from the issues at trial.

Some defendants have a difficult time understanding relevancy, and struggle with recognizing issues. They tend to blend issues and may attempt to introduce evidence relating to facts that are, at best, remotely relevant, if relevant at all. Substantial time and energy are wasted as the defendant attempts to tie a preposterous defense theory to pertinent issues. Depending on the situation, a prosecutor may be prudent in allowing the defendant some latitude prior to objecting. This leeway may provide the jury with an opportunity to comprehend the irrelevancy. Patience, instead of zeal, may also prevent the jury from suspecting that the prosecutor is too eager and is trying to prevent the disclosure of some relevant fact. The risk that the jury will grow tired of listening to objections will simultaneously be lessened. Additionally, a prosecutor must remain cognizant that jurors generally hold the judge in high regard, and continuous objections could invite a reprimand from the judge, thus causing the jury to lose patience with the prosecutor.

C. The Defendant's Cross-Examination

45. These hearings are commonly referred to as *Richardson* hearings, named for *Richardson v. State*, 246 So. 2d 771 (Fla. 1971). The purpose of the hearing is to determine whether a party's failure to abide by the rules of discovery set forth in Florida Rule of Criminal Procedure 3.220 has resulted in undue prejudice to the opposing party. If such prejudice exists and cannot be rectified by alternative means, the court may preclude the admission of the evidence causing the prejudice. *See id.* at 774–75.

Skillful cross-examination is vital to successful trial practice. Cross-examination is an art that requires practice and a full understanding of the object of the cross-examination. *Pro se* defendants, because they are often unskilled and unpracticed in the art of cross-examination, do not understand what they are doing or why they are doing it. They simply attack and badger the witness. This aspect of the trial requires constant attention and diligence. The prosecutor's duty is to protect witnesses for the prosecution. This duty is particularly important when the witness, such as a child or the victim of a violent or sexual offense, is fragile.

Nevertheless, the accused has the right to confront witnesses and to cross-examine them.⁴⁶ This includes the right to "face-to-face" confrontation at trial.⁴⁷ For example, using a screen, which permits the victim to avoid looking at the defendant and prevents the defendant from seeing the witness, is improper.⁴⁸ When the prosecution can show the likelihood of harm to the witness, using either videotaped testimony (at which the defendant or defense counsel were present for cross-examination) or closed circuit television (on which the defendant can see the witness) may be a suitable alternative.

The defendant is not entitled to harass the witness. Standing before the witness and calling the witness a liar is not tantamount to cross-examination. A defendant's attempts to have the witness divulge embarrassing information that is unrelated to the issues in the case is not cross-examination, neither is an attempt to intimidate the witness. These tactics are simply harassing. If the defendant persists in harassing behavior, a request to cease cross-examination or to appoint counsel to assist the defendant may be well received.

A prosecutor must be prepared at all times during the trial to take steps to prevent a defendant from testifying during questioning or cross-examination. As with any trial, the only time the defendant may testify is when he or she is called as a witness. If the defendant chooses to exercise the right to remain silent⁴⁹ and not testify, the court should not permit him or her to testify during argument.

46. See U.S. CONST. amend VI; FLA. CONST. art. I, § 16(a).

47. See *Coy v. Iowa*, 487 U.S. 1012, 1019–20 (1988).

48. See *id.* at 1020; see also *Disinger v. State*, 569 So. 2d 824, 825 (Fla. 5th Dist. Ct. App. 1990).

49. See *supra* notes 35–38.

Alternatively, the prosecutor must be careful not to violate this constitutional right by commenting on a defendant's failure to testify.⁵⁰ A *pro se* defendant does not waive the right to remain silent by briefly testifying during argument if the prosecutor improperly comments on the failure to testify, regardless of the defendant's failure to contemporaneously object to the comments.⁵¹

CONCLUSION

Facing a *pro se* defendant is often difficult. Most problems associated with self-represented defendants arise from inexperience and lack of knowledge of rules and procedures. Many defendants struggle with legal concepts and misunderstand the legal process. When dealing with the *pro se* defendant, a prosecutor must maintain the highest degree of patience and professionalism. The prosecutor must afford the *pro se* litigant the same courtesy and respect afforded to a licensed attorney.

Further, the prosecutor should clearly explain his role to the defendant and the jury, and take measures to ensure that neither misconstrues the prosecutor's loyalties or obligations. Realizing that some jurors may sympathize with a *pro se* defendant, the prosecutor should make efforts to assure that the jury understands the defendant's role and obligations. The attorney should also deal with the defendant cautiously and avoid engaging in any transactions or discussions that may give rise to inaccurate reports regarding counsel's statements or conduct. In this regard, requesting that all dealings take place in open court is a good practice.

It is essential to include the judge in all matters relating to the case. Prosecutors should have the judge explain rules and procedures to the defendant and clarify misconceptions. Also, one would be wise to bring all concerns about pretrial and trial matters, such as discovery and evidence, to the court's attention prior to trial. Doing so may eliminate many problems at trial.

During trial, the prosecutor should maintain dignity and composure at all times. He or she should employ discretion and restraint when making and meeting objections and when proffering

50. To so comment may result in a reversal of conviction on appeal. *See Porterfield v. State*, 522 So. 2d 483, 488 (Fla. 1st Dist. Ct. App. 1988).

51. *See id.* at 487-88.

and opposing the introduction of testimony and tangible evidence. A little patience can go a long way with a jury when trying a case against a self-represented accused.