Due Process: Not for Everyone?
By Edward Lynch

Introduction

The United States Constitution is the backbone of our Republic. It is a document which has stood the test of time and which has been the impetus in helping the United States of America establish itself as an example to others – a city on a hill, so to speak. It is the blueprint for a government, which while imperfect, has endured the dangers and pitfalls that have brought other nations down. While often challenged by emerging and growing trends that include individualism and changing social morals, it has stood up to the rigors of legal challenge.

It is vigorously defended by legal minds with professional degrees with regard to such issues as abortion, equal rights based on gender and race and all of our citizens being afforded due process defined as a fundamental principle of fairness in all legal matters, both civil and criminal, especially in the courts. All legal procedures set by statute and court practice, including notice of rights, must be followed for each individual so that no prejudicial or unequal treatment will result. While somewhat indefinite, the term can be gauged by its aim to safeguard both private and public rights against unfairness.¹

The universal guarantee of due process is documented in the Fifth Amendment of the U.S. Constitution. The amendment provides that, “No person shall…be deprived of life, liberty, or property, without due process of law.”² It is applied to all states through the application of the 14th Amendment, which states,

- “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

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shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

From this basic principle flows many legal decisions determining both procedural and substantive rights. However, there are many times that due process is not afforded to individuals, especially if these individuals fall into the category of small business owners or entrepreneurs.

**Current Regulation**

It has been long established that a business entity cannot represent itself in court. According to Andrew Douglas in his article concerning corporate representation by non-attorneys, courts have applied this common law rule based on prohibiting the unauthorized practice of law and have offered three primary justifications. First, because a Corporation is a “hydra-headed entity and its shareholders are insulated from personal responsibility,” there must be one designated spokesperson accountable to the court. Second, "[u]nlike lay agents of corporations, attorneys are subject to professional rules of conduct and thus amenable to disciplinary action by the court for violations of ethical standards." Third, attorneys purportedly have the legal skills necessary to

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3 Id.
5 *Nicholson Supply Co. v. First Federal Savings & Loan Association of Hardee County*, 184 So.2d 438, (Fla. 2d DCA 1966).
competently participate in litigation and other proceedings. When corporate agents are not attorneys, "a lack of legal expertise combined with a failure to maintain a proper chain of communication between the agents at each level of the action may act to frustrate the continuity, clarity and adversity which the judicial process demands." 

Another court opined, "To allow a corporation to maintain litigation and appear in court represented by corporate officers or agents only would lay open the gates to the practice of law for entry to those corporate officers or agents who have not been qualified to practice law and who are not amenable to the general discipline of the court." Jonathan Macey in his book, *Macey on Corporation Laws*, quoted a number of court decisions, which led him to conclude that the act of filing a complaint constitutes the practice of law. He identified a case as an example, where a real estate broker submits the usual form for an earnest money contract to a court and that contract only identified facts. Macey went on to say that, if a person, not authorized to practice law were to fill out forcible entry and detainer complaints, that would constitute the unauthorized practice of law.

Our inquiry will turn to whether the product, the complaint of that

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9 Oahu Plumbing and Sheet Metal, Ltd. v. Kona Construction, Inc., 590 P.2d at 575. See also State ex rel. Western Parks v. Bartholomew County Court, 270 Ind. 41, 44-5, 383 N.E.2d 290, 293 (1978).

10 Land Management, Inc. v. Department of Environmental Protection, 368 A.2d 602, 603 (Me. 1977).

11 Union Savings Ass’n v. Homeowners Aid, Inc., 23 Ohio St.2d 60, 64, 262 N.E.2d 558, 561 (1970).


unauthorized practice (a non-attorney who filed the underlying complaint), must therefore be treated as null and void.\textsuperscript{16}

With very few exceptions, while a person may represent themselves \textit{pro se} (a Latin term meaning “for oneself” or “on one’s own behalf”\textsuperscript{17}), a corporation may not represent itself by having its officers represent the interest of the business:

- The general rule is that an individual may appear pro se and represent themselves in court. Fla. Stat. § 454.18. This general rule does not apply to probate proceedings or to corporations. . . . A corporation, as a fictitious entity, may not appear pro se. \textit{Szteinbaum v. Kaes Invecciones Valores}, 476 So. 2d 247 (Fla. 3d DCA 1985).\textsuperscript{18}

This appears to be a violation of due process rights. There is a limited exception for corporations in small claims courts, if the amount is controversy is less than $5,000. In that case, an officer of the corporation may represent the corporation at any stage of the trial proceedings or any employee authorized in writing by an officer of the corporation.\textsuperscript{19}

A recent Florida court decision analyzed whether this exception applied to post-judgment collection litigation, and held that it does not. Judge Herbert M. Berkowitz, writing for the Hillsbоро County Circuit Court, stated,

“The phrase “trial court proceedings” as used in Fla. Sm. Cl. R. 1.7050 (a) (2), does not extend corporate self-representation to post judgment proceedings. Once a small claim final judgment has been entered, wherein a corporation is a party, any further representation of

\begin{itemize}
\item[] Legal Information Institute, https://www.law.cornell.edu/, (last visited Feb. 13, 2018).
\item[] Rule 7.050 Florida Small Claims Rules
\end{itemize}
that corporation must only be by duly licensed counsel.”

Judge Berkowitz’s ruling evidenced that a small company’s officers are only afforded due process up to a certain limit.

In *Florida Bar v. Schramek*, the court determined that it is in the best interest of the public, in general, to prohibit the practice of law by non-lawyers.

- The court emphasized that the major purpose for prohibiting the unlicensed practice of law is to protect the consuming public from being advised and represented in legal matters by unqualified person who may put the consuming public’s interests at risk.”

Judge Berkowitz went on to explain that to extend the definition of “trial court proceedings” as applying to post judgment collection activities would be to ignore the concerns and warnings as expressed in *State v. Sperry*. In *Sperry*, the Court noted that the reason behind prohibiting the unlicensed practice of law is “to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe.”

Then in the *Florida Bar v. Florida First Financial Group, Inc.*, the court found that conducting the necessary legal steps essential to the prosecution of post judgment collection activities, inherently and unquestionably constitutes the practice of law, because such prosecution requires legal skill and knowledge of the law greater than that possessed by the average citizen.

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21 *Florida Bar v. Schramek*, 616 So.2d 979, 983 (Fla.1993), See also *Florida Bar v. Furman*, 376 So.2d 378, 381 (Fla.1979).
22 *State v. Sperry*, 140 So.2nd 587, 595 (Fla., 1962).
23 Id.
In Ohio, the Supreme Court of Ohio ruled that a non-lawyer officer or salaried employee of a limited liability company (LLC) does not engage in any unauthorized practice of law by completing or filing legal documents on behalf of the company in small claims court or by appearing in small claims court on behalf of the company. Provided, that the non-attorney does not engage in cross examination, argument or other acts of advocacy.\textsuperscript{25}

Other courts have responded similarly in the cases of small claims courts and have allowed limited representation as long as the representation does not cross into that particular court’s definition of “practicing law.” According to the American Bar Association, the definition for practicing law in Florida concerns,

- “. . . the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law .”\textsuperscript{26}

Practicing law may include legal advice to clients, drafting legal documents on behalf of clients and representing clients in legal proceedings. Essentially, anything a lawyer can charge a client for, is considered “practicing law.”\textsuperscript{27} But of course, lawyers and judges (who are usually practicing attorneys) and are frequently in the position of making rules or laws, have a conflict of interest because any law that would prohibit non-lawyers from practicing law means that the public must use legal representation, which keeps the market for attorneys active. Failure to do otherwise would constitute the allowing of competition with players outside of the profession. Therefore, it appears that the legal system has acted in its own best interest to perpetuate a system where the only way to access the courts and one’s constitutional rights is to pay a lawyer an often exuberant fee. Failure to hire a personal attorney would

\textsuperscript{25} Cleveland Bar Assn. v. Pearlman, 106 Ohio St.3d 136, (2005), Ohio-4107.  
\textsuperscript{27} West's Encyclopedia of American Law, ed. 2. 2008, The Gale Group, Inc.
practically result in a more likely denial of due process. This is especially true for small companies.

**Analysis**

Some industries are prone to being held hostage by their clients. Consider this, as an example, the construction industry or any business where it becomes cost prohibitive to defend their rights against potential litigants. In these industries, there are clients who prey on the knowledge that smaller businesses cannot afford to pay high price lawyers to represent small businesses up to certain amounts. These clients will refuse to pay the contractor, knowing that a court case would take more resources in time and money to fight and win than it would be worth for the contractor to walk from the situation. If a small contractor isn’t paid their last 10% retainer on a $300,000 project, it is likely that a lawyer would charge upwards of $40,000 to be able to get the $30,000 owed to the contractor. This amount would be even higher if the case were to go to trial.

However, it is not the unscrupulous client, or contractor who bears most of the responsibility in these matters. It is the lawyers who have set up conditions upon which there is no rational reason for lawyers to resolve the issues. In fact, there is more of a financial incentive for lawyers to drag out a case via the minutiae of legal protocols, procedures and wrangling. It is actually quite simple; lawyers generally make more money the longer a case goes on. Simply put, there is no incentive to resolve a case expeditiously.

Lawyers who wrote the laws and which lawyers in front of judges, who used to be lawyers, have significantly more incentive to deny the ability of defendants or plaintiffs to represent themselves in legal proceedings, defend. Lawyers take advantage of the fact that a businessman who owns a small business needs to spend their day running their business to bring money in and they do not have the time to research procedural nuances in order to respond to even the most mundane legal matter. Lawyers have set up a legal profession which emphasizes procedure rather than justice.

It is not justice for a small businessperson to have to pay a lawyer more than $30,000 or $40,000 in order to take a case to trial to recover the $20,000
rightfully owed to them. Many times, there is no provision in small contracts for lawyer’s fees to be recovered, even if the suit is successful. And it may be that when a complaint is settled, each side will be responsible for their own lawyer’s fees.

There are many times when a lawyer will require an exorbitant amount as a retainer before even beginning a case. These retainer amounts may not be exorbitant to a large company who may have an army of lawyers on staff, but to a small company, they can mean the difference between having access to due process or not… and it is the “not” which must be addressed.

However, not to place the burden of guilt and corruption solely on the shoulders of lawyers, it is the legal system and what it has become that is ultimately at fault and must be adequately addressed to truly guarantee due process for all. It is a system that has been set up, not to win, not to secure justice for their client, but to drag procedural matters out until such a time that the small business who cannot afford to go any further due to a lack of financial resources decides to “call uncle” and must ultimately settle, many times losing more money than they were seeking. It is a system where a lawyer can be hired and when both sides drag the case out and the lawyer sees no prospect of being paid any longer, so they resign from the case.

It makes sense that lawyers want to get along with other lawyers, for the most part. They may have to do business with them in the future and they want to be viewed as “reasonable.” The system has been set up to promulgate a long, dragged out process which, more often than not, provides for no winner…other than the lawyers. Gone are the days when a lawyer is a true advocate for their clients. The profession systematically bleeds clients dry of every last bit that they feel reasonably assured they are able to get away with and, when the client has had enough, they move to settle. The cost for small businesses to take a case to trial is so cost prohibitive that they have no option but to settle after a long, drawn out procedural process of paying their lawyer until they can’t afford to pay any longer.

The system has put in place an “out” or compromise for small companies, as mentioned above, the small claims court. In some cases, small claims courts
allow for a representative from a small business to represent their company in disputes under $5,000. However, in Florida, to be represented after a judgment is entered, the small business is no longer allowed to represent themselves. The purpose of small claims court is to allow people to bring relatively minor claims before a judge without incurring considerable expense in the form of attorney's fees and court costs. By its very nature, small claims court is a simple, inexpensive and reasonably fast alternative to a full-blown lawsuit. The considerable expense represented by attorney fees has become a significant point of concern.

On the other hand, our system is also set up in such an onerous manner that even large companies are not immune to the economic injustices. There are many times when large companies are sued in small claims court and, rather than incurring exorbitant legal costs which are significantly higher than the claim against them, they choose to settle these matters prior to the court date as it is more economically feasible to do so. This sets a very serious precedent as this type of condition in our system opens up, even larger companies, to settling frivolous lawsuits due to the economic impact that defending themselves would create.

In all cases, it is our system, which focuses more on procedural matters than substantive ones, where lawyers will not take a case without requiring large retainers or charging exorbitant hourly fees, that has made due process unavailable to all…especially small businesses. In some cases, small businesses for tax reporting purposes are treated as individuals with the direct pass through tax treatment. Corporations that choose a Subchapter S election, for federal income tax purposes, are closely held corporations that make the election to be taxed under Subchapter S of Chapter 1 of the Internal Revenue Code. This tax treatment is virtually the same as a Limited Liability

30 26 U.S. Code § 1361
Company or Limited Partnerships where the company issues a K-1 which is a
direct pass through to the individual owner of the company. Therefore, the
federal government allows for the treatment of some small businesses as
individuals.

Even the court’s rulings are suspect in this matter of an entity or company
representing itself, particularly when dealing with a small company. When the
court decided in Oahu Plumbing and Sheet Metal, Ltd. v. Kona Construction,
Inc.,\(^\text{[31]}\) that a corporation is a hydra-headed entity and its shareholders are
insulated from personal responsibility,\(^\text{[32]}\) we must ask if the court’s decision is
relevant for a small business where there may be only one or two members of
the company. Additionally, it can be argued that the shareholders of a small
company are not insulated from personal responsibility because the inability to
be able to represent itself opens up the shareholders, or owners, to complete
financial loss if the business represents the whole or substantial part of their
resources.

Then, when the court decided, also in Oahu, that "[u]nlike lay agents of
corporations, attorneys are subject to professional rules of conduct and thus
amenable to disciplinary action by the court for violations of ethical
standards,"\(^\text{[33]}\) the court failed to consider the situation of small companies on
several levels. Small companies are harmed when an attorney takes a case and
pursues a matter that has little to no chance of a successful resolution.
Attorneys are not typically exposed to ethical violations for accepting and
pursuing a case that has little chance of success. Yet, the small business person
is left with a substantial legal bill for a high-risk effort, that they may have
sought legal counsel to evaluate before the legal fees accrued. It is also

\(^{31}\) Oahu Plumbing and Sheet Metal, Ltd. v. Kona Construction, Inc., 60 Haw. 372,
Properties, Inc., 87 Misc.2d 25, 27, 385 N.Y.S.2d 466, 467 (Sup.Ct. 1976), construed
in Jonathan Macey, Macey on Corporation Laws: A Comparative Guide to the Model

\(^{32}\) Id.

\(^{33}\) Oahu Plumbing and Sheet Metal, Ltd. v. Kona Construction, Inc., 590 P.2d at 574
(citing Merco Construction Engineers, Inc. v. Municipal Court, 21 Cal.3d 724,
727, 581 P.2d 636, 641, 147 Cal.Rptr. 631, 636 (1978)).
important to note that the court has the ability to hold an owner representing their company in contempt of court for violation of professional rules of conduct.\textsuperscript{34} Thus, the court is not without recourse in protecting the shareholders in the event of misconduct. The \textit{Oahu} decision failed to take into consideration these other factors when determining that a company must be represented by a lawyer.

Finally, what is taught in law school is more of a general knowledge of different aspects of law. In some cases, law students may only take one course in the field in which they ultimately practice. They may or may not have developed the requisite skills by the time they are in front of a judge. Additionally, it is not beyond the ability of a business owner to understand the procedures required in court and any judge truly seeking to promote justice should be more than willing to guide a non-lawyer to navigate the murky waters of legal jargon and procedural minutiae.

\textbf{Conclusion}

It is nearly impossible for man to create any system which will work perfectly all of the time. Unfortunately, our legal system has morphed into a system which is more interested in preserving the status quo. We have a system where a defendant must pay exorbitant legal fees to defend itself or file a righteous lawsuit against those who have wronged them. The inability of small businesses to represent themselves is a blatant denial of the protections provided for in the Constitution. After all, small businesses such as limited liability companies (LLC), partnerships, sole proprietorships and corporations which elect sub-chapter S treatment are all companies where there is a direct pass through of income and are treated as individuals. Likewise, these companies should also be treated as individuals when it comes to representing themselves in courts of law and all legal matters.

Small businesses, which are treated as individuals for filing their own paperwork, filing their taxes, having a pass-through tax treatment and having

“limited” corporate protection should be able to represent themselves or pick a person within the entity who will act on behalf of the entity in court. If small businesses are continued to be denied the ability to represent themselves in any legal proceedings, the entity and the individuals owning the entity are, unequivocally, denied the right of due process provided for by the United States Constitution which constitutes a violation of their civil rights.