The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications

RICHARD ZORZA, ESQ.*

INTRODUCTION

This Article analyzes and suggests an approach as to how judges can deal appropriately and neutrally with the hugely increased numbers of those who appear in court without counsel in civil cases.¹

Notwithstanding the numerical evidence of the importance of this phenomenon, and the obviousness of its impact on the both litigants and judges, during most of the recent period of rapid growth there has been little public academic or judicial attention, and indeed little ABA or state regulatory attention, to how the judiciary should be responding to the challenge of this change in the courtroom.²

¹ J.D., Harvard (1980); A.B., Harvard (1971). The author offers particular thanks for their ideas and inspiration to the following: Judge William H. Abrashkin (First Justice, Western Division, Housing Court Department of the Massachusetts Trial Court); Judge Rebecca Albrecht (Justice, Superior Court, Maricopa County, Arizona); Barrie Althoff (Executive Director, Commission on Judicial Conduct, Washington State and former Chief Disciplinary Counsel, Washington State Bar Association); Jeanne Cham, Esq. (Instructor and Director of the Hale and Dorr Legal Services Center, Harvard Law School); Russell Engler (Professor of Law, New England School of Law); John M. Greacen, Esq. (Partner, Greacen Associates); Bonnie Rose Hough, Esq. (Senior Attorney, California Administrative Office of the Courts); Sally Hillsman, Ph.D. (President, American Sociological Association); Judge Laurie Zelon (Associate Justice of the California Court of Appeal, Second Appellate District, Division Seven). Notwithstanding the debt owed them all, the faults and inadequacies are the author’s own.

² In many courts, well over 50 percent of litigants appear without lawyers. For example, in California, a court study found that in child support cases, only 15.95 percent of the cases had counsel on both sides and that in 63 percent of cases neither parent was represented (let alone the children). JUDICIAL COUNCIL OF CALIFORNIA, REVIEW OF STATEWIDE UNIFORM CHILD SUPPORT GUIDELINES 6-21 (1998). More recent California figures show that 81 percent of eviction proceedings had at least one party without a lawyer. John M. Greacen, Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know, at 7, available at http://www.courtinfo.ca.gov/programs/cfcc/pdf/SLRwhatweknow.pdf [hereinafter Greacen, Self-Represented Litigants]. This last paper includes a general summary of the state of research knowledge about pro se litigants and their cases. Id. at 1-3. Given the importance of the issue, the state of our collective knowledge can only be described as abysmal. Id. at 2, 32 (describing what is not known).

² The lack of attention is well-illustrated by ROBERT E. KEETON, JUDGING IN THE AMERICAN LEGAL SYSTEM 172 (1999), in which the only analysis, beyond passing mentions, is a three paragraph section, which draws attention to the judge’s duty under Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam), to construe pro se pleadings liberally.

This reticence is in contrast to the substantial attention now being paid to how courts may appropriately assist litigants in dealing with the front end of the system and in giving them general information. AMERICAN
Recently, however, there has finally been some growing attention to the question of how judges should deal with such cases and of their implications for the judicial role. This attention now includes a recently launched State Justice


3. The focus on judges in this Article should not be read to suggest that other players in the system do not also bear appropriate responsibility for ensuring access for those without lawyers. For a comprehensive multi-player study and recommendations, see Russell Engler, And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks, 67 Fordham L. Rev. 1987, 2025-31 (1999). The judge, of course, does have the ultimate responsibility for the result that goes beyond that of the other players in the system.

Institute funded study being conducted by the American Judicature Society, with a particular focus on the ethical issues faced by judges dealing with such cases; it also includes an inquiry by the recently established ABA task force into exploring the possible need for changes in the Model Code of Judicial Conduct ("Model Code"). The urgency of this attention has been highlighted by the growing realization that those who appear in court without lawyers are, as a general matter, only "choosing" to do so in the most formal sense. Rather, that "choice" is a product of their economic situation and the cost of counsel.

Part One of this Article suggests an intellectual structure for analyzing this issue. Its core thesis is that our focus on the appearance of judicial neutrality has caused us improperly to equate judicial engagement with judicial non-neutrality, and therefore to resist the forms of judicial engagement that are in fact required to guarantee true neutrality. The intellectual structure proposed in the Article attempts to "unpack" that confusion.

Having built a structure for analyzing the distinction between neutrality and disengagement, the Article then suggests a theoretical approach for how a judge might obtain the benefits of engagement and true neutrality without running the risk of creating the appearance of non-neutrality.

The remaining parts of the Article commence an exploration of the implications of this analysis for how judges might conduct their courtrooms on a day to day basis (Part II), for changes that might be considered in the Canons of, or Comments to, the Model Code (Part III), for standards of appellate review of judicial decisions made in managing cases (Part IV), and for future research (Part V).

In summary, the paper concludes that:

including self-represented litigants with special attention to cases in which only one of the parties is represented." See COSCA Position Paper, supra note 2, at 7. The CCJ-COSCA Final Report states,

To secure the cooperation of the trial bench in these endeavors, judges should be given adequate tools (e.g., judicial guidelines, recommended practices and procedures) with which to structure their interactions with self-represented litigants in the courtroom. The discussion of what these guidelines might entail has only just begun in a handful of states, and to date there is no clear consensus of where the lines should be drawn between appropriate and inappropriate judicial assistance for self-represented litigants. The sooner that the topic is placed on the table for discussion, the sooner that judges can begin to formulate concrete ideas for improving the in-court experience of self-represented litigants.


7. For research data on the income levels of the self-represented, see infra note 47.
Judicial neutrality and judicial passivity are very different, and should not be confused.

In the pro se context, the appearance of neutrality and true neutrality are often very different, and true neutrality often requires a form of engagement that may seem inconsistent with traditional expectations for the appearance of neutrality.

This apparent contradiction can be resolved by the development of a transparent style of judging, in which judicial engagement is demonstrated to be in the service of true neutrality. Moreover, while the perceived fears of the dangers of engagement are perhaps greatest at the (rarely occurring) trial phase, such an approach is equally valid and needed in the other phases of judicial involvement with cases, including supervision of the participation of other components of the court system.

Such transparency can be achieved by relatively simple courtroom techniques, many of which are already in use and have been written about.

Such innovations, and the dialog needed to advance them, could be greatly assisted by additional comments to the Model Code, which could clarify that such changes in courtroom conduct are in no way inconsistent with the Canons of the Model Code.

Current case law, including its general approaches to review of cases challenging judicial management of the courtroom, provides guidance for the development of additional ways of thinking about judicial courtroom management that will help provide an accessible forum.

Finally, additional empirical research is urgently needed into these matters.

I. AN INTELLECTUAL STRUCTURE FOR ANALYSIS OF THE NEUTRALITY PROBLEM IN JUDICIAL MANAGEMENT OF PRO SE CASES

A. THE TWO DIMENSIONS OF JUDGING: NEUTRALITY VERSUS NON-NEUTRALITY AND ENGAGEMENT VERSUS PASSIVITY.

It is a truism that there is no concept more fundamental to the common law and United States legal systems that judicial neutrality. Without such neutrality, the entire legitimacy of the legal system, indeed its reason for existence within the democratic experiment, falls.8

8. While it is hard to define "neutrality," one verbally effective effort is Justice Cardozo's, which also highlights the importance of the concept of neutrality to the social order: "One of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in its actions that savors of prejudice or favor or even arbitrary whim or fitfulness." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921). The Terminology section of the Model Code defines "impartiality" as follows: "'Impartiality' or 'impartial' denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." See http://www.abanet.org/cpr/mjc/pream_term.html#TERMINOLOGY. These support the commonsense meaning of the word as evenhanded and not taking sides.
Because such neutrality is so crucial and so entwined with the legitimacy of the system, society and the legal system have built up a complex and multi-faceted structure to protect and emphasize this neutrality. The components of this structure include the general impartiality language of the Model Code,9 the

9. Canon 2 of the Model Code currently reads, in relevant part,

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES.

A. A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1997) [hereinafter MODEL CODE].

Canon 3 of the Model Code similarly reads as follows:

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.* In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law* and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require* order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
explicit prohibitions on *ex parte* communications in the *Model Code* and the common law,\textsuperscript{10} and, of greatest relevance here, the entire ideal judicial courtroom persona on which we have been reared, and which we take absolutely for granted.

This ideal persona, known to generations of attorneys and TV watchers, is characterized by a responsive and reactive attitude, in which the judge does no more or less than acts as an umpire, responding only when asked to do so by counsel.\textsuperscript{11}

However, the conception of this ideal persona is completely grounded in the inaccurate and now outdated courtroom model in which both parties have counsel. Today, since such a courtroom is no longer the statistical norm,\textsuperscript{12} the model represents a serious oversimplification of how fairness and neutrality can be achieved and in particular of the consequences for the *actual*, as opposed to *perceived*, neutrality of the system when the judge acts according to this persona.

As the tables below suggest, in fact a judge can be neutral or non-neutral\textsuperscript{13} and

\begin{itemize}
\item[(ii)] the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.
\item[(b)] A judge may obtain the advice of a disinterested expert on the law\textsuperscript{*} applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
\item[(c)] A judge may consult with court personnel\textsuperscript{*} whose function is to aid the judge in carrying out the judge’s adjudicative responsibilities or with other judges.
\item[(d)] A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
\item[(e)] A judge may initiate or consider any *ex parte* communications when expressly authorized by law\textsuperscript{*} to do so.
\item[(8)] A judge shall dispose of all judicial matters promptly, efficiently and fairly.
\item[(9)] A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require\textsuperscript{*} similar abstention on the part of court personnel\textsuperscript{*} subject to the judge’s direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.
\item[(10)] A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.
\item[(11)] A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information\textsuperscript{*} acquired in a judicial capacity.
\end{itemize}

\textit{Model Code} Canon 3 (1997).

\textsuperscript{10} \textit{Model Code} Canon 3 (1997).

\textsuperscript{11} Of course, as part of this persona, the judge must also maintain unchallenged control of the courtroom so that counsel always have the full opportunity to do their jobs of presenting arguments and evidence to this umpire and, where relevant, the jury.

\textsuperscript{12} See studies cited supra note 1.

\textsuperscript{13} See definitions cited supra note 8.
at the same time can be either engaged\textsuperscript{14} or passive. This Article suggests that there are two dimensions on these issues (neutral or non-neutral and engaged or passive) rather than one (passive or non-neutral), and therefore four possible judicial behavior choices rather than two. Under this way of looking at things, the consequences with respect to the fairness and actual neutrality\textsuperscript{15} of the proceeding as a whole for the parties depend on how the judge behaves with respect to both of the two available dimensions, not just his or her formal lack of bias.\textsuperscript{16}

The table below details these two dimensions and describes, albeit in a simplified way, judicial behavior and the general consequences for neutrality and fairness in each of the four “cells” of the table.

\begin{table}
\centering
\begin{tabular}{|c|c|}
\hline
Dimension 1 & Dimension 2 \\
\hline
Neutral & Engaged \textsuperscript{14} \\
\hline
Non-neutral & Passive \\
\hline
\end{tabular}
\caption{Judicial Behavior and Consequences} \label{tab:judicial}
\end{table}

\textsuperscript{14} While this Article uses the phrase “engaged,” a better term might be “purposefully engaged,” in the sense that the engagement has a purpose – access to justice and a truly neutral result. One can imagine forms of engagement that are neither non-neutral, nor particularly productive of access to justice.

\textsuperscript{15} It is axiomatic in this Article that a proceeding that appears or is even intended to be neutral, but leads to an unfair result, as fairness is defined in terms of the governing law, is not neutral in any ultimate sense. In other words, it is neither the intent, nor the appearance that counts, but what is achieved in terms of neutrality.

This entire analysis deals only with the fairness and neutrality of the proceeding, not the substantive fairness of the underlying law. Put another way, a result that is “unfair” because of the perceived unfairness of the underlying substantive law that is applied cannot be said to be unfair as the result of a non-neutrality of the proceeding.

It should be emphasized that nothing in this entire analysis challenges the fundamental conception of an adversary system. Unlike other proposals which have suggested that the United States should move toward more of an inquisitorial system, e.g., Goldschmidt, The Pro Se Litigant’s Struggle, supra note 4, at 40-50, the theoretical goal of this Article is to make sure that the adversary system does what it is supposed to do at its best – to get to truth and justice through a competition between two versions of fact and law before a neutral decision-maker.

\textsuperscript{16} This approach is in intentional contrast to the general perception that engagement in such situations is equivalent, or at least close to, non-neutrality. See, e.g., Goldschmidt \textit{et al.}, supra note 2, at 29 (“The data collected in this survey show that the most serious concern of trial judges [about pro se issues] is their perceived inability to assist a pro se litigant due to their duty to maintain impartiality.”).

More generally, it should be noted that while this analysis is offered primarily as an aid to understanding the dynamics of the pro se courtroom, its two dimensions of neutrality/non-neutrality and engagement/passivity, may well work just as well in understanding other situations in which traditional conceptions of the required aloofness of the judge no longer serve court and social needs. For example, traditional views of judicial neutrality are coming under similar pressure in the context of specialty courts such as drug courts, community courts, and domestic violence courts. See, e.g., Greg Berman & John Feinblatt, Judges and Problem Solving Courts 16-18 (2002) (discussing problems of judicial independence); Nat'l Ass'n of Drug Ct. Prof'ls, Defining Drug Courts: The Key Components, Jan. 1997, available at http://www.nadcp.org/whatis. For a state rule response, see Cal. Rules of Ct., stds. of Jud. Admin. § 39 (2004) (allowing judges to play community outreach, education, and information-gathering roles); see also Cal. Rules of Ct., stds. of Jud. Admin. § 39 Drafters' Notes, Apr. 1999 (stating that the amendments and new rule “encourage judges to provide leadership for and personally engage in community collaboration and outreach activities as part of their judicial functions”).

A judge in such a court is similarly often today considered to be caught between engagement and neutrality, as if the two are opposites. It may be that understanding neutrality as being on a different dimension from, rather than on the same dimension as, engagement may help transcend the apparent tension, and it may be that in this context too that transparency, see discussion infra Part I.D, is the key to reaching and sustaining acceptance of engaged neutrality.
# Table I

## The Two Dimensions of Judging

<table>
<thead>
<tr>
<th></th>
<th>Engaged</th>
<th>Passive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Neutral</td>
<td>Creates an environment in which all the relevant facts are brought out; Engages the parties, as needed, to bring out these facts, and their foundation; Ensures neutrality by making sure that each side gets their side fully out. 17</td>
<td>Leaves it to the parties to get their evidence and foundations before the court; Does not engage the parties, but rules on motions and objections; Relies on the balance of the system to ensure neutrality.</td>
</tr>
<tr>
<td>Non-Neutral</td>
<td>May intervene to deter or prevent one side getting story before court; May also allow bias to cloud how evidence is seen. 18</td>
<td>Acts as above but allows bias to cloud whether and how evidence is admitted and seen.</td>
</tr>
</tbody>
</table>

17. Cases in support of a duty of engagement include: Breck v. Ulmer, 745 P.2d 66, 75 (Alaska 1987) (holding that the trial judge has “explicit” duty to advise self-represented litigants of rights and procedures for opposing a summary judgment motion, but that the failure to do so here was not prejudicial); Keating v. Traynor, 833 P.2d 695, 696 (Alaska 1992) (finding a similar duty to inform one seeking to intervene of proper procedure); Collins v. Arctic Builders, 957 P.2d 980, 982 (Alaska 1998) (reversing a dismissal of appeal for procedural defect; stating that the court was “not concerned that specificity in pointing out technical defects in pro se pleadings will compromise the superior court’s impartiality”); Lombardi v. Citizens Nat’l Trust & Sav. Bank of Los Angeles, 289 P.2d. 823, 824-25 (Cal. Ct. App. 1955).

18. Examples of such non-neutral engagement include Pavilon v. Kaferly, 561 N.E.2d 1245, 1255-58 (Ill. App. Ct. 1990) (holding that reversal was required based on judicial comments and objections that revealed bias against a self-represented defendant); Bullard v. Morris, 547 So. 2d 789, 791-92 (Miss. 1989) (finding an abuse of discretion in requiring an unrepresented litigant to appear in person before a decree of divorce was issued).
Table I is therefore self-explanatory. At the first level of this mode of analysis, the table shows that a passive judge may or may not be neutral and an engaged judge may or may not be non-neutral. At the second level of analysis, the table suggests that a neutral judge may or may not achieve a fair result. This is because, as discussed in detail below, if the whole story does not get before a passive judge because of that judge’s passivity, then, notwithstanding the judge’s apparent evenhandedness the result can not be truly neutral.

B. WHETHER THE RESULT IS TRULY NEUTRAL, AND WHAT IS OBSERVABLE WITH RESPECT TO NEUTRALITY, VARY AND DIFFER DEPENDING ON REPRESENTATION STATUS

The non-neutrality of the result from a neutral, but passive judge, can come in a wide variety of ways, a preliminary exploration of which is useful for understanding both the ultimate non-neutrality of the result, and how a judge might be able to manage a courtroom to avoid it. All these reasons can occur with or without counsel, but they are far more likely to occur when a party does not have counsel. The non-neutrality in the outcome might come from:

- The judge not hearing facts or evidence because of the litigant’s lack of understanding of its relevance to the ultimate issue.
- The judge not hearing facts of evidence because of the litigants’ lack of knowledge of how to get it front of the judge, in terms of establishing admissibility, foundation facts, etc.
- The judge not understanding the relevance of facts before him or her because of the litigant’s failure to explain, and the judge’s failure to elicit, the relevance.
- The litigant being too intimidated from getting the story in front of the judge.
- The litigant not raising issues because he or she did not know they could impact the outcome, or did not understand the legal analysis relating the two.
- The litigant getting so tangled in the story that he or she is unable to communicate a coherent version of events to the judge.
- The litigant being intimidated or confused by objections raised by the opposing party, or, more likely, opposing counsel.

As the tables below illustrate, the risks and benefits of judicial behavior with respect to fairness and neutrality in each of the “cells” therefore depend on the skill and knowledge of the parties, and more precisely therefore on whether they have counsel.

Equally important, however, is the impact of judicial engagement or passivity, and neutrality or non-neutrality, upon the observability of the ultimate neutrality of the proceeding. Judicial behavior which may be viewed as demonstrating non-neutrality, regardless of whether it is in fact related to non-neutrality, might include behaviors such as the following:
• Asking of questions from which a judicial state of mind might accurately or non-accurately be inferred.
• Comments on the law or on required evidence, from which similar accurate or non-accurate inferences might be drawn.
• Interruption or redirection of witnesses, counsel, or parties, from which similar accurate or non-accurate inferences might be drawn.
• Tone of voice or other body language.

As the tables below also show, the extent of the observability of the risks and benefits of engagement with respect to true neutrality also depends not only on which “cell” most accurately characterizes the judge’s behavior, but the relationship of that “cell” to the representation status of the parties, i.e., whether they or their opponent have counsel. Crucially, it is the relationship between judicial behavior and representation status which governs the appearance of justice.

As the tables show, the relationship between the two is not the same for actual fairness and for the appearance of justice. The differences explain and highlight the disconnect between justice and the appearance of justice.

**TABLE II.A**

**Consequences and Observability When Both Parties Have Counsel**

<table>
<thead>
<tr>
<th></th>
<th>Judge Engaged</th>
<th>Judge Passive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge Neutral</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Consequences</strong></td>
<td><strong>Observability</strong></td>
</tr>
<tr>
<td>Judge Non-Neutral</td>
<td><strong>Consequences</strong></td>
<td><strong>Observability</strong></td>
</tr>
</tbody>
</table>

This table highlights a fact little noticed in the dialogue about neutrality, that judicial passivity increases the risk that a non-neutral process will nonetheless be seen as neutral, particularly when the presence of counsel for both sides provides a veneer of process neutrality.
TABLE II.B
CONSEQUENCES AND OBSERVABILITY WHEN NEITHER PARTY HAS COUNSEL

<table>
<thead>
<tr>
<th></th>
<th>Judge Engaged</th>
<th>Judge Passive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge Neutral</td>
<td><strong>Consequences</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Lesser risk of unfair result.</td>
<td>Risk of unfair result;</td>
</tr>
<tr>
<td></td>
<td>Observability</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Risk of non-symmetry of process</td>
<td>Apparent symmetry of process;</td>
</tr>
<tr>
<td></td>
<td>(depending on capacity of parties), from which</td>
<td>Lack of evidence of judicial behavior from which</td>
</tr>
<tr>
<td></td>
<td>there is a risk that unfairness may be inferred;</td>
<td>fairness of process or result may be inferred.</td>
</tr>
<tr>
<td></td>
<td>Greater evidence from which an informed judgment</td>
<td></td>
</tr>
<tr>
<td></td>
<td>as to fairness of process and result may be drawn.</td>
<td></td>
</tr>
<tr>
<td>Judge Non-Neutral</td>
<td><strong>Consequences</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Likelihood of unfair result.</td>
<td>Likelihood of unfair result.</td>
</tr>
<tr>
<td></td>
<td>Observability</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Likely apparent lack of symmetry</td>
<td>Apparent symmetry;</td>
</tr>
<tr>
<td></td>
<td>(depending on capacity of parties);</td>
<td>Little chance that evidence of</td>
</tr>
<tr>
<td></td>
<td>Greater chance that evidence of</td>
<td>unfair process or result will</td>
</tr>
<tr>
<td></td>
<td>unfair process and result will be visible.</td>
<td>still be visible.</td>
</tr>
</tbody>
</table>

As shown in this table, when neither party has counsel, the nature of judicial intervention becomes critical as to the two separate questions of whether the result is unfair and whether the result is perceived to be unfair.

TABLE II.C
CONSEQUENCES AND OBSERVABILITY WHEN ONLY ONE PARTY HAS COUNSEL

<table>
<thead>
<tr>
<th></th>
<th>Judge Engaged</th>
<th>Judge Passive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge Neutral</td>
<td><strong>Consequences</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Lesser risk of unfair result.</td>
<td>Substantial risk of unfair result.</td>
</tr>
<tr>
<td></td>
<td>Observability</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Risk that asymmetry of engagement</td>
<td>Likelihood that asymmetry of process will lead to</td>
</tr>
<tr>
<td></td>
<td>will lead to incorrect inference of</td>
<td>correct inference of unfairness of process and</td>
</tr>
<tr>
<td></td>
<td>unfairness of process and result.</td>
<td>result.</td>
</tr>
<tr>
<td>Judge Non-Neutral</td>
<td><strong>Consequences</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Likelihood of unfair result.</td>
<td>Likelihood of unfair result.</td>
</tr>
<tr>
<td></td>
<td>Observability</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Most likely that engagement will be non-neutral</td>
<td>Likelihood that asymmetry of process will lead to</td>
</tr>
<tr>
<td></td>
<td>and support correct inference of unfairness of</td>
<td>correct inference of unfairness of process and</td>
</tr>
<tr>
<td></td>
<td>process and result.</td>
<td>result, even though the real reason for the</td>
</tr>
<tr>
<td></td>
<td>There is a possibility that asymmetry of</td>
<td>unfairness is the non-neutrality of the</td>
</tr>
<tr>
<td></td>
<td>process could lead to inference of bias towards</td>
<td>judge.</td>
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<td></td>
<td>unrepresented party and conclusion that ultimate</td>
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<td></td>
<td>result in favor of represented party is fair.</td>
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Generally, it is when only one party has counsel that the consequences of passivity are likely to be greatest. In addition, however, is the fascinating result that non-neutral behavior may be masked by a judicial engagement that appears to balance the unfairness of one side having counsel.

C. THE APPARENT CONFLICT BETWEEN THE NEEDS FOR ENGAGEMENT WITH THE REQUIREMENT OF THE APPEARANCE OF NEUTRALITY

Taken together, these results lead to the following conclusions about the disconnect between the consequences for true neutrality and the observability and appearance of such neutrality.

<table>
<thead>
<tr>
<th>Table III</th>
<th>SUMMARY OF CONSEQUENCES AND OBSERVABILITY</th>
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</thead>
<tbody>
<tr>
<td>1. Passivity is less likely to produce a fair result</td>
<td>This risk is greatest when only one party has counsel.</td>
</tr>
<tr>
<td>2. Engagement is more likely to produce a fair result</td>
<td>This engagement is least needed when both parties have counsel.</td>
</tr>
<tr>
<td>3. Passivity is more likely to give an inaccurate observation of a just process and result (appearance of neutrality without neutrality).</td>
<td>This risk is greatest when there are counsel, since in the absence of counsel on both sides, disparities in presentation ability may in themselves lead to a perception of unfairness, although the perception will wrongly ascribe the reason to the capacity of the parties rather than the attitude of the judge, and this erroneous perception will provide a mask of legitimacy to the result, and make correcting it harder.</td>
</tr>
<tr>
<td>4. Engagement is more likely to produce inaccurate observation of an unjust result and process (neutrality with the appearance of non-neutrality).</td>
<td>This risk is minimized when both sides have counsel, and is most acute when only one side has counsel.</td>
</tr>
</tbody>
</table>

In short, and only at a first cut, the conclusions that this more detailed analysis highlight are that passivity tends to appear neutral when it is not and that engagement is more likely to appear non-neutral when it is in fact neutral. The implication is that we need to be skeptical that passivity is really neutral, or that engagement is truly non-neutral.

In other words, justice and the appearance of justice appear to pull in different
directions, at least when it is not the case that both sides have counsel.19

Moreover, deep institutional and ideological pressures, as described above,20 lead us to choose the appearance of justice over justice itself. There is particular irony in this disconnect, given that the system's concern for the appearance of justice is driven largely by its ultimate desire for justice itself, and its view of the appearance of justice as a proxy for justice.

This disconnect is precisely parallel to the one that has until recently been reflected in the rule that "clerks don't give legal advice", which, has been interpreted to prevent clerks from providing any information to the self-represented. That over-interpretation has derived from the fear that an engaged clerk would result in the court being seen as non-neutral, and from ignoring the barrier to neutral access the justice erected by that interpretation.21 What is suggestive about this example is that the clear thinking about how clerks' information provision to litigants can be neutral has within a few short years transformed how state courts think about this issue, resulting in the establishment of wide changes in practice, and a network of court-based information-providing institutions.22

The question for the next portion of this paper is whether we can similarly break out of the parallel disconnect with respect to courtroom neutrality, and what forms of judicial behavior might break out of the conundrum of the disconnect.23

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19. As Barrie Althoff puts it: "If there is no one else to provide assistance to the unrepresented person, the judge or the judge's staff may need to do so, and the more assistance given, the more likely the opposing parties will be deprived or feel deprived of themselves receiving a fair and impartial hearing." Althoff, supra note 4. He also notes that

[In this context the test of impartiality and fairness is not merely whether the judge assisted an unrepresented party, but rather whether that assistance would lead a 'reasonably prudent and disinterested observer' to conclude that all parties had not had a 'fair, impartial, neutral hearing.' The judge's role is neither to so assist an unrepresented party as to equalize the resources of the litigants nor to oversee a travesty of justice. But it is difficult for a judge to know where between the Scylla of seeking a level playing field and the Charybdis of presiding over a litigation massacre the judge may safely sail.]

Althoff, supra note 4 (quoting State v. Ladenburg, 840 P.2d 228 (Wash. Ct. App. 1992)).

20. See discussion supra Part I.A.

21. See generally Greacen, No Legal Advice, supra note 2. For more recent developments, see John Greacen, Legal Information vs. Legal Advice: Developments During the Last Five Years, 84 JUDICATURE 198 (Jan.-Feb. 2001).

22. These innovations, which include court-based self-help centers and re-definition of the clerk's role to include the giving of information are described in detail in the materials listed supra note 2.

23. The task should be made less daunting with a recognition that Administrative Law Judges in many state and federal contexts, as well as state judges in small claims courts, have to do this every day. See generally Engler, supra note 3, at 2017-18.

Nor should it be forgotten that the mediation process often proceeds without counsel, and that there may be much to be learned from its practitioners. While as a general matter it is perceived that the formality of the proceedings means that judicial aloofness is more important that mediator aloofness, it may well be in fact that the formality of judicial proceedings provides protections against bias that make judicial engagement less likely to lead to non-neutrality or the appearance of non-neutrality, provided that the correct non-prejudicial mechanisms of engagement can be found. That is the task that this Article urges.
D. TOWARDS TRANSPARENCY: THE USE OF STRUCTURE, MODULARIZATION, EXPLANATION, AND INQUIRY AS FORMS OF ENGAGEMENT THAT DEMONSTRATE THE NEUTRALITY OF, AND NEED FOR, SUCH ENGAGEMENT

The disconnect between the needs of justice and the appearance of justice may well most helpfully be seen as a symptom of the lack of transparency in the system. People are simply not seeing the truth about neutrality. Their misunderstanding of judicial behavior comes from a natural focus on what is observable, or more accurately from what the judicial systems chooses to make observable. Having created expectations about judicially neutral behavior shaped by the needs of cases with counsel, and having failed to develop methods of transparency that give the public the tools to make fully informed decisions about true neutrality, the system can not blame the public. Rather it needs to develop techniques of true transparency relevant to the current situation so that the public can make fully informed choices about the true neutrality of the procedures it views.24

In attempting this path in their day-to-day work, judges have a lot to work with. They have a significant reservoir of respect and credibility,25 they have near total authority in their courtrooms, and they face a public with a desperate desire to feel that they will be listened to when they go to court.26 At the same time, it has to be recognized that these ways of thinking are far from the traditional approach of most judges, and their adoption will require substantial rethinking and openness. The ideas will strike some as increasing the risk of being viewed as non-neutral, as increasing the risk of complaints, and as increasing the risk of being reversed on appeal.27 These fears will only dissipate when the entire culture of the legal system takes a broader view.

24. At least in theory there are three ways to align the needs of justice and those of the appearance of justice. The first way, providing counsel for all, is far from currently financially practical. A recent study, for example, found that 88 percent of legal needs were being met without the assistance of an attorney. See WASH. ST. CIVIL LEGAL NEEDS STUDY 25 (2003), available at http://www.ejc.org/c1nn093003.pdf. The second option, radically to change the way the public perceives the appearance of justice so that changes in procedure will not be viewed as non-neutral, seems highly ambitious, and little within the control of the justice system, although it should not be ignored. The third, however, worthy of more immediate inquiry, is to explore whether there are forms of judicial behavior and courtroom organization that may result in greater actual justice while being consistent with public expectations about the appearance of justice. Put another way, the question is whether judges can find a way of being engaged that nonetheless demonstrates both the fundamental neutrality of that engagement and the need for engagement to provide neutrality.

25. See NAT'L CONF. ON PUBLIC TRUST AND CONFIDENCE IN THE JUSTICE SYSTEM, 9, 10 (1999) at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_NatActionPlanPub.pdf (79 percent agree with statement that judges are "generally honest and fair in deciding cases," but other data raise disturbing questions about perceptions of access and non-discrimination.). It should be noted that the second highest priority identified in the process of the Conference was the "[high cost of access to the justice system." Id. at 16.

26. Id. at 9.

27. While concern on the part of judges that they appear neutral is not only highly desirable but required by Canon 2A of the Model Code, see MODEL CODE Canon 2A (1977), as a practical matter, fear of disciplinary retribution appears exaggerated. As cases demonstrate, judicial remarks must be way beyond the pale to attract
Perhaps most important for the approach suggested here and for its ultimate acceptance, is that the needs of transparency align with the needs of justice itself. Just as transparency allows the public to judge neutrality, so it allows the litigants to engage the court with their stories in their search for access to justice.

True transparency is not just openness. Openness describes the attitude of the institution to outsiders. Transparency, in contrast, describes a state of the relationship between the institution and the audience in which the audience actually does see what is going on. In the legal neutrality context, this requires not only that the institution is trying to be open, but that the institution has adopted means of operating that guarantee that the audience, (here the public) actually does know and understand that the judge and the system are being neutral, and how they are being neutral. When there are counsel present, this transparency is achieved in part from the visibility of the interplay between counsel and the judge, and in part from the faith that if the judge was not being neutral, then counsel would take appropriate action. When there are no counsel, far greater responsibility therefore falls on the court.

This Article suggests that when one or other or both parties do not have counsel, judges can achieve such transparency by the general techniques which may be labeled, at the risk of jargonizing, Structural Transparency, Sequential Transparency, Explanation, Inquiry and Consistency.28

1. STRUCTURAL TRANSPARENCY (SHOWING THE NEUTRALITY OF THE STRUCTURE)

The core idea is that that each particular procedure or event is put in the context of an appropriate overall structure, broadly defined, that is seen to meet the overall goals sought to be achieved by the institution or process.

the attention of disciplinary bodies. See Jeffrey M. Shamant et al., Judicial Conduct and Ethics 118-25 (3d ed. 2000). As the authors comment,

So long as the judge keeps an open mind about the final outcome of the case, comments or remarks made in court expressing a reaction to or attitude about the evidence are not indicative of improper bias. In fact, the case law suggests that a judge can successfully fend off a charge of improper bias or prejudice merely by stating on the record that his or her mind is still open and that a final decision on the matter will not be made until the close of all the evidence.

Id. at 119-20 (citations omitted).

28. This analysis assumes that judges will continue to play their roles as both courtroom traffic cop and, absent a jury, decider of the facts as well as the law. An alternative structure would be to divide these tasks in all cases in which there was other than a full complement of counsel, with an expert layperson or group making the decision while the judge played the role of neutrally drawing the evidence out for all sides. This role would be very different from that of the judge sitting with a jury.

Yet a different model would be to maintain the current judicial role, while having a court employee, presumably an attorney, drawing out the narrative of, and laying the required foundation for evidence of, all parties. This last model might be seen as an extension of the court Self Help Center approach, in which court staff provide information to all sides. See, e.g., Cal. Rules of Ct., Guidelines for the Operation of Family Law Information Centers and Family Law Facilitator Offices, available at http://www.courts.ca.gov/rules/appendix/appdiv5.pdf.
When, as here, the goal is neutrality, this means that the process of the court is structured so that those present and observing understand what is going to happen is neutral—indeed, in other words that the judge creates a procedure which is neutral and in which the relationship of what will happen to the desired goal of neutrality is clear to all. The structure of the process itself is neutral and can be seen to be neutral, even when the parties may be very differently situated.

This occurs when the processes can be analyzed at a level of generality and totality that makes them neutral as a whole. If what happens is analyzed only in moment to moment terms it may seem non-neutral, when, for example a judge asks a question of one party. But if that question is established as part of a process in which all are asked questions when needed for the judge to understand what happened, then a process that is seen to be neutral in an overall sense has been created. Similarly, if the judge sees himself or herself as establishing a structure, for example, in which he or she checks at each step whether the whole story has been told, then that structure is neutral, even if it may help more those who need to be helped because they lack counsel or education or both.

2. Sequential Transparency (Steps)

A similar technique is sequential transparency, the use of steps, in which the proceeding is broken up into a number of phases, in which the relationship between these steps is clear, and in which the relationship of what happens in each of these steps is clear to the participants and the audience. For example, in the courtroom, a judge might separate the steps required in fact-finding, explaining the relationship of each step to those that have passed, and those that have followed.

3. Explanation

Explanation is crucial to transparency. Explanation of the process, of the relationship between the process and neutrality, and of the reasons for the conclusion make it possible for the participants and audience to understand. Explanation is particularly important when participant perceptions are shaped by pre-existing assumptions about what they will see and its implications. Those trained to expect the traditionally passive judge are much more prone to see engagement as non-neutral, and explanation is all the more critical.

One way such explanation enhances the appearance of neutrality is that it focuses the participants and audience on the level of neutrality that the explanation emphasizes. If the explanation explains the judge’s goals and criteria for asking a question, for example, then the neutrality preserving role of those interventions will be much clearer than if those present are forced to make their generalization as to motive.
4. INQUIRY

Transparency requires a feedback mechanism. Judicial inquiry of the parties as to whether they understand what is expected of them, what the judge is doing, what has been decided, and the consequences of that decision, are all ways of ensuring that there is such a feedback mechanism. The mechanism serves justice by making it possible to obtain more information when misunderstanding has led to lack of information, and serves the appearance of justice by showing the interest of the judge in justice.

5. CONSISTENCY

Finally, visible, predictable consistency is crucial to transparency, neutrality, and the appearance of neutrality. Whatever the judge does, engagement or passivity, inquiry or explanation, must be done in a consistent manner. Consistency does not require absolute symmetry, the same number of questions for each party, for example. What does require is predictability, regardless of the party. Thus, it requires a set of rules for behavior which are seen as neutral, and from which behavior can accurately be predicted from factors that are appropriate.

The trick in obtaining neutrality is stating the rule in general enough terms. “I will inquire about what self-represented litigants want from the court” may seem biased, even though it leads to consistency and predictability. “I will ask about what the parties want from the court whenever it is not clear to me” is neutral, since it relies on an appropriate factor, and remains relatively predictable.29

Of course the existence of the practices, and their content, must be explicit, visible, and understandable.

E. TRANSPARENT JUDGING AS TRANSCENDING THE APPARENT CONFLICT BETWEEN THE NEEDS FOR ENGAGEMENT WITH THE REQUIREMENT OF THE APPEARANCE OF NEUTRALITY

In short, use of these transparency techniques means that a judge can structure the proceeding so that it is truly neutral without running significant risk of the appearance of non-neutrality. As discussed in detail below, transparency means that the audience will see that the proceeding is fully neutral, even if the conduct of the court is not necessarily in accordance with the participants’ and audience’s traditional prior expectations as to how neutrality is achieved and manifested.

It should be emphasized that this general approach applies with equal force not

29. Interestingly, truly neutral rules tend to be more general, and thus lead to less predictability of behavior, which is one reason their application may seem less consistent with the appearance of neutrality. Cf. CARDozo, supra note 8, at 112-13 (“Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.”). The overall remedy is greater transparency.
only to the trial, but to all aspects of the judge’s involvement with the case, including the possible referral to, and supervision of, other components of the court and affiliated agencies. Judicial management of discovery, adjournments, the paper flow, settlements, mediation, etc., should all be viewed as benefiting from transparent engagement aimed at maximizing access to justice. That the examples used here draw mainly on the drama of the courtroom comes from a desire to take head-on the fact that the greatest fears about judicial engagement (as well as the decided cases) appear to focus on the trial itself.\textsuperscript{30}

\section*{II. What This Structure Suggests as to How Judges Should Approach Concrete Issues in Judicial Management of Pro Se Cases}

The fundamental touchstone against which any change in procedure should be measured is whether it contributes to a truly neutral and accessible forum, that is to say whether it helps make sure that any litigant, regardless of whether he or she has a lawyer, is able to present his or her case to a neutral decision-maker. True neutrality is the creation of a forum in which such a goal is achieved. This is done by creating protocols, rules, and procedures which are, as a general matter, applied to all, regardless of whether they have lawyers, and which ensure that both those with and without lawyers have a chance to tell their story.

The above analysis should suggest that it is in fact far easier than is generally understood for a judge to move in this direction, and that if a judge does so, there will be no claim of non-neutrality. In other words, it is not “leaning over the bench,” “putting a hand on the scale of justice,” or “intervening to level the playing field.” Rather it is, from day one, creating a fully level playing field in which those with or without lawyers are able to tell their stories and, in the words of Canon 3B(7), be “heard.”

A brief medical analogy may be helpful. Assume that you have two people in a room, and both will be exposed to a disease. You know that one has already been vaccinated, and who it is. You are determined to be neutral. There are three approaches, all arguably neutral, but having very different consequences. You can refuse to vaccinate both. This is formally neutral, and is what the traditional view of legal neutrality says should be done. To follow that choice means that one person will get sick. You can vaccinate them both. This is equally neutral, and has a good public health outcome. It is the approach being advocated here, in large part because of its unassailable neutrality. Or, you can choose to vaccinate only the one who has not yet been vaccinated, saving resources, but arguably facing a charge of at least formal non-neutrality – one which interestingly would never be made in the public health context.\textsuperscript{31}

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\textsuperscript{30} See, e.g., cases cited supra notes 17-18.

\textsuperscript{31} There is one major place where the vaccination analogy breaks down. A courtroom is, at least to the first order, a zero-sum environment, one wins and one loses. Where the analogy is still correct, we hope, is that we do
A. GENERAL APPROACHES TO THE COURTROOM PROBLEM

These general approaches are offered as the beginning of a debate on how to best create a truly neutral courtroom. They apply primarily to the relatively simple problem of non-jury proceedings, although the general approaches offered may be of help in thinking through equivalent approaches for cases in which there is a jury.32

1. THE JUDGE SHOULD SET THE CONTEXT AND STRUCTURE OF THE HEARING

As described above, the key to combining neutrality and the appearance of neutrality in the courtroom is to establish from the start a general neutral process that will guarantee that all are given a true opportunity to be heard regardless of whether they have counsel and regardless of their literacy and language status.33

Such a general neutral process can be established by the judge explaining at the beginning of the proceeding that:34

not believe that outcomes in that zero-sum game, who wins and who loses, should be too greatly determined by the ability to access a lawyer.

32. When a jury is present, a judge has to be concerned not only with signaling to the parties or the audience that he or she is non-neutral, but also with the even greater danger of the jury believing that it is being signaled to by the judge in his or her conduct. Moreover, the process of keeping inadmissible evidence from a jury is far more complicated than that of a trial judge giving only legal weight to properly admitted evidence. On the other hand, some of the explanation techniques detailed here might be helpful for a jury too.

33. This is the core recommendation in Albrecht et al., supra note 4, at 45-46. The detailed discussion below is in large part an elaboration of the analysis of that article. Indeed, the whole approach of this Article is very much inspired by Judge Albrecht’s concrete day-to-day practice in Maricopa County Superior Court in Phoenix, Arizona, and her powerful descriptions of that practice in various forums, including Albrecht et al., supra note 4, at 45-46. See also ZORZA, supra note 4, at 75; Engler, supra note 3, at 2028-31.

34. There are similarities, but far from identity, with Minn. Conf. of Chief Judges, Pro Se Implementation Comm., Proposed Protocol to be Used by Judicial Officers During Hearings Involving Pro Se Litigants, available at http://www.ajs.org/prose/pdfs/Proposed_Protocol.pdf [hereinafter Minnesota Proposed Protocol]. In particular, this proposal suggests a greater structuring of the case, and permits greater engagement in the reception of evidence. For a more radical approach, see Goldschmidt, The Pro Se Litigant’s Struggle, supra note 4, at 48-49.

Several judges have commented to the author that use of this full list is unrealistic, given the time constraints they face in their courts. In the end, the legal system may have to decide whether it is cheaper to increase judicial resources to enable the court to slow down, or to pay for counsel who would allow courts to maintain their momentum. A more optimistic analysis would suggest that time saved in avoidance of re-litigation and enforcement would repay investment in explanation.

In the somewhat different context of mediation, see MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION Standard III(A) (2001), reprinted in AM. BAR ASS’N SECTION OF DISPUTE RESOLUTION, DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 265 (Phyllis Bernard & Bryant Garth eds., 2002) (recommending that a family mediator commence the proceedings with an overview which is to include: the consensual nature of the proceedings, distinctions from other proceedings, the requirement of court approval of any settlement (where applicable), the right to independent advice, the possibility of separate sessions, the governing rules dealing with presence of counsel or others, confidentiality obligations, the possibility of suspension or termination of the process, and the right of the parties to terminate at any time).
The procedures in the court are structured so that each side has the greatest possible opportunity to be heard.

The judge will give each side the opportunity to explain why they are in court and what they want, and then tell their story, and may ask anyone for clarification, explanation, or more detail. Each side has the right to object to evidence, but must give a good legal reason, and each side has the right to ask courteous relevant questions of the other.

The judge may have to limit or cut off one or other party if they are drifting too far from what is relevant to the decision that has to be made.

The judge will break the case up into steps and will explain what is happening in each step.

The judge will explain at the beginning of each step what the basis for decision will be in that step, and what the parties need to prove or undercut in order to prevail.35

When someone offers certain kinds of evidence, the judge will explain what must be shown about that evidence in order for it to be considered. If those conditions are not met, then the evidence may not be able to be considered, or may be given less weight. If the evidence is excluded, the judge will not consider it.

That the other side may object to certain evidence, or what someone is saying. That evidence will only be ignored if those objections go to the reliability of the evidence, or must, for some other reason that will then be explained, be ignored.

The judge may decide to stop the hearing and recommend that one or another party consult with the Self Help Center (if available), or with a lawyer, in order that they move forward as well as possible.

If one party has counsel, explaining that the attorney will, of course, be allowed to play the traditional role of counsel within this structure, but that counsel will not be permitted to inappropriately take advantage of the fact that only one party has counsel.

If these explanations are part of the general introduction, they will come as no surprise and be seen as confirmation of the underlying neutrality of the proceeding, rather than inconsistent with it.

Several judges have noted the practical time difficulty of such a detailed recitation. Consideration should be given to alternative means of communicating

35. Cf Minnesota Proposed Protocol, supra note 34, at 1 ("Explain the elements"). This is an area in which a Self Help Center or other court preparation program is perhaps most appropriate to play this role, given the extent to which it may involve a dialog about facts with each party.

There is a lurking fear among some that if you tell litigants what they need to prove, those litigants will then lie to the court. Of course, litigants with lawyers can obtain this information from lawyers, but there is perhaps a faith that counsel will not allow themselves to be so used. But see ROBERT TRAVER, ANATOMY OF A MURDER 32, 35 (St. Martin's Press 1958) (Counsel to murder defendant, prior to explaining the law and possible defenses to murder, including insanity, comments that now they will discover if he is as clever as he thinks he is.).
the information. However, in the end, nothing can substitute for the parties hearing the neutrality commitment directly from the judge.

2. **The Judge Should Have a Plan and Follow It**

To be effective in this mode, the judge needs to have a plan for how to handle the case. If there are detailed papers, this plan needs to be based on the matters apparently in dispute. In any event, the plan should be a simple walk through the decisions needed to resolve the case, allowing each side to be heard. That plan clearly needs also to be based on an understanding of the governing law.

3. **The Judge Should Explain What He or She Is Doing**

At each step the judge should explain what is going on – including repetition of the previously explained overall plan, and particularly any deviations from it, and the relation of the activity to general neutral practices. As decisions are made they might be announced and explained, heightening transparency.

4. **The Judge Should Ask the Parties and Participants If They Understand What Is Happening**

Throughout the process, the judge should have in place protective processes to make sure that the parties do understand what is going on and why. This should include asking if they understand, and seeking confirmation of understanding at critical points.

B. **Specific Examples**

These examples are drawn from conversations with a number of judges, who are nonetheless in no way responsible for the final product or suggestions, some of which might make them uncomfortable. For simplicity, these examples generally assume that neither party has counsel. If one party has counsel, then the same model might be followed, but permitting counsel to follow the traditional path, if desired, for each component, and subject to any needed and appropriate regulation of actions by counsel that might prevent the unrepresented party from having the full opportunity to present their case.

1. **Taking of Direct Testimony**

The judge should swear in all the parties and witnesses at the beginning, then explain again that each side has the opportunity to tell their story on each of the issues that has to be decided, and the structure of the issues, and begin the first issue.

On the first issue to be decided, the judge may invite one party to tell their story, encouraging them to start by saying what they want from the court, or why
they are there and reminding them of what needs to be shown in order to obtain this.\textsuperscript{36} Once completed, and once any clarification questions have been answered, the judge turns to the other party, allowing him or her first to ask clarification questions, and then to present their own story, itself subject to clarification questions. The judge may want to introduce this segment by explaining that the party may ask questions that might reasonably be expected to cast doubt on the story already heard.

When all has been heard on that issue, including checking with the parties that they understand what has been said, and that they feel that all has been laid out, the judge may issue a decision on that issue, and make clear the implications for the case as a whole.\textsuperscript{37}

The judge then proceeds to the next issue, following the same template, ultimately making a decision on the merits, issuing a decision and order (preferably there in the courtroom) and checking that the parties understand the order, its details and what they are required to do. It might also be appropriate to check with the parties if there are any barriers anticipated to compliance, and if so to increase the specificity of the order, add reporting requirements, or the like.

\section*{2. Hearsay Evidence}

Traditionally, hearsay evidence raises some of the greatest problems for the self-represented. It can lead to incomprehensible objections from opposing counsel, confused attempts to develop a foundation, and resentment all around.

Applying modularity and explanation when hearsay issues arise, the judge might want to refer to his or her introduction, ask the proponent of the evidence what they are trying to admit, explain the general law and then establish whether the relevant foundational facts are there, and if so, announce it.

\section*{3. Documentary Evidence}

Documentary evidence raises the same issues, although it is more likely that there may be a need for a continuance to obtain foundational evidence. Such foundations should only be insisted upon if there is objection. Such objection should be asked to focus on the risk of non-accuracy of the proffered evidence.

\section*{4. Required Documents}

Where documents are required, there is nothing non-neutral about the judge making that clear in his or her initial summary of the case, and where appropriate,

\textsuperscript{36} This might be by reference to, and repetition of, what has already been mailed out or given in printed form. \textit{See} Albrecht et al., \textit{supra} note 4, at 45.

\textsuperscript{37} \textit{Compare with id. at} 46.
providing extra time to produce the needed document.\(^{38}\)

5. FAILURE TO MEET THE ELEMENTS OF A PRIMA FACIE CASE

Similarly, the frequency of failure to meet the elements of a prima facie case or defense should be greatly reduced by the judge explaining those elements early in the proceedings. The difficult question is the extent to which a judge, at the end of a case-in-chief, should point out any missing element, even when the need for that element has been made clear at the beginning. Each judge needs to develop a consistent answer to this question. One possibility is for the judge to ask what in the testimony, in the opinion of the profferor, meets that element, without explicitly drawing repeated attention to any possible need for additional evidence. It may indeed be that the party has failed to make explicit an inference clear to him or her, but not yet to the judge, and which an attorney would have known the need to emphasize.

6. OBJECTIONS

Finally, judges must develop a consistent set of responses for situations when an attorney or a well-informed self-represented litigant uses disruptive objections to prevent a party from presenting his or her case. Objectors should, especially when an unrepresented party is present, always be required to give the reason for the objection, and not just in shorthand. If the objections are legally incorrect, then it is easy to overrule them, with explanation. If they are legally correct, but needlessly disruptive, and/or not preventing the receipt of irrelevant or harmful and correctly excludable testimony, then the objector should be asked to explain why the objection is helping the truth finding process and why the objection would lead to the exclusion of inadmissible evidence.\(^{39}\)

III. WHAT THIS STRUCTURE SUGGESTS AS TO WHAT THE MODEL CODE OF JUDICIAL CONDUCT SHOULD SAY ABOUT THE NEUTRALITY PROBLEM IN JUDICIAL MANAGEMENT OF PRO SE CASES

One way of understanding the conundrum in which judges find themselves is to imagine a dialog between two judges on what the Model Code of Judicial Conduct tells them about how to act when they feel that a self-represented litigant is being taken advantage of by an attorney-represented one, or indeed by a better prepared or more belligerent self-represented one. Let's call the judges Judge Over Fray and Judge Into Fray. (Notwithstanding the fact that they are brother's, they sit in reasonable amity in the same jurisdiction.)

\(^{38}\) Compare with id. at 48.
\(^{39}\) Compare with id. at 48.
Judge Into Fray: I just can’t understand how you can stay aloof when a litigant loses just because they don’t know, for example, that they have to show a change in circumstances to get a change in child support.

Judge Over Fray: Look, if I help someone by telling them what they have to show me, then I am in violation of Canon 2, which requires me to “promote[] public confidence in the integrity and impartiality of the judiciary.” And also Canon 3(B)(5) which says that “Judges shall perform judicial duties without bias or prejudice.” It is underlined by the comment to Canon 3(B)(5) which states: “A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.”

Judge Into Fray: But if you don’t do help, then aren’t you failing to “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law” as required by Canon 3(B)(7). So long as I follow the substantive rules and procedure of the jurisdiction I can not be in violation of that section. Indeed, if I do intervene, then I may well be violating those rules themselves, and therefore also Canon 3(B)(7).

Judge Into Fray: Wait a minute, that’s following form over substance. If your passivity leads to an obviously unjust result, aren’t you in fact undercutting “public confidence in the integrity and impartiality of the judiciary” under Canon 2, and aren’t you in fact stopping them from being “heard” in any real sense under Canon 3(B)(5). Remember that Canon (B)(5) which you relied

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See also id., Terminology, for the definition of impartiality in the Model Code, “ ‘Impartiality’ or ‘impartial’ denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.”

41. Canon 3(B)(5) of the Model Code reads in full,

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.


42. Canon 3(B)(7) of the Model Code reads, “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.” MODEL CODE Canon 3B(7) (1997).

43. Id.

44. MODEL CODE Canon 3B(5) (1997) (“A judge shall perform judicial duties without bias or prejudice . . .”). The Comment to Canon 3B(5) reads,

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial
on says that “A judge shall perform judicial duties without bias or prejudice . . .,” and that the comment to (B)(5) adds that “A judge must perform judicial duties impartially and fairly.” I repeat, “and fairly.”

Judge Over Fray: If I lean over the bench to help someone out, no matter how impartial and fair I am trying to be in an ultimate sense, I will be seen as violating Canon 2, because I will not be seen as acting consistent with the "impartiality of the judiciary, or Canon 3, because I am acting with bias.”

Obviously this debate can go on forever. It suggests, however, that in the end the whole matter hinges on the definition of "fair[ness]” and that it would therefore be useful if the code, or rather perhaps just a Comment to Canon 3(B)(5) and (7), were to clarify that a judge who engages in neutral and transparent practices of engagement not inconsistent with governing law to make sure that all are heard, would not be undercutting the appearance of impartiality, but would be enhancing it.45 The long term goal would be to advance an understanding that transparency and engagement are required for true neutrality.

One specific suggestion is that a new Comment to Canon 3B(7) should read as follows:

When one or both parties is proceeding pro se, non-prejudicial and engaged courtroom management may be needed to protect the litigants equal right to be heard. This may include questioning witnesses, modifying the traditional order of taking evidence providing information about the law and evidentiary requirements and making referrals to agencies able to assist the litigant in the preparation of the case. A careful explanation of the purpose of this type of management will minimize any risk of a perception of biased behavior.

Under this proposal, a similar new comment to Canon 3B(5) would read:

When a litigant is appearing pro se, affirmative, engaged, and non-prejudicial steps taken by a judge who finds it necessary to take such steps, as described in the Comment to Canon 3B(7), to make sure that all appropriate evidence is properly before the court, are not inconsistent with the requirements of Canon 3B(5).46

expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

46. It is suggestive that the history of the Model Code shows a solicitude for “indigent persons and other disadvantaged persons and their lawyers.” See E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 52 (1973). The Reporter to the Special Committee on Standards of Judicial Conduct described complaints about judicial behavior and the request made to “set a specific standard of courtroom conduct for judges” dealing with the indigent, as well as the rejection of the need for any population specific language: “The
IV. AN APPROACH TO APPELLATE REVIEW OF JUDICIAL ACTIONS IN PRO SE ACCESS CASES

It is far from easy to reconcile the relatively small number of cases dealing with judicial responses to the self-represented.47 This Article suggests that the best way to understand them is as being about judicial discretion. The cases can best be read to suggest that judges have broad discretion concerning how to deal with the needs and circumstances of pro se litigants, provided they act within broad boundaries.

Not surprisingly, appellate courts are not sympathetic to trial judges refusing to correct errors within their own bureaucracies,48 nor do they see courts generally having the power to waive jurisdictional requirements for those without a lawyer.49 But between those two limits, they tend to be sympathetic to the dilemmas suffered by trial judges, and reluctant to second-guess them.50 Thus almost all the cases sustain what the trial judge did, relying, when it is a self-represented litigant who appeals, on language that those who do not have a lawyer can not expect any special treatment,51 and, more rarely, when it is the opponent of the self-represented litigant who appeals, on the care the judge took to maintain the underlying neutrality of the courtroom procedures.52

Committee rejected the suggestion as unnecessary. The standards of patience, dignity, and courtesy are the same in every proceeding . . . . Compliance with Canon 3A(3) [now Canon 3B(4)] will do far towards changing the image of our courts in the minds of a substantial segment of the public." Id. at 52; see also id. at 51 (citing a similar decision that no specific language needed to remedy problems of judicial misconduct towards the indigent, since the general requirement of "faithful[ness] to the law" of Canon 3B(2) (then Canon 3A[1]) met the need). This history highlights the need to make sure that neutral and all encompassing language does indeed protect the indigent and disadvantaged. See generally LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE (1992).

47. A relatively comprehensive listing, and attempted synthesis, appears in Albrecht et al., supra note 4
48. Rappleyea v. Campbell, 884 P.2d 126, 129-31 (Cal. 1994) (vacating default judgment even after a six-month period, since the default was caused by the clerk's misinformation to a self-represented litigant); Gamet v. Blanchard, 111 Cal. Rptr. 2d 439, 445 (Cal. Ct. App. 2001) (reversing the trial court's dismissal and citing the "confusing, indeed misleading, nature of the various orders and communications" from the court to the plaintiff). But see Boyer v. Fisk, 623 S.W.2d 28, 30 (Mo. Ct. App. 1981) (reinstating a default judgment notwithstanding assurances from the clerk's office that a filing was sufficient and holding that a self-represented couple did not exercise due diligence in relying on this advice, nor did they serve the document as was required on the face of a summons).
49. Kelley v. Sec'y, United States Dep't of Labor, 812 F.2d 1378, 1380 (Fed. Cir. 1987) (holding that a court cannot waive the consequences of a pro se litigant's failure to file an action within 60 days of notice in the federal register); Bowman v. Pat's Auto Parts, 504 So.2d 736, 737 (Ala. Civ. App. 1987) (holding that a trial court cannot waive the fourteen-day rule for the entry of an appeal following the entry of judgment on the docket).
50. Often the appellate opinion includes a lengthy, and sympathetic, recitation of the trial judge's efforts on behalf of the still unhappy litigant.
51. E.g., Brown v. City of St. Louis, 842 S.W.2d 163, 165 (Mo. Ct. App. 1992) (dismissal for failure to comply with appellate rules).

Considerable latitude must be allowed in conducting a trial. The conduct and remarks of the judge are grounds for reversal only if they are such as would ordinarily create prejudice in the minds of the jury.
However, beyond this deference, there may be a largely unspoken consensus that how judges deal with such cases goes very much to the core integrity of the judicial system, and must ultimately remain under the control of the appellate courts. This would suggest that now that the number of these cases is drawing attention to their significance, appellate courts may be open to a process for developing a more coherent body of law on how that discretion must be exercised, and the factors that should be taken into account in deciding how a trial judge should act, and how the judges actions should be reviewed.53 Among the factors that might be included in such a jurisprudence, and which already find some support in the cases are:54

A. NECESSITY OF RELIEF FOR A PARTY TO BE HEARD AND TO OBTAIN ACCESS TO JUSTICE

Whether the judicial intervention sought is critical to the party’s obtaining access to justice and the right to be heard, or whether it is collateral to obtaining that right, should make a significant difference in how a refusal of intervention is viewed, or in whether the intervention being granted is open to challenge on appeal by the opponent. This factor should be crucial, required as it is by our conceptions of justice.55

How Complicated It Would Be for the Judge to Engage in the Requested Behavior

If what is being sought would be complicated and difficult for the judge to do, that is a factor mitigating against error in its denial.56

53. As Professor Engler points out, too much should not be made of language apparently hostile to judicial sensitivity to pro se litigants. Engler, supra note 3, at 2014-16. Some come from criminal cases with a right to counsel, others depend on particular facts showing judicial patience and litigant provocativeness, and others a (hopefully changing) general discomfort with pro se litigants. Id.

54. It should be noted that these cases generally deal either with a specific action that was requested and denied at the trial level, and therefore the subject of appeal, or, more rarely, a judicial action that was objected to and challenged on appeal. The actions are therefore described here as specific “interventions,” rather than the broader judicial structuring of the process encouraged in the remainder of this Article.

55. Cf. Gamet v. Blanchard, 111 Cal. Rptr. 2d 439, 446 (Cal. Ct. App. 2001) (citing a failure to avoid careless and harmful use of jargon and stating that “[t]he ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system”).

B. WHETHER THE REQUESTED BEHAVIOR WOULD THREATEN NEUTRALITY OR THE APPEARANCE OF NEUTRALITY

Courts will also look at whether the requested behavior would make it harder for the judge to continue to act in the required neutral role, or would make it more likely that he or she would not longer be viewed as neutral. Such a specific finding offers a powerful reason against error in the denial of the litigant’s assistance request, and indeed, upon review, would show error and harm in the granting of the request.\(^{57}\)

C. THE EXTENT OF CONSIDERATION OF ALTERNATIVE WAYS OF OBTAINING ACCESS TO JUSTICE

To the extent that the judge has considered alternative ways of facilitating access to justice for the party seeking help, that would militate in support of whatever decision the judge finally makes, whether that there is no alternative to the intervention sought, or that the intervention is not needed.\(^{58}\)

D. THE EXTENT OF PRIOR EFFORTS BY THE JUDGE

Similarly, prior efforts by the judge to assist a litigant or make sure that he or she has access will tend to support appellate deference to the trial judge’s decision about the appropriateness of continued and additional efforts on the trial judge’s part, or indeed, the termination of such efforts.\(^{59}\)

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57. Collins v. Arctic Builders, 957 P.2d 980, 982 (Alaska 1998) (“We are not concerned that specificity in pointing out technical defects in pro se pleadings will compromise the superior court’s impartiality.”); Lombardi, 289 P.2d at 825 (noting that the judge would have had a conflicted role if he had assisted the pro se litigant); Oko, 466 N.E.2d at 661.


59. See, e.g., Newsome v. Farer, 708 P.2d 327, 333 (N.M. 1985) (finding no error in dismissal for failure to attend requested document production meeting and noting that the trial judge had given special attention to discovery requests and had provided three hearings for the party to explain his failure).
E. THE GOOD FAITH OF THE PARTY SEEKING ASSISTANCE

Finally, inferences about the good faith of the party seeking assistance can be highly determinative. In particular, a trial judge’s determination of bad faith of a party – even if only implicit – is very unlikely to be upset on appeal unless evidence in support of the finding is totally absent. Similarly, both trial and appellate courts are likely to use evidence of good faith in support of intervention.

F. UNFAIRNESS TO OPPOSING PARTY

Unfairness to an opposing party (as opposed to mere harm), provides a powerful reason in support of non-intervention, as the lack of unfairness indeed provides such support for intervention. While one with no counsel can not reap an advantage from that fact, nor should the party with counsel be able to reap benefit from that status.

G. REASON FOR SELF-REPRESENTATION STATUS

This final issue is the elephant in the room, and our response to it offers great danger. As the data gathered so far confirms, the vast majority of those who go to court without a lawyer do so because they cannot afford one. There is some support in the cases for the initially appealing idea that the judicial response to one who is in court trying in good faith to navigate a system built for lawyers

60. See, e.g., Lombardi, 289 P.2d at 824-25.
61. Among the cases demonstrating this use of good faith is Traguth v. Zuck, 710 F.2d 90, 95 (2nd Cir. 1983) (reversal for refusal to vacate default judgment for failure to answer; "[self-represented litigant] searched in good faith for a lawyer to represent her, and failing in that, she responded within that period diligently, if unskilfully, to every pronouncement of the Court.").
62. See Kasson State Bank v. Haugen, 410 N.W.2d 392, 395 (Minn. Ct. App. 1987) ("A trial court has duty to ensure fairness to a pro se litigant by allowing reasonable accommodation [to obtain attorney] so long as there is no prejudice to an adverse party.").
63. The data showing the extent to which it is poverty that is driving self-representation are collected at Greacen, Self-Represented Litigants, supra note 1. This data includes (1) an Idaho Court Assistance Program finding that 43 percent of its clients had incomes no more than $15,000 a year, id. at 3-4 (citing Ginger M. Kyle et al., Helping Self-Represented Litigants in Idaho: An Evaluation Report on the Idaho Court Assistance Program (2000)); (2) a 1991 Phoenix, Arizona study finding that more than 50 percent had incomes of $30,000 or less, id. at 3 (citing Bruce D. Sales et al., Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?, 37 ST. LOUIS U. L.J. 553, 561-62 (1993)); (3) the Van Nuys, California Legal Self Help Center finding that 56 percent of its clients were at or below the poverty line, id. at 5 (citing EMPIRICAL RESEARCH GROUP OF THE UNIVERSITY OF CALIFORNIA SCHOOL OF LAW, EVALUATION OF THE VAN NUYS SELF HELP CENTER: FINAL REPORT (2001)); (4) Hennepin County, Minnesota’s Legal Access Program finding that 76 percent of clients have incomes below 187 percent of the poverty line, id., at 5 (citing Susan Ledray et al., Hennepin County District Court Pro Se Programs: Information and an Evaluation of Effectiveness (2002)); (5) a 1996 Maryland study finding that only 12 percent of those interviewed by the Family Law Assisted Pro Se Project had incomes over $50,000 a year, id. at 5 (citing Michael Milliman et al., Rethinking the Full Service Legal Representation Model: A Maryland Experiment, 30 CLEARINGHOUSE REV. 1178, 1187 n. 28 (1997)).
without the help of one, just because the alternative is not eating, should surely be
very different from the response to one who is taking extra time in court, and
making demands for special treatment for whatever personal reasons that lead
them to reject obtaining help they can afford.64

However, as judges have commented, the creation of a culture at the trial level
in which judges feel empowered to ignore the access to justice needs of litigants
whenever they feel that those litigants have resources or are “pains in the butt,”
would serve as a real brake on needed changes in judicial behavior. (This is
particularly likely because many judges pre-judicial litigation experience is in the
criminal area, and they therefore come with an experience-based pre-disposition
to believe that those without lawyers not only appear pro se by choice, but are
manipulative and attempting to game the system.)

The strong presumption – clearly supported by the data cited previously65 –
therefore should be that litigants who appear without lawyers do not do so out of
choice, but rather because of financial barriers, and that courts should always
structure themselves to meet the needs of those who end up without lawyers. To
the extent that some litigants with resources are taking advantage of this judicial
openness, that will soon become clear from their obstructive or manipulative
behavior itself, and that behavior can be dealt with under the factors above, rather
than as an economic factor. Occasional language in court opinions about financial
status should be read merely as additional support for the access-fairness of
measures taken by the judge to deal with such obstruction.

It is significant that most of the above factors focus less on the specifics of the
intervention, and more on the overall context of the case. Typical components of
this context include the judge’s other actions, the need for the intervention in
context, and the overall impact on the neutrality of the proceeding. In other
words, they support the general approach urged in this Article, that is, the creation
of an access friendly environment in the courtroom, in which appropriate actions
ensuring the right to be heard can be taken whenever needed.

V. SOME EARLY DIRECTIONS FOR EMPirical RESEARCH

A. EXPERIMENTS WITH CHANGES IN COURTROOM PROCESSES

There is need for conscious and rigorous experimentation with changes in
courtroom procedure. The creation of one or more court laboratories would make

64. Cases in which the reason for lack of counsel are cited in the analysis include: Traguth, 710 F.2d at 94-95
(reversal for refusal to vacate default judgment for failure to answer; “[self-represented litigant] searched in
good faith for a lawyer to represent her”); Garnet v. Blanchard, 111 Cal. Rptr. 2d 439, 442 (Cal. Ct. App. 2001)
(citing plaintiff’s involuntary self-represented status); Lombardi, 289 P.2d at 825 (“If plaintiff had a legitimate
claim against this estate for $25,000 it would have been an easy matter to employ competent counsel to
represent him in the trial court as he has now done at this late date on appeal.”).
65. See Greacen, supra note 1.
possible systematic testing of impact on access, on outcomes and on the perceptions of litigants and the parties of changes like those suggested in this paper.66

B. DEVELOPMENT OF OUTCOME MEASURES AND OUTCOME MEASUREMENT METHODOLOGIES

This research will require extensive work on the development of ways to measure both court processes and outcomes. Astonishingly, there is little agreement in the field on how this should be done, and indeed little agreement that it is appropriate to measure and compare courtroom outcomes.

C. EXPERIMENTS WITH PERCEPTIONS OF JUDICIAL ENGAGEMENT AND NEUTRALITY

We also need to find out more about how the public views judicial behavior, and in particular how they view courtroom interventions and engagement in the interest of neutrality. Such information could be obtained by interviewing observers in such a court laboratory, by setting up dummy hearing scripts, with focus groups observing innovations, or by more general surveys of how people react to what happens in courtrooms.

D. STUDIES OF THE EXTENT TO WHICH NORMS, SKILLS, AND EXPERIENCES FROM THE MEDIATION CONTEXT CAN BE TRANSFERRED TO THE COURTROOM

Given the similarity of the challenge a mediator faces in maintaining neutrality, while aiming for a just result (notwithstanding differences in power, skill, and resources between the parties) it would be well worth a sustained study of the possible uses of the learnings from that context into the courtroom.67

E. LONG-TERM RESEARCH CAPACITY

These and other related research tasks can only be completed if the justice system develops a sophisticated long-term research capacity.

66. Such a concept is explored in more detail in Zorza, supra note 4.
CONCLUSION

We may well be on the verge of a fundamental revolution concerning the way courts deal with the self-represented. Such a revolution should be guided by an understanding of the complex pressures on judges, and by an understanding of how they can be transcended by changes in expectations, rules, and the conduct of the courtroom itself.
Ensuring the Right to Be heard for Self-Represented Litigants: Judicial Curriculum

I. Introduction

This course will assist trial judges in developing the skills needed to manage cases involving self represented litigants (SRLs) more efficiently and effectively and with greater personal satisfaction.

The curriculum highlights tools and techniques to help judges run their courtrooms effectively, comply with the law, maintain neutrality, and increase access to justice. It was designed to help judges handle the growing numbers of self-represented litigants that are appearing in the nation’s courtrooms.

The curriculum is based on a 2008 judicial curriculum, developed by the Self-Represented Litigation Network with funding from the State Justice Institute and launched at a Conference at Harvard Law School. It integrates the Presentation, Bench Guide, Handbook of Resource Materials and Handbook of Optional Activities. The 2013 version, developed by the National Center for State Courts’ Center for Court Access to Justice for All with funding from the Public Welfare Foundation, includes updated information, case law and an updated list of resources and is divided into easy to use modules. Both versions of the curriculum are grounded in courtroom research and utilize the experiences of hundreds of judges who have shared their perspectives, ideas, and suggestions. The 2013 Curriculum modules (available at www.ncsc.org/atj-curriculum) can be used as a series, be presented as standalone training modules, or integrated into broader programs, such as those for new judges.

II. Current List of Modules

The currently available list of modules is as follows:

A: Judges, Ethics and Self-Represented Litigants – The Law Today

B: Making the Courtroom Work – a Quick Techniques Overview

C: Starting the Self-Represented Case – Setting the Right Foundation

D: Getting Facts in Self-Represented Cases – Approaches and Techniques

E: The Decision and Beyond

Additional Modules are in development.

III. Local Modification of the Curriculum

This curriculum was developed as an introduction to the subject matter. Presenters are encouraged to modify the presentation and exercises to meet the needs of the audience and the style of the presenter. The curriculum indicates where case law, statutes, and rules specific to a state would be useful for a state judicial educator or other presenter to include. Examples from several states may be included for a national presentation.

IV. Presentation of the Curriculum

The PowerPoint presentation contains notes for the presenter within the slides. These notes were developed to assist the presenter with his or her presentation. The presenter should review the notes
and alter them to meet the needs of the particular audience. Once the presentation is in its final format, the presenter may wish to print the Power Point presentation, with or without the notes, as a handout for the participants.

IV. Feedback Welcomed

We invite and welcome feedback and suggestions on how to improve this curriculum. We are particularly interested in ideas for how to present these concepts as effectively as possible, thoughts on how to respond to questions or issues raised, and in activities that presenters may have found useful or effective with particular groups of judges.

V. Activities and Exercises (may include updates since the 2008 version)

The activities that follow generally utilize small groups, brainstorming, role playing, videos and discussions. For these exercises, please use the following general guidelines to the extent relevant:

Guidelines for Small Groups
- Give all the instructions to the large group before splitting them into small groups.
- Develop explicit instructions concerning what you want the groups to do.
- Provide a handout with written as well as oral instructions for the activity.
- If appropriate to your plan, ask each group to select a reporter (if necessary -- for reporting back to the larger group) and a recorder (if necessary -- for producing a written product to be reported back to the larger group).
- Set a time limit. You can be flexible, but give them some idea of how long you anticipate the activity to take.
- Before ending the group work, give the students a one-minute time warning telling them to wrap things up.
- If there is a report back, be clear in your instructions to the group as a whole about what you expect the reporters to report.

Guidelines for Brainstorming
- Provide a clear statement about what you want the students to brainstorm.
- Have a title prepared on your easel pad with a summary of the statement.
- Write each response as it is provided.
- You may seek clarification on each provided point or ask the student, “May I write x?” to simplify the entry or otherwise frame it so it fits the objective.
- Don’t critique or allow others to critique.
- Consider asking a student or fellow instructor to capture the responses (ensure they have good handwriting).
- Provide closure for the brainstorming exercise. State why you solicited ideas and how they fit into the larger educational session.

Guidelines for Role Plays
- Provide a cast of role players.
- Provide a script or have students improvise dialogue (the latter is usually preferred).
- Ensure that the role play is relatively brief (3 to 5 minutes at most).
- Base the role play on a factual scenario that is realistic.
- Consider providing differing information to the various role players to more realistically represent the fact that different persons would have access to different information.
- Provide sufficient time to adequately debrief the role play.

Guidelines for Discussions
- Plan key questions in advance.
- Consider beginning with simple questions and progressing to the more complex.
VI. Resources

The following resources will be referred to in the curriculum modules:


http://scholar.google.com/scholar_case?case=8203402461706269179&hl=en&as_sdt=2&as_vis=1&oi=scholarr


Judicial Techniques for Cases Involving Self-Represented Litigants

By Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough, and Richard Zorza

This article is an attempt to stimulate a national dialogue about how judges can best structure and manage their courtrooms to accommodate the needs of self-represented litigants. The four authors of this article have worked with and written extensively about the judiciary’s response to self-represented litigants—persons choosing to appear in court without a lawyer. The numbers of such persons have increased significantly during the past decade. In most states the majority of family law matters now include at least one unrepresented party. Although the situation in Maricopa County, Arizona (where one of us presides), may be extreme, it is instructive: in recent years, roughly 60 percent of all domestic relations cases involve two unrepresented parties, 30 percent of the cases have a lawyer representing one side, and only 10 percent of the cases have lawyers on both sides.

Some laypersons are able to prepare court documents and present their positions effectively in court, but many others are not. Their lack of knowledge of the law and its rules imposes burdens on the judges and court staff. Courts throughout the country have responded by providing assistance such as easy-to-use forms; simplified instructions; printed and online information about substantive and procedural law; and direct assistance from court staff, often referred to as courthouse or family law facilitators. Much has been written about these programs, and many of them have been evaluated and found to be valuable to both litigants and the courts.

However, one issue of particular concern to trial court judges, and about which little has yet been written, stands out: how a judge can deal with self-represented litigants in the courtroom without departing from the judicial role as a neutral, impartial decision maker. When a party is unable to present its case to the court, how can the judge facilitate the resolution of the matter without in effect becoming the party’s lawyer? When there is an imbalance of knowledge in the courtroom, particularly if one party is represented by counsel and the other is not, how can the judge manage the trial or hearing impartially? The judge appears to be caught in a dilemma. If the judge does not intervene on behalf of the unrepresented litigant, the party may be unable to present evidence supporting its position and manifest injustice may result. If the judge does intervene, he or she may be violating the duty of impartiality and denying the represented party the benefit of retained counsel.

We have been involved in many discussions of these issues with trial and appellate judges. Trial judges have no common understanding of the applicable ethical standards, case law, or practical techniques to use to ensure that justice is done in their courtrooms—and to guarantee that they have not violated or bent the rules by “leaning over the bench” to assist a floundering unrepresented party. This article examines the applicable code of ethics and case law and suggests options for trial judges seeking helpful techniques.

This is not the first article to address this issue. In 2002 Dr. Jona Goldschmidt published an article entitled “The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance” in Family Court Review. He views judicial reluctance to assist self-represented litigants as arising from the traditional passive role of the judge in the adversary process and judges’ basic antipathy, as lawyers, to self-representation. We discuss Dr. Goldschmidt’s approach and recommendations later in this article. We hope that these two discussions will serve as the foundation of a rich written literature on this difficult topic—and that trial judges will participate actively in building this body of work.

As will become clear in the discussion of the case law, many judicial statements say that self-represented litigants should be held to the same rules as attorneys. For example, in promulgating a new set of forms for use in uncontested divorce and paternity cases in New Mexico, the New Mexico Supreme Court recently included the following statement: “A self-represented person must abide by the same rules of procedure and rules of evidence as lawyers. It is the responsibility of self-represented parties to determine what needs to be done and to take the necessary action.”

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One issue of particular concern to trial court judges, and about which little has yet been written, stands out: how a judge can deal with self-represented litigants in the courtroom without departing from the judicial role as a neutral, impartial decision maker.

The Judges' Journal   Winter 2003

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Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants

Editor’s Note: The following text is the product of the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges.

Judicial officers should use the following protocol during hearings involving pro se litigants:

1. Verify that the party is not an attorney, understands that he or she is entitled to be represented by an attorney and chooses to proceed pro se without an attorney.

2. Explain the process. “I will hear both sides in this matter. First I will listen to what the Petitioner wants me to know about this case and then I will listen to what the Respondent wants me to know about this case. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. So please do not interrupt while the other party is presenting their evidence. Everything that is said in court is written down by the court reporter and in order to insure that the court record is accurate, only one person can talk at the same time. Wait until the person asking a question finishes before answering and the person asking the question should wait until the person answering the question finishes before asking the next question.”

3. Explain the elements. For example, in Order for Protection (OFP) cases: “Petitioner is requesting an Order for Protection. An Order for Protection will be issued if Petitioner can show that she is the victim of domestic abuse. Domestic abuse means that she has been subject to physical harm or that she was reasonably in fear of physical harm or that she was reasonably in fear of physical harm as a result of the conduct or statements of the Respondent. Petitioner is requesting a Harassment Restraining Order. A Harassment Restraining Order will be issued if Petitioner can show that she is the victim of harassment. Harassment means that she has been subject to repeated, intrusive, or unwanted acts, words, or gestures by the Respondent that are intended to adversely affect the safety, security, or the privacy of the Petitioner.”

4. Explain that the party bringing the action has the burden to present evidence in support of the relief sought. For example, in OFP cases: “Because the Petitioner has requested this order, she has to present evidence to show that a court order is needed. I will not consider any of the statements in the Petition that has been filed in this matter. I can only consider evidence that is presented in court today. If Petitioner is unable to present evidence that an order is needed, then I must dismiss this action.”

5. Explain the kind of evidence that may be presented. “Evidence can be in the form of testimony from the parties, testimony from witnesses, or exhibits. Everyone who testifies will be placed under oath and will be subject to questioning by the other party. All exhibits must first be given an exhibit number by the court reporter and then must be briefly described by the witness who is testifying and who can identify the exhibit. The exhibit is then given to the other party who can look at the exhibit and let me know any reason why I should not consider that exhibit when I decide the case. I will then let you know whether the exhibit can be used as evidence.”

6. Explain the limits on the kind of evidence that can be considered. “I have to make my decision based upon the evidence that is admissible under the Rules of Evidence for courts in Minnesota. If either party starts to present evidence that is not admissible, I may stop you and tell you that I cannot consider that type of evidence. Some examples of inadmissible evidence are hearsay and irrelevant evidence. Hearsay is a statement by a person who is not in court as a witness: hearsay could be an oral statement that was overheard or a written statement such as a letter or an affidavit. Irrelevant evidence is testimony or exhibits that do not help me understand or decide issues that are involved in this case.”

7. Ask both parties whether they understand the process and the procedure.

8. Non-attorney advocates will be permitted to sit at counsel table with either party and provide support but will not be permitted to argue on behalf of a party or to question witnesses.

9. Questioning by the judge should be directed at obtaining general information to avoid the appearance of advocacy. For example, in OFP cases: “Tell me why you believe you need an order for protection. If you have specific incidents you want to tell me about, start with the most recent incident first and tell me when it happened, where it happened, who was present, and what happened.”

10. Whenever possible the matter should be decided and the order prepared immediately upon the conclusion of the hearing so it may be served on the parties.

Note: Idaho has developed a draft protocol for its trial judges derived from the Minnesota protocol.
impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.]

(6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

Canon 2A also mentions impartiality: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Nothing in the text of or commentary to these Code sections bears directly on the issues that concern us. Unrepresented persons are not mentioned, except by implication in Subsection 3A(7), which enjoins judges to “accord every [unrepresented] person . . . the right to be heard according to the law.” In particular, the Code says nothing about requiring self-represented litigants to abide by the same rules and standards that apply to lawyers. We are aware of only three ethics decisions or advisories bearing on our issue. Each of them emphasizes a judge’s obligation to accommodate the needs of self-represented parties. We found no instance in which a judge was disciplined or criticized for relieving a self-represented litigant of the strict requirements of procedural or evidentiary rules.

In a 1999 Decision and Order Imposing Public Censure, the California Commission on Judicial Performance reprimanded a San Bernardino County Superior Court judge for nine instances of failure to respect the rights of unrepresented individuals. All but one of the incidents arose in the context of criminal matters; the exception concerned a juror who was incarcerated for being late to court without being informed of his rights in a contempt hearing.

In a 1997 Advisory Opinion, the Indiana Commission on Judicial Qualifications concluded, “a judge’s ethical obligation to treat all litigants fairly obligates the judge to ensure that a pro se litigant in a non-adversarial setting is not denied the relief sought only on the basis of a minor or easily established deficiency in the litigant’s presentation or pleadings.” The opinion, limited to non-adversarial matters, addressed situations such as a litigant’s failure to aver that a name change was not sought for a fraudulent purpose, or a married couple’s inadvertent failure to plead their county of residence. The commission stressed that a judge has no obligation to “cater to a disrespectful or unprepared pro se litigant” or to “make any effort on behalf of any citizen which might put another at a disadvantage.” It also stated that a judge should not “normally ‘try a case’ for a litigant who is wholly failing to accomplish the task.”

The Minnesota Conference of Chief Judges Pro Se Implementation Committee has issued the Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants. (See text on page 18.) Far from requiring self-represented litigants to follow the same rules as lawyers, it explains how judges should set up different procedures for them. However, these procedures preserve the core of the rules of procedure and evidence, requiring sworn testimony, allowing for cross-examination, requiring identification of exhibits, and excluding inadmissible evidence.

In sum, the Canons of Judicial Ethics require judges to remain fair and impartial and to maintain the appearance of fairness and impartiality, but give no further guidance about the meaning of those terms when unrepresented persons appear in court. Two states have established guidelines for judges dealing with unrepresented parties. Both recognize that fairness and impartiality require the judge to treat unrepresented litigants differently than represented litigants. To our knowledge, no judge has been disciplined for doing so, and one has been disciplined for failing to respect the rights of unrepresented persons.

Social science sheds some interesting light on this issue. In a 1988 study of what causes a litigant to view a proceeding as fair, Tom Tyler found that the ability to present one’s case was much more important to the litigant than his or her perception of the judge’s impartiality.

Case Law

In Faretta v. California, the U.S. Supreme Court recognized a Sixth Amendment right, made applicable to the states through the Fourteenth Amendment, of self-representation in a criminal matter. The Court limited that ruling in 2000 by holding, in Martinez v. Court of Appeal of California, that a convicted person has no similar right to self-representation in a direct criminal appeal.

In a speech to the Massachusetts
All federal and virtually all state courts have precedents that papers submitted by pro se litigants will face a different standard of judicial review than those submitted by lawyers.

Conference on Pro Se Litigants on March 15, 2001, Chief Justice Marshall of the Supreme Judicial Court of Massachusetts reviewed the deep historical roots of the right to self-representation in this country. In the early colonies, the right to have a lawyer was often limited, but never the right to represent oneself.11

All federal and virtually all state courts have precedents that papers submitted by persons representing themselves will be subject to a different standard of judicial review than filings submitted by lawyers. The courts will construe them as liberally as possible in favor of the litigant, searching them for any statement that could constitute a meritorious claim or defense.12 On the other hand, appellate courts will not relieve a self-represented litigant of the consequences of a default, such as failure to object to an instruction or ruling by the trial court.13 In reviewing many of the reported appellate cases, we found a rich set of judicial views on the general issue of how trial court judges should deal with self-represented litigants. Most of the cases are consistent in outcome even though they may differ in the reasoning used by the appellate court. We found only one case—from the Illinois intermediate appellate court—directly addressing this article’s central issue. Here we present short summaries of some of the cases.

**Newsome v. Farer, 708 F.2d 327 (1985).** This case led the New Mexico Supreme Court to establish the standard contained in the instructions for the new domestic relations forms quoted earlier.14 The court upheld the trial judge’s dismissal of the plaintiff’s case for Newsome’s failure to attend a meeting at which the defendant was to produce documents requested by Newsome. The court dismissed Newsome’s contention that he did not understand that he was required to follow the judge’s directions.

Finally, Newsome asserts his belief that he was not required to attend production of documents because the court did not affirmatively order him to do so. We view this argument as a disingenuous attempt to invoke special privilege because of his pro se status. He did not claim ignorance or misunderstanding in the trial court, and the assertion here conveniently overlooks the rule that a pro se litigant must comply with the rules and orders of the court, enjoying no greater rights than those who employ counsel. Although pro se pleadings are viewed with tolerance, a pro se litigant, having chosen to represent himself, is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar. Production of documents was ordered upon Newsome’s request. Even though one may not be legally trained, common sense dictates that when a party petitions the court to enforce a right to inspect public records, and the court responds by ordering that requested documents be produced, the petitioner is not then free to disregard the arrangements made to comply with the relief ordered, simply because the court did not affirmatively direct the petitioner to attend. Certainly it does not require legal training or even any great degree of intelligence to understand that documents are not ordered to be produced in a vacuum. Production necessarily implies inspection. Newsome’s pro se status does not require us or the trial court to assume he must be led by the hand through every step of the proceeding he initiated. We reject his claims of compliance or excuse therefrom because of his layman’s ignorance.

At the trial court, the trial judge clearly did not hold Newsome to the same standards as those for an attorney. He gave special attention to Newsome’s discovery requests, fashioning an order for production of documents very close to that requested. He gave Newsome three separate hearings to attempt to explain his failure to attend the document disclosure session. The supreme court nowhere criticized the trial judge for the special accommodations given to this self-represented litigant; it merely held that he was not entitled to any more.

**Bates v. Jean, 745 F.2d 1146 (8th Cir. 1984).** The Federal Court of Appeals reversed a dismissal of a state prisoner’s civil rights suit against a prison guard for cruel and unusual punishment on the grounds of inconsistency of special jury verdicts, even though the prisoner—representing himself—did not object to the inconsistent verdicts at trial. The court stated it “usually accord[ed] pro se litigants somewhat greater flexibility than attorneys” with regard to waiver of objections, noting that “the question of consistency of special verdicts in this case...
requires a greater degree of legal sophistication than we ordinarily demand of pro se prisoner litigants.” The court noted that the trial judge merely asked the prisoner, “Do you have anything at this time, Mr. Bates?” and compared the generality of the judge’s question to the specificity of another judge’s question in a previous case involving special verdicts. There, the trial judge, addressing counsel, stated, “Gentlemen, there seems to be a discrepancy between the answer to the interrogatory and the verdict. Do either of you desire that I explain this matter to the jury and to ask them to return to the jury room for further deliberation?” In a footnote, the Bates court stated:

We do not, of course, imply that the district court has a duty to point out possible inconsistencies in special jury verdicts to all pro se parties. However, the amount of guidance given by a district court judge is a factor to be considered in deciding whether a pro se litigant is barred from asserting an issue for the first time on appeal.

*Traguth v. Zuck,* 710 F.2d 90 (2d Cir. 1983). In this federal case from the Second Circuit, the appellate court reversed the trial judge’s denial of a self-represented litigant’s motion to vacate the entry of default against her. Holding that the trial judge had abused his discretion, the court stated:

Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training. While the right “does not exempt a party from compliance with relevant rules of procedural and substantive law,” it should not be impaired by harsh application of technical rules. Trial courts have been directed to read pro se papers liberally and to allow amendment of pro se complaints “fairly freely.” The court’s duty is even broader in the case of a pro se defendant who finds herself in court against her will with little time to learn the intricacies of civil procedure. Zuck had no reason to know, upon service of the complaint, that she faced default if she did not answer within twenty days. She searched in good faith for a lawyer to represent her, and, failing in that, she responded within that period diligently, if unskilfully, to every pronouncement of the court.

*Ortiz v. Cornetta,* 867 F.2d 146 (2d Cir. 1989). Six years later, the same court reinforced the same principle in an even broader rule. The court stated:

At the outset, we note the general standards—some of which have only recently emerged from both Supreme Court and second circuit decisions—which hold a pro se litigant to less stringent standards than those governing lawyers. Such has long been the case with rules governing pro se complaints (pro se complaint held “to less stringent standards than formal pleadings drafted by lawyers”) (pro se complaint held to “less stringent standards of pleading”), but it has only been in the past year that courts have extended this principle to form a general standard. Once a pro se litigant has done everything possible to bring his action, he should not be penalized by strict rules which might otherwise apply if he were represented by counsel (incarcerated pro se petitioner’s notice of appeal considered “filed” at moment of delivery to prison authorities because at that point, petitioner had done all within his power to abide by filing requirements)(if in forma pauperis relief is subsequently granted, pro se complaint deemed “filed” when received by pro se office).

The court of appeals held that a complaint would be deemed filed when first received by the clerk’s office, even though it was returned to the self-represented filer for correction of a defect. The corrected filing was not received until after the running of the statute of limitations.

*Bowman v. Pat’s Auto Parts,* 504 So. 2d 736 (Ala. Civ. App. 1987). Alabama’s rules of procedure require that an appeal be filed within fourteen days of the clerk’s entry of judgment in the docket, whether or not a party receives actual notice of the entry of the judgment. The court ruled that a self-represented litigant is held to that rule.

Alaska has an interesting series of cases on these issues.

*Breck v. Ulmer,* 745 P.2d 66 (1987). In *Breck* the Alaska Supreme Court held that a trial judge has an “explicit” duty “to advise a pro se litigant of his or her right under the summary judgment rule to file opposing affidavits to defeat a motion for summary judgment” and that “[a] judge should inform a pro se litigant of the proper procedure for the action he or she is obviously attempting to accomplish . . . .” The court concluded that the trial judge’s failure to do so in the instant case was not prejudicial.

*Keating v. Traynor,* 833 P.2d 695 (1992). The Alaska Supreme Court applied the same principle to a trial court’s handling of a letter seeking permission to intervene. The trial court had a duty to notify the litigant of the proper procedure for seeking permission to intervene.

*Bauman v. DFYS,* 768 P.2d 1097 (1989). The court set an outside limit on the trial court’s duty in *Bauman*, holding that the trial judge had no duty to warn a litigant of the consequences of failure to respond to a motion for summary judgment. “To require a judge to instruct a pro se litigant as to each step in litigating a claim would compromise the court’s impartiality in deciding the case by forcing the judge to act as an advocate for one side.”

In two recent cases, the Alaska court added to these precedents.

*Sopko v. Dowell Schlumberger,* Inc., 21 P.3d 1265 (2001). The court characterized its prior cases as imposing a “limited” duty on the trial judge to assist a self-represented litigant. “We have imposed some limited duties on courts to advise pro se litigants of proper procedure, [including] . . . the duty to inform . . . (1) of specific procedural defects, . . . and (2) of the necessity of opposing a summary judgment motion
with affidavits or by amending the complaint.” In Sopko the court found the court’s advice proper.

Collins v. Arctic Builders, 957 P.2d 980 (1998). Here, the court overturned a trial court’s dismissal of a notice of appeal for a procedural defect in a pro se’s second attempt to comply with the appellate rules. The court stated, “We are not concerned that specificity in pointing out technical defects in pro se pleadings will compromise the superior court’s impartiality.”

Wright v. Black, 856 P.2d 477 (1993). The trial judge expressed his intention to take evidence at a child support hearing on the paternity issue raised by the father in an earlier pleading. Neither party objected. On appeal the father claimed that his failure to object should be excused because of his lack of familiarity with court proceedings. The court held that if the litigant had “attempted to object, or even hinted that he was unprepared to handle the paternity issue, then Breck might apply. While we may relax formal requirements for pro se litigants, even a pro se litigant must make some attempt to assert his or her rights.” (This latter point was also emphasized in Noey v. Bledsoe, 978 P.2d 1264 (1999), in which the court stated that pro se litigants are not excused from “making good faith efforts to assert their rights.”)

Rappelyea v. Campbell, 884 P.2d 126 (1994). The California Supreme Court, in an opinion written by Justice Mosk, held that a self-represented couple from Arizona would be relieved of a default judgment entered against them even though they had not sought relief within the six-month period allowed by statute to vacate a default judgment. The court reasoned that their default had been caused by the court clerk’s error in quoting the filing fee for an answer—thereby causing their timely answer to be rejected for failure to enclose the proper filing fee. Justice Mosk stated:

[M]ere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. . . . A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation.

Gamet v. Blanchard, 91 Cal. App. 4d 1276 (2001). The appellate court reversed the trial judge’s dismissal of the plaintiff’s case, citing lack of service of the court’s order allowing her counsel to withdraw the “confusing, indeed misleading, nature of the various orders and communications” from the court to the plaintiff, and the plaintiff’s involuntary pro per status. The majority stated:

We further note that pro per litigants are not entitled to special exemptions from the California Rules of Court or Code of Civil Procedure. (Rappelyea v. Campbell, supra.) They are, however, entitled to treatment equal to that of a represented party. Trial judges must acknowledge that pro per litigants often do not have an attorney’s level of knowledge about the legal system and are more prone to misunderstanding the court’s requirements. When all parties are represented, the judge can depend on the adversary system to keep everyone on the straight and narrow. When one party is represented and the other is not, the lawyer, in his or her own client’s interests, does not wish to educate the pro per. The judge should monitor to ensure the pro per is not inadvertently misled, either by the represented party or by the court. While attorneys and judges commonly speak (and often write) in legal shorthand, when a pro per is involved, special care should be used to make sure that verbal instructions given in court and written notices are clear and understandable by a layperson. This is the essence of equal and fair treatment, and it is not only important to serve the ends of justice, but to maintain public confidence in the judicial system.

The confusing, indeed misleading, nature of the various orders and communications that Gamet received from the trial court is particularly important in light of Gamet’s (involuntary) pro per status. As noted above, pro per litigants are not entitled to any special treatment from the courts. But that doesn’t mean trial judges should be wholly indifferent to their lack of formal legal training. Clarity is important when parties are represented by counsel. How much more important is it when one party may not be familiar with the legal shorthand which is so often bandied around the courtroom or put into minute orders?

There is no reason that a judge cannot take affirmative steps—for example, spending a few minutes editing a letter or minute order from the court—to make sure any communication from the court is clear and understandable, and does not require translation into normal-speak. Judges are charged with ascertaining the truth, not just playing the referee. A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits. Judges should recognize that a pro per litigant may be prone to misunderstanding court requirements or orders—that happens enough with lawyers—and take at least some care to assure their orders are plain and understandable. Unfortunately, the careless use of jargon may have the effect, as in the case before us, of misleading a pro per litigant. The ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system. (citations omitted)

Judge Bedsford, in dissent, lamented the inconsistent message being sent to the trial judges:

My colleagues recognize in one sentence the hoary but still vigorous rule that “pro per litigants are not entitled to any special treatment from the courts,” but devote several paragraphs to setting out the kinds of special treatment trial judges will be obliged to accord them under this opinion.

Pro per litigants have become more common in recent years and seem destined to become a much larger portion of the trial court docket than they have been in the past. It may be time to reassess our case law regarding them. And while I agree with much that is said in the majority opinion, and might be prepared to
give a second look to our rules regarding pro per litigants, I think an ad hoc reversal which tells trial judges to treat pro per the same as they treat represented litigants—only different—accomplishes little in the way of addressing the problem and does a disservice to the people who must deal with pro per every day.

**Cersosimo v. Cersosimo, 449 A.2d 1026 (1982).** Connecticut articulated a standard similar to that used in the federal courts. In Cersosimo the supreme court stated:

> It is “our established policy to allow great latitude to a litigant who, either by choice or necessity, represents himself in legal proceedings, so far as such latitude is consistent with the just rights of any adverse party. . . .” This does not, however, mean that we will entirely disregard the established rules of procedure, adherence to which is necessary so that the parties may know their rights and the real issues in controversy may be presented and determined (internal citations omitted).

The case involved a petition for a change in child support and alimony payments; the former wife represented herself. The supreme court held that the trial court had erred in refusing to let the former wife have physical possession of the tax returns of the former husband solely on the grounds that she was representing herself. The trial court had appointed an accountant to review the former husband’s financial affairs and report his annual income. The supreme court then found that the error was harmless.

**Pavilion v. Kaferly, 561 N.E.2d 1245 (1990).** In this interesting case the Appellate Court of Illinois, First District, Fifth Division, overturned a jury verdict against a self-represented litigant because of a series of remarks by the trial judge that demonstrated hostility towards the pro se defendant.

**Kasson State Bank v. Haugen, 410 N.W.2d 392 (Minn. App. 1987).** The Minnesota Court of Appeals reversed a trial judge’s grant of summary judgment to a bank despite the defendant’s testimony at the hearing that the loan in question was induced by the bank’s own fraud. The court also found that the trial judge had abused his discretion in failing to grant the defendant a continuance to obtain counsel. The court’s articulation of the standard to be followed by the trial judge is similar to that used in Connecticut: “[a] trial court has a duty to ensure fairness to a pro se litigant by allowing reasonable accommodation so long as there is no prejudice to the adverse party.”

**Bullard v. Morris, 547 So. 2d 789 (1989).** The Mississippi Supreme Court held that the chancery court had abused its discretion in requiring one of the litigants in a divorce case arising from irreconcilable differences to appear personally before a decree would be issued. The litigants were not represented by counsel. One was in state prison, and the other lived in California.

**Brown v. City of St. Louis, 842 S.W.2d 163 (1992).** The Missouri Court of Appeals, Eastern Division, reviewed a trial court’s affirmance of a Labor and Industrial Relations Commission dismissal of a claim for workers’ compensation. After noting that the appellant filed a “nonsensical” brief with “no discernible relationship to the orders from which appellant purports to appeal,”

> the court noted in typical language that “[a]lthough an appellant has the right to act pro se on appeal, he or she is bound by the same rules of procedure as attorneys and is entitled to no indulgence that would not have been given if the appellant were represented by counsel,” and that the appeal was subject to dismissal for failure to comply with the appellate rules. The court nonetheless proceeded to dispose of the appeal on the merits: it affirmed the trial court. The court also noted that the appellant had been notified that his original brief did not comply with the appellate rules and was given an opportunity to file an amended brief. In sum, while stating the opposite principle, the court in actuality accorded the self-represented litigant different treatment than he would have received had he been represented by counsel (the opportunity to amend his brief and not dismissing the appeal for failure to file an acceptable brief and record).

**Boyer v. Fisk, 623 S.W.2d 28 (1981).** The same court reversed a trial court’s vacating of a default judgment entered against a self-represented couple. The couple had partially filled in a form at the courthouse that stated “[n]o cause of action” but did not sign it as an answer to a civil complaint, relying on assurance from the clerk’s office that the filing was sufficient and they would be notified of a trial date. The court of appeals reinstated the default judgment, finding that the self-represented litigants did not exercise reasonable diligence in relying on the statements of the clerk and in failing to send a copy of their “answer” to plaintiff’s counsel as required on the face of the summons.

**Brown v. Texas Employment Commission, 801 S.W.2d 5 (Tex. App.—Hous. 1990).** The appellant sought to be relieved of procedural requirements to timely file an appeal of an administrative determination within the administrative process, to timely file an appeal in court, and to join an indispensable party. The court refused, stating that a self-represented litigant is held to the same procedural rules as one represented by counsel.

**Plummer v. Reeves, 93 S.W. 3d 930 (2003).** The Texas Court of Appeals, Amarillo, dismissed an appeal because the pro se appellant, given several opportunities, failed to file a brief with citations to legal authority supporting her position. The court wrote, “Finally, as judges, we are to be neutral and unbiased adjudicators of the dispute before us. Our being placed in the position of conducting research to find authority supporting legal propositions uttered by a litigant when the litigant has opted not to search for same runs afool of that ideal, however. Under that circumstance, we are no longer unbiased, but rather become an advocate for the party.”

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Kelley v. Secretary, U.S., Department of Labor, 812 F.2d 1378 (Fed. Cir. 1987). The U.S. Court of Appeals for the Federal Circuit similarly held that a plaintiff’s failure to file a court action within sixty days of notice of the government’s publication of notice in the Federal Register deprived the trial court of jurisdiction to hear the case, despite the plaintiff’s status as a pro se litigant.

Waushara County v. Graf, 480 N.W.2d 16 (1992). Wisconsin courts limit the rule for lenient treatment of self-represented litigants to prisoners. In a case involving the appellate court’s consideration of issues not raised on appeal, the Wisconsin Supreme Court wrote:

While pro se litigants in some circumstances deserve some leniency with regard to waiver of rights, the rule applies only to pro se prisoners.

We recognize that the confinement of the prisoner and the necessary reasonable regulations of the prison, in addition to the fact that many prisoners are “unlettered” and most are indigent, make it difficult for a prisoner to obtain legal assistance or to know and observe jurisdictional and procedural requirements in submitting his grievances to a court. These concerns have not been extended to persons who are not incarcerated.

Meyers v. First National Bank of Cincinnati, 444 N.E.2d 412 (Ohio App. 1981). An Ohio intermediate appellate court decision rests on the same distinction as above. The court upheld a municipal court’s dismissal of plaintiff’s case pursuant to its local rule requiring the submission of a memorandum in opposition to a motion to dismiss. The court wrote:

Appellants’ argument that as pro se civil litigants they should receive special consideration and not be bound by the same rules as civil litigants represented by counsel is against the weight of Ohio as well as national authority. Pro se civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors. Appellants’ argument that prisoners in pro se habeas corpus proceedings do not have to meet the same procedural standards as those with counsel is inapplicable to the case sub judice (internal citations omitted).

Hodgins v. State, 1 P.3d 1259 (2000). The courts of Wyoming apply a standard of leniency to self-represented litigants. The Wyoming Supreme Court set forth this standard: “The litigant acting pro se is entitled to ‘a certain leniency’ from the more stringent standards accorded formal pleadings drafted by lawyers; however, the administration of justice requires reasonable adherence to procedural rules and requirements of the court.” In this case the court imposed the sanction of costs on the litigant for filing a frivolous appeal, noting that he was familiar with the rules of appellate procedure and should be held to account for violating them by filing an appeal utterly lacking in legal justification.

Oko v. Rogers, 466 N.E.2d 658 (Ill. App. 3d 1984). This is the only case we found that is directly on point for the issue addressed in this article. The plaintiff, represented by counsel, sued the defendant doctor, who represented himself, for medical malpractice. The jury returned a verdict for the doctor. The plaintiff appealed, claiming among other things that the trial judge denied her a fair trial by giving assistance to the defendant in presenting his case. Because both the facts and the legal analysis in this case are important, we include lengthy quotes from both the majority and dissenting opinions:

Majority: Although the defendant on numerous occasions departed from the rules of trial court practice, his excursions were usually cut short by objections which were sustained and repeated until the defendant conformed to proper procedures. The defendant was not permitted to do as he pleased. Furthermore, the trial court took steps to make sure that the defendant’s unorthodox questions did not confuse the jury. Whenever necessary, the trial judge would make his own brief and limited examination of a witness in order to clarify the testimony. The court also guided the defendant through parts of his own testimony in order to avoid a long narrative on irrelevant matters.

Considerable latitude must be allowed a judge in conducting a trial. The conduct and remarks of the judge are grounds for reversal only if they are such as would ordinarily create prejudice in the minds of the jury. We find that the judge remained within his proper provinces in the present case. The judge gave due consideration to the defendant’s pro se status but was never reluctant to sustain the plaintiff’s objections when necessary. Although the judge would carefully explain to the defendant why certain objections were being sustained, there is no evidence that he conducted the defendant’s case for him or failed to remain impartial.

As any judge or lawyer knows, the conduct of a jury trial with a pro se litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. There is no law that requires a litigant to have a lawyer. The lawyer for the opposing side cannot be expected to advise the opposing party who is pro se. The judge cannot presume to represent the pro se party. In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides. We believe that Judge Cerri adequately faced up to that high responsibility in this case (footnote and citation omitted).

Dissent: At the conclusion of her examination of defendant, the trial court explained to defendant the tactical alternatives available to him—
i.e., that he could wait and testify as a part of his own case or he could give direct testimony at the conclusion of plaintiff’s examination of him. Defendant indicated that he wanted to testify right then, and the trial judge proceeded to question defendant at length about his post-operative treatment of plaintiff and about her progress under that treatment. Thus the court conducted the direct examination of defendant. Later, while defendant was attempting to cross-examine plaintiff’s expert medical witness, defendant started to read from an article that had not been introduced into evidence. After sustaining plaintiff’s objection to defendant’s questions, the court told defendant, “Ask him if he read it and is familiar with the article, Doctor, the operation procedure.” During subsequent cross-examination of the same witness, defendant attempted several times to ask the witness whether his responsibility to his patient did not end when she terminated her relationship with him. After several versions of the question were objected to by plaintiff and the objections sustained by the court, defendant asked, “Is there any way I can accomplish that?” and the court advised defendant, “Ask him what is customary.” Following plaintiff’s redirect examination of the witness, defendant had no recross, but the trial court asked several questions to clarify certain details of surgical procedure which had been mentioned by the witness on redirect. In effect, the court conducted the recross examination for defendant.

During another occasion, while defendant was questioning his own expert witness, Dr. McSweeney, the court overruled an objection by plaintiff to the form of a question asked by defendant relating to the surgical procedures the witness would use, and then the court provided defendant with the correct form by adding, “Based on the standards of our local community.” At the close of Dr. McSweeney’s testimony, plaintiff moved that the testimony be stricken as not relevant to the issue of the prevailing standard of care for a reasonably well-qualified surgeon. The court stated: “Well, normally if I had a lawyer sitting there, I would—you might be technically correct. You might be correct. With Dr. Rogers, who at least in his artful questioning, I think the concept is sufficiently established in the record to allow that testimony to stand.” It is apparent to us that the trial court did not hold defendant to the same rules of procedure as he would have an attorney in determining the relevancy and admissibility of this evidence. To condone such actions of the trial court here is to invite pro se representation in difficult trials which would make a mockery of the judicial process, even though to fully inform a jury is a commendable purpose. Defendant was entitled to a fair opportunity to present his evidence, but nothing more. If he was insufficiently versed in legal procedure to place his evidence before the jury pursuant to the ordinary rules of procedure, then he was not entitled to have the court assist him by phrasing questions, by conducting the examination of witnesses, or by special rulings in his favor.

Without unnecessarily lengthening this opinion with additional examples, it is my firm belief the trial court overstepped the bounds of judicial discretion in assisting defendant with the trial of this cause, and accordingly, that plaintiff is entitled to have the judgment reversed and a new trial granted.

A Suggested Synthesis

What does all this mean? In reviewing the case law, we were struck with the large number of instances in which appellate courts reversed trial judges who were short or summary in their rejection of the causes of unrepresented litigants. Trial courts are expected to lean over backward (if not “lean over the bench”) to identify meritorious issues hidden in the presentations of an unrepresented litigant. This comports well with the ethical requirement in Canon 3A(7) that the judge “shall accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law.”

The courts appear to espouse three different standards for limiting the judge’s duty to actively seek out the merit of an unrepresented litigant’s case. The majority position is that self-represented litigants will be treated the same as attorneys. The minority position, taken by the federal courts, Alaska, Connecticut, and Minnesota (as articulated by Minnesota), is that “[a] trial court has a duty to ensure fairness to a pro se litigant by allowing reason-able accommodation so long as there is no prejudice to the adverse party.” The very minority view is taken by Ohio and Wisconsin: standards applied to prisoners and other unrepresented litigants differ (more flexible and less flexible, respectively). We do not believe this third position can withstand careful analysis. Prisoners operate under a number of factors not imposed on other citizens, and courts should be solicitous of their right to access to the courts to present grievances, but other citizens should have equal access to judicial remedies.

The first two positions differ quite a bit from each other. The first takes the view that it is best when a judge accords the self-represented litigant no “special treatment.” Exceptions exist, but they are limited. The emotional message that seems embedded in the majority view is that self-representation is a voluntary choice, it is moreover a foolish choice, and litigants who put themselves in this position “deserve” the consequences of that choice. The minority view is the opposite: a judge has a duty to accommodate the special circumstances of the unrepresented litigant up to the point that such accommodation infringes on the rights of the other side. The emotional message in minority view opinions is that a person’s lack of counsel likely is not voluntary and is instead the result of a lack of means—but that even if voluntary, self-representation is a choice vouchsafed by the Constitution. The court has an obligation to provide as fair a process for the uninformed and unsophisticated citizen as for the one who can afford the most accomplished and aggressive attorney.

These contrasting standards give very different messages to the trial judge attempting to cope with an
unrepresented litigant in the courtroom. The first posits a basically passive role for the judge, with the litigant bearing the burden of becoming sufficiently familiar with the law, rules of procedure, and rules of evidence to function as a lawyer. The second instructs the judge to aid the unrepresented litigant, who cannot be expected to perform as a trained lawyer would, in every way short of prejudicing the opponent. It is no accident that Minnesota is the only state to generate a protocol for judges dealing with self-represented litigants; its protocol follows from the standard articulated in its appellate case law.

In fact we think that these different standards have even less impact in the appellate court holdings than the above review suggests. In every case summarized above, the “majority rule” appears to be dictum. It is a formula intoned after the court announces its decision. The analysis in the court’s ruling does not focus on the standard to which attorneys will be held. The statement that self-represented litigants will be held to the standard of an attorney seems, instead, to be merely a shorthand phrase for stating that the court will not let the unrepresented litigant use his or her status as a reason to avoid application of a particular procedural rule. The holdings of the cases summarized here can be synthesized into the following six basic propositions:

• The law must produce a consistent outcome for all litigants, regardless of their legal representation, based on the law and facts of their case. The real message behind the statement that self-represented litigants must follow the same rules as attorneys is the fundamental idea that an unrepresented litigant cannot obtain relief from the court in cases in which a party represented by an attorney would not prevail. The outcome of the matter should be directly related to the merits of a party’s case. An unrepresented party must meet the same legal standards for obtaining a judicial remedy as a party represented by counsel and should receive no sympathy or other advantage because of choosing to proceed without a lawyer.

• The “hard” procedural bars—pertaining to statutes of limitations, availability of administrative remedies, and time limits for filing an appeal—apply equally to unrepresented and represented litigants. Some of the cases do not support this principle, but the majority do. These procedural bars are fundamental rules governing the legal process. For the most part, appellate courts are uncomfortable applying them differently to different parties for any reason—and particularly not because they are or are not represented by counsel.

• “Soft” procedural bars—pertaining to contemporaneous objection, raising issues on appeal, or vacating a default judgment—can be mitigated for unrepresented litigants. The issue becomes murkier when it involves failure to preserve error by stating an objection on the record in the trial court, or in applying the standard for relief from a default judgment. Whether or not to apply these matters falls within the equitable discretion of the trial court. An appellate court can always decide an issue not raised by a party when it discovers “fundamental error.” It can waive the contemporaneous objection rule for the same reason. Relief from a default judgment does not create the same degree of prejudice to the other party as overturning a decision on the merits. So, in exercising inherently equitable principles, judges are more likely to consider the ignorance and inexperience of an unrepresented party. If the unrepresented party did all that a reasonable person in the situation could do, that factor will weigh in the person’s favor. If the individual appeared to scorn the court’s rules and directives, the facts will weigh in the other direction. This is as it should be.

• Courts will grant unrepresented litigants enormous leeway in both form and content of the documents they file. This standard is universally observed. Of course courts cannot and will not assert a claim for a party that the party has not raised. This is the point of the Alaska cases, imposing the duty to assert individual rights on the self-represented litigant.

• Judges will help assure that a litigant has an opportunity to present evidence in court, so long as the judge does not prejudice the other side in doing so. The only reported case we discovered is Oko v. Rogers. We repeat the majority’s analysis in that case:

As any judge or lawyer knows, the conduct of a jury trial with a pro se litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. There is no law that requires a litigant to have a lawyer. The lawyer for the opposing side cannot be expected to advise the opposing party who is pro se. The judge cannot presume to represent the pro se party. In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides.

• Judicial efforts to enable unrepresented litigants to present their cases should be limited to assistance to the party in accomplishing the party’s own strategy, not in suggesting a different or better strategy. So long as the judge is merely facilitating the unrepresented litigant’s presentation of his or her own case—as the litigant has conceived it—the judge can be seen to be giving the party “legal information” about how to do in court what the party seeks to accomplish. The judge would lose his or her impartiality and “become the advocate” for the unrepresented litigant if the judge gives “legal advice” such as tactical or strategic recommendations for how the case should be presented—what witnesses to call, what arguments to make, what additional evidence to seek.
As the majority in Oko v. Rogers pointed out, the trial judge can ensure the self-represented litigant’s right to be heard without departing from the judge’s duty to remain impartial. The duty of ensuring both parties’ right to be heard is not inherently in conflict with the duty to remain impartial. We believe this position will be adopted by other appellate courts when and if they address the practical problems facing the trial judge in similar cases. We also believe that trial judges can use a number of practical techniques to reduce the appearance of such a conflict.

Judicial Techniques

As noted earlier, our analysis of issues facing the trial judge is somewhat different from that of Dr. Goldschmidt in his Family Court Review article. Although we agree that trial judges cannot maintain a passive role, we do not necessarily espouse all of his specific recommendations for a more active role for judges and court staff. We address some of his recommendations in the following discussion, which is divided into three areas: general principles, specific approaches to cases involving two unrepresented litigants, and cases involving the more difficult situation where one party is represented and the other is not.

General Principles

● Prepare. Pro se cases require a much more active role on the part of the trial judge—who must master the substantive law applicable to the case. When handling a case with two well-prepared lawyers, the trial judge can depend on counsel to identify the legal issues involved, but this is not so with cases in which no lawyers appear. The judge has the full responsibility for knowing and explaining the law. Most self-represented litigants appear in a few types of cases: family law (including divorce, paternity, child custody, child and spousal support, and domestic violence); traffic and misdemeanors; landlord/tenant; and small claims. In most urban areas, judges handle these calendars as regular assignments and consequently are steeped in the law and process related to each case type. However, a judge called to cover for a sick or absent judge in one of these assignments may be in an awkward situation unless the judge has reviewed the legal elements and standards governing the matters likely to arise.

● Provide the parties with guidelines. In pro se cases it is helpful for the judge to explain the applicable substantive and procedural principles. When both parties are represented by counsel, this is not necessary; each attorney is aware of the requirements and can be expected to address them. Unrepresented litigants may need more. By presenting background at the beginning of the hearing, the judge neutrally aids both parties. Much of this information can be given to the parties in writing before the hearing or trial. The following items are particularly helpful:

  • A basic primer on courtroom protocol, addressing who sits where in the courtroom, how to behave (rising when the judge enters and leaves the courtroom; not interrupting another person who is speaking), order of events (the moving party presents first), how to state objections, attire, and other matters the judge considers important (for example, gum chewing).

  • Basic rules for evidence presentation, including the burden on the moving party to prove entitlement to relief. Many litigants literally expect the trial judge to be omniscient—to “know” the truth behind all matters without needing evidence. They should be instructed that the judge will rule based on the evidence presented. The judge may explain the different types of evidence—testimony, documents, exhibits—and how each is presented to the court. (Item 6 in the Minnesota protocol briefly describes the more important rules of evidence.)

  • A list of elements that must be proved in order to obtain relief. This section should be short and clear, with no explication of legal nuances. For example, a motion to modify child support must establish a change in the non-custodial parent’s financial situation and show why the custodial parent should receive increased support. Where possible, the list should explain what evidence can prove the elements, such as a pay stub, tax return, and the like.

Judge Albrecht combines the latter information with a minute entry notifying litigants of the date and time of the hearing or trial. She uses standard word processing templates for recurring situations, so her staff can easily include the pertinent information in any printed communication. Providing the materials in advance greatly increases the likelihood that the parties will be prepared to proceed when the case is called. Some courts provide these materials on a website, and others make them available at a “self-help center” in the courthouse. Whatever the form, it is helpful either to provide the information in writing or to give the parties written notice of the location of the material, their duty to review it before the hearing or trial, and where additional copies or information are available.

Even if materials have been provided in advance, the hearing or trial should begin with the judge’s review of all three topics—explaining how the proceeding will be conducted, the legal elements of the matter, and types and forms of acceptable evidence. Judge Albrecht explains that each party will have an opportunity to present its position (or tell its story), that she will ask questions as needed to obtain additional information, and that she will apply the rules of evidence in deciding what weight to give the evidence presented. She also explains that she may interrupt either party—if she believes she does not understand the point being made, has heard enough on the point, or if she believes the party is going into an area that is not legally relevant—and ask that the individual move to the next point.

To the extent judges give general instructions in advance to both parties, they minimize the likelihood that their
Instructions can be perceived as favoring one party. The Minnesota Protocol on page 18 provides an excellent outline for these preliminary instructions.

- Conduct the proceeding in a structured fashion based on the required legal elements. We suggest that the judge provide the parties with an outline of the decision-making process and follow it explicitly during the proceeding. To continue with our child support example: The judge would state that the first determination is whether the court has jurisdiction to decide the case, then whether financial circumstances of the non-custodial parent have changed, and finally, if so, what change in monthly child support would be appropriate. After taking testimony on the first issue, the judge would clearly state, “Let the record show that the court has jurisdiction in this case.” After hearing testimony on the non-custodial parent’s changed income, the judge would conclude that phase of the proceeding with, “I find that Mr. Jones’s income has increased from $X per month when child support was first established in this case in 1999 to $Y per month today.” Then the judge would announce the guideline child support amount and invite the parties to give reasons, if any, for departing from them. At the end, the judge would announce the final result: “The child support guidelines call for monthly support of $Z in these circumstances. I find no reason to deviate from the guidelines. I order an increase in Mr. Jones’s monthly child support from $Q to $Z.”

Attorneys of course are already familiar with this outline and address all of the topics in the course of presenting the case. Using this approach will enable the judge to structure the proceeding for both parties and set clear boundaries for arguments and presentations; it will help them focus on the specific topic being addressed. Any extra time required for the judge to establish this agenda will be more than offset by the reduced time needed for the parties to present evidence and arguments.

Judges may want to use visual aids to assist the parties in understanding and following the issue outline. Richard Zorza discusses the options of flipcharts and more highly automated alternatives in his book.18

- Create an informal atmosphere for the acceptance of evidence and testimony. Dr. Goldschmidt recommends that the formal rules of procedure and evidence be relaxed for cases involving self-represented litigants. We agree and suggest that the judge can easily accomplish this by using informal language. By stating, “I will give each of you a chance to tell me what you think I need to know to decide each of the issues in this case;” the judge can create an informal environment for accepting evidence. Any party can object at this point and insist on following the rules of evidence, but this is unlikely. In the absence of objection, the parties can waive the rules of evidence regarding following the traditional question and answer format, establishing a foundation for introducing documents and exhibits, qualifying an expert, and the like.

Generally, such an introductory statement will suffice because issues of privilege rarely arise in most matters in which litigants typically self-represent. However, judges may need to deal more explicitly with hearsay. Hearsay will be excluded if a party objects, but it is otherwise probative—if a party does not object, a judge or jury may consider hearsay evidence. Does the judge have a duty to inform the parties of this rule? The Minnesota protocol suggests that a judge do so but does not require specific notice. We suggest the judge’s initial advice to the parties include such language but not that the court bring it to the attention of the parties. The initial instruction should suffice.

- Ask questions. Judges should freely ask questions of unrepresented parties and their witnesses. When judges make clear to the parties at the beginning of the hearing that they will ask questions—and explain why (to make sure they have the information they need to make a decision)—chances are minimal that their apparent impartiality could be impaired. The Minnesota protocol suggests that the judge pose questions in the most general form to avoid the appearance of leading a party or witness to a particular conclusion.

- Provide written notice of further hearings, referrals, or other obligations of the parties. Optimally, the parties will leave the courtroom with an order or minute entry documenting the next court date, the court’s referral to another service or resource (such as the court’s self-represented litigants support office, a courthouse facilitator program, or an alternative dispute resolution program), and any other obligations the parties may have (such as preparing and serving further papers or proposed orders).

Dr. Goldschmidt suggests that judges call witnesses and conduct “limited independent investigations” if they believe either process is necessary to discover the truth of a matter. We do not endorse this suggestion. A judge should feel free to ask questions of a witness already in the courtroom and should be prepared, in special circumstances, to continue a matter to allow a party to secure the presence of an additional witness. But we do not believe it proper for a judge to decide an additional witness is needed and to subpoena or call that witness. Nor do we think it possible for the judge to conduct an independent investigation without losing the appearance of impartiality.

Cases Involving Two Unrepresented Parties

We suggest these additional procedures for cases involving two unrepresented parties.

- Swear both parties at the beginning of the proceeding. When both parties are sworn, distinctions between their arguments and their testimony are not necessary. All statements made by the parties can now be considered as evidence. The judge should explain that the parties must remember they are
under oath throughout the hearing or trial and that anything they say—as a question, statement, or argument—must be truthful.

- Maintain strict control over the proceedings. Most self-represented litigants are respectful of the court and will conduct themselves in a dignified manner. However, especially in family law matters, emotions often flare, and the judge should quickly terminate arguments and calm anger. Recessing for a moment may be necessary to give the parties a chance to regain their composure. The judge must be alert and set and enforce clear ground rules, especially that the parties may not interrupt each other and that each will have an opportunity to be heard. The judge may need to use the contempt power or authority to dismiss the lawsuit for abuse of the legal process as a threat to restrain inappropriate behavior.

- Remain alert to imbalances of power in the courtroom. The judge must ensure that both sides have a full opportunity to present their points of view, especially where it is clear that one of the parties has more power (relationships involving domestic abuse, disputes in which one party is far more sophisticated than the other, or situations in which one of the parties has a limited knowledge of English). Judges should make a special effort here to ask the less powerful party its views on each issue or even to draw out those views with follow-up questions. The judge should not rely on the party’s ability to take the initiative or to speak proactively. In extreme cases, the judge should continue the matter and seek pro bono legal representation for one or both parties.

**Cases Involving Represented and Unrepresented Parties**

Most trial judges find cases with unequal resources most difficult, as illustrated in *Oko v. Rogers*. Problems arise when counsel advocate for their clients to prevent unrepresented litigants from adding testimony or other evidence to support their cases. Judges can use a number of different approaches to ensure that unrepresented litigants fully present their case without negating altogether the value of counsel for represented parties. Counsel must fully represent the client, leading in presentation of testimony, documents, and exhibits; cross-examining testimony presented by the unrepresented party; and arguing the legal and factual merits of the client’s case. In terms of the minority standard, the judge accommodates the special needs of the self-represented party but does not prejudice the case of the represented party. The represented party is not prejudiced, in the legal sense of that term, by the introduction of the other side’s evidence. That is what the hearing and trial are for. The represented party retains an unfettered opportunity to object to the admissibility of all evidence offered.

We recommend as a first principle, as the Minnesota protocol provides, that all cases involving self-represented litigants be handled in the same fashion, whether or not the other party retains counsel. The most serious problems arise when judges conduct the case as if both sides are represented by attorneys but find, as in the *Oko* case, they must intervene repeatedly in order to enable the non-lawyer to function in the proceeding. When this occurs, the lawyer must accommodate to the informal setting established by the judge. The lawyer may lead the client and witnesses through testimony, cross-examine the opposing party and its witnesses, make objections to testimony or documents, and argue the merits of the client’s case. Most attorneys recognize the need for the judge to proceed informally, but a few will insist that the proceeding be conducted in strict compliance with the rules of evidence. The judge has several options in dealing with this objection.

- Convince the attorney of the benefits of proceeding informally. The judge can call the attorney to the bench, explain the reasons for the informal structure, and convince the lawyer to withdraw the objection. The judge can point out that going through the question and answer process will take much more time—for the judge, the attorney, and the attorney’s client—and could be much more difficult and frustrating for everyone concerned.

- Overrule. The judge can overrule the objection on the grounds that it would be a waste of judicial resources to proceed in formal compliance with the rules of evidence.

- Set special ground rules for the conduct of the proceeding under the rules of evidence. The judge can inform counsel that if the matter proceeds under the formal rules of evidence, the lawyer will be required to explain to the unrepresented litigant the basis for any objection the attorney makes, with enough detail so that the unrepresented litigant can take whatever corrective steps are needed to proceed. For example, if the attorney objects to a leading question, the attorney would need to explain the objection sufficiently so the self-represented party would be able to pose an appropriate non-leading question.

This is not the same as requiring counsel to assist the unrepresented litigant by formulating that party’s questions. It merely makes counsel responsible for explaining, in whatever depth necessary, the nature of counsel’s objection. The judge, as well, will help assure that the unrepresented litigant is equipped with the tools needed to get all evidence before the judge for a fair determination of the matter. The judge should explain to counsel that counsel may decide at any time during the proceeding to abandon the objection and proceed informally from that point.

- Refuse to uphold objections to the form of questions or testimony. The judge can decide not to entertain objections to the form of questions or testimony and limit such objections to only the admissibility of the evidence itself. For instance, if the attorney objects to the manner in which the self-represented litigant attempts to introduce a document, the judge can cut to the ultimate question: “Counsel, does your client contend...
that this document is either inadmissible or something other than what it purports to be?" The lawyer thus can protect the client’s interests without prolonging the process or requiring the judge to provide additional assistance to the litigant.

- Use leading questions or prompts as often as necessary to remind the unrepresented litigant to present evidence in a manner consistent with the rules of evidence. This should be a last resort but, as Oko illustrates, is proper. Judges should try all other approaches first because these generally produce less cumbersome, less frustrating, and less contentious hearings and trials. But if counsel refuses to cooperate with the other approaches introduced by the judge, the judge will have established on the record the need for measures to ensure the unrepresented litigant’s right to be heard.

- Offer the unrepresented litigant the option of a continuance if necessary. This could mean reconvening later the same day or returning to court another day. If, for example, an unrepresented litigant does not have the witnesses present to authenticate a document or photograph and counsel insists on the need for such authentication, the judge can offer to continue the matter long enough for the litigant to contact and summon the necessary witnesses. This approach puts additional pressure on counsel to be reasonable in voicing objections and enables the judge to demonstrate doing whatever is necessary in order to maintain a level playing field within the courtroom. Counsel will have to weigh the delay and expenditure of additional time and money to return to court against the possibility of discovering weaknesses in the documents or exhibits introduced.

- Allow or help obtain assistance for the unrepresented litigant. The Minnesota protocol recognizes the potential benefit of a friend or counselor who can sit with the litigant at counsel table. The assister is not allowed to ask questions or argue on behalf of the litigant but may provide advice on the form of questions and the procedures for introducing evidence as the case proceeds. Assistors do not necessarily need court experience to provide help. If the litigant has language difficulty or is otherwise limited in literacy or comprehension of the process, a friend who is able to read and understand the materials and accurately interpret the information provided by the judge and opposing counsel would be helpful to the litigant. In extreme cases, the judge may need to adjourn the matter sua sponte and seek pro bono counsel for the unrepresented party. This is particularly appropriate when the litigant speaks a different language or is a person with mental or comprehension handicaps.

### Conclusion

The challenge for the trial judge dealing with unrepresented litigants is to ensure they have a full opportunity to present their cases for resolution on the merits. The duty of impartiality requires the judge to consider all competent evidence in the possession of the unrepresented litigant. We have suggested a number of techniques to help judges accomplish that result. We believe that they are fully acceptable under both the majority and minority views of the judge’s role in these types of proceedings. We invite responses to this analysis and hope it will encourage trial judges to contribute additional techniques they have found useful and effective in these situations.19

### Notes


2. John M. Greacen, What We Know and Do Not Know about Self-Represented Litigants (California Administrative Office of the Courts, Center for Children and Families).


5. Available at www.abanet.org/cpr/mcj/hioc.html. Although the ABA Code of Judicial Conduct applies to judges only as it was adopted in the state in which the judge presides, and states often modify ABA codes in the course of adopting them, we are not aware of any state that has modified these sections in any way that would affect our analysis.


7. ABA MODEL CODE OF JUDICIAL CONDUCT, 1-97.

8. Tom Tyler, What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures, 22 LAW AND SOCIETY REVIEW 1 (1988), at 103. On page 126, Tyler reports separately the data for uncontested and contested matters. We rely on the data for contested matters. The study found overall that the most important factor in litigants’ assessments was the perception of the judge’s effort to be fair.


12. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). But see Minoe v. Commonwealth, 473 N.E.2d 169 (Mass. 1985) (Mass. Supreme Judicial Court reversed trial judge’s denial of motion to dismiss pro se complaint following three-day hearing at which pro se litigant was allowed to supplement and clarify 35-page complaint orally).


14. See supra, note 4

15. The court surmised that the appellant merely copied a brief from another case and changed a few words in an attempt to make it relevant to his case.

16. For instance, Dr. Goldschmidt urges that court staff be trained to advise litigants concerning “the elements of common causes of action, defenses, statutes of limitations, service of process, execution of judgment, and other procedural requirements,” taking issue with limitations one of the authors advocated in other articles. (See supra, note 1.) We choose not to address those issues here because the article focuses on the role of the trial judge, not staff.

17. Dr. Goldschmidt recommends the formal rules of procedure and evidence be revised for cases involving self-represented litigants. We know of no state that has formally adopted this principle in its rules. However, the trial judge can choose to conduct a hearing or trial in an informal manner and signal this to the parties by stating that they will be given an opportunity to tell the judge whatever they think the judge needs to know about the matter.


19. John M. Greacen writes a regular column in The Judges’ Journal and will include all suggestions and comments received in response to this article in a future column. He can be reached at john@greacen.net.
Future Trends in State Courts 2012

Turner v. Rogers: Improving Due Process for the Self-Represented
by Richard Zorza
The U.S. Supreme Court’s decision in Turner v. Rogers (2011) stresses the due-process rights of self-represented litigants. Courts should see this decision as an opportunity to improve their services and programs for such litigants.

On June 20, 2011, the United States Supreme Court, in its first trip to the self-represented courtroom in 25 years, issued a groundbreaking opinion in Turner v. Rogers (2011) about the due-process rights of the self-represented and what courts must do to ensure that they are given true access to justice. The decision challenges judges and court administrators to build consensus around innovations and improvements. This article briefly summarizes the core holding of Turner, including its broader due-process elements, suggests the approaches that courts and access-to-justice institutions might consider to deal with the broad implications of the decision, and offers concrete resources to assist in that process. The good news is that many of the needed access innovations are already being deployed and have now been effectively endorsed by the Supreme Court in this decision.

The Turner Decision
Significantly, the case as it came to the Supreme Court was in a posture that did little to suggest the ultimate broad reach of its holding—one very different from that sought by either of the parties. In the South Carolina Supreme Court, a child support obligor sought reversal of his civil-contempt-incarceration order on the grounds that he had lacked counsel. (The party seeking the incarceration order was not the state and also did not have counsel.) After South Carolina had rejected the claim, certiorari was granted. During briefing of the case, the solicitor general, representing the United States, urged rejection of both the self-represented litigant’s right-to-counsel claim and the respondent’s urging of affirmance. The solicitor general urged that although there was no categorical right to counsel in such cases, the failure of the trial court to follow available alternative procedures that would have protected the litigant’s due-process rights required reversal.

And we consequently determine the “specific dictates of due process” by examining the “distinct factors” that this Court has previously found useful in deciding what specific safeguards the Constitution’s Due Process Clause requires in order to make a civil proceeding fundamentally fair. Mathews v. Eldridge, 424 U. S. 319, 335 (1976) (considering fairness of an administrative proceeding). As relevant here those factors include (1) the nature of “the private interest that will be affected,” (2) the comparative “risk” of an “erroneous deprivation” of that interest with and without “additional or substitute procedural safeguards,” and (3) the nature and magnitude of any countervailing interest in not providing “additional or substitute procedural requirement[s].”

[A]s the Solicitor General points out, there is available a set of “substitute procedural safeguards,” Mathews, 424 U. S., at 335, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. The court nonetheless found Turner in contempt and ordered him incarcerated. Under these circumstances...
Turner’s incarceration violated the Due Process Clause (Turner v. Rogers, 2011: slip opinion at 11, 14, 16).

There are a number of important points about the opinion as a whole that should be emphasized:

- While the decision itself focuses on incarceration (and, indeed, states the importance of the private interest at stake in such situations), it relies on the due-process clause, which is implicated in every case dealing with the potential deprivation by a court of a constitutionally protected interest—which means almost every nontrivial self-represented-litigant case.
- Moreover, since the case discusses the needs of the party seeking the deprivation, the decision supports the idea that due process applies to the person seeking the deprivation as well as the party potentially subject to it (Turner v. Rogers, 2011: slip opinion at 13-14).
- The touchstone for whether procedures satisfy due process is whether they provide sufficient fairness and accuracy—in this case in determining the capacity to pay (Turner v. Rogers, 2011: slip opinion at 14-15)—thus potentially raising that key question in every self-represented litigant case.
- The Supreme Court explicitly approved—indeed in some cases required—the use of forms in self-represented-litigant cases, thereby putting to final rest any claim of their inappropriateness (Turner v. Rogers, 2011: slip opinion, 14-16).
- The Supreme Court similarly approved, and in some situations required, engaged judicial questioning, also shutting off any objection that such neutral questioning is forbidden (Turner v. Rogers, 2011: slip opinion, 14-16).
- The Court reached out to endorse the concept of neutral court staff providing assistance to litigants, even though the facts did not include such staffing (Turner v. Rogers, 2011: slip opinion, 14-15).
- The Court made clear that, notwithstanding its decision in Turner, there might well be situations in which there was a right to counsel. The court gave as possible examples situations similar to Turner, but in which the other side had counsel, or was the state itself (Turner v. Rogers, 2011: slip opinion, 15).
- Moreover, in what may be of greater immediate day-to-day significance for trial courts, the Court acknowledged that there might well be particular factual situations in which appointment of counsel is required to ensure fairness and accuracy (Turner v. Rogers, 2011: slip opinion, 16).

Some state court systems might respond to the decision by a cursory review of their procedures and conclude that since a) they do not use civil-contempt incarceration in child support cases, b) they provide counsel in such cases, or c) provide the notice, forms, questioning, and fact finding required in Turner in such cases, they do not need to pay attention to the case.

In the opinion of this writer, such an approach would be seriously flawed. It would fail to recognize the broad legal import of the decision, particularly its groundbreaking application of the due-process clause to the rights of the self-represented, and would fail to embrace the opportunity for expanding the already launched systemic access-to-justice improvements upon which the decision implicitly relies. Moreover, the Supreme Court’s effective endorsement of innovations that are already being broadly deployed—such as greater judicial engagement and user-friendly forms—should reassure the states that their access-innovation efforts will find support at the highest judicial levels.

Implications for Judges and for Judicial Education

The decision, and its endorsement of an engaged role for judges in self-represented cases, provides clear permission for judges to continue on their current path of experimenting with ways to make sure that the self-represented are fully heard. Those who have felt inhibited in doing so for fear of being perceived as non-neutral should be reassured that they have received both Department of Justice (DOJ) and Supreme Court imprimatur for such engagement, provided, of course, that it is neutral and consistent with ethical rules. Those who have believed that their lack of engagement is required by the Constitution would be advised to reconsider their position.

It may be that part of the reason that DOJ felt able to support, and the Supreme Court endorsed, such judicial questioning is that there are now extensive research-based protocols for such neutral engagement. In any event, these protocols
demonstrate that questioning, particularly when carefully structured in an engaged context, runs little if any risk of being, or even appearing, non-neutral. Examples of such best practices are making clear in the “framing” of the case that questions are likely, but not an indication of sympathy or leanings, as are follow-up questions that elicit the detail needed to decide the case on sufficiently full information.

More generally, judges might be wise to bear in mind the teaching of Turner that in self-represented cases the procedures of the case as a whole must be sufficient to provide the accuracy and fairness appropriate to the stake and situation. Turner encourages judges to consider how their discretion in applying governing procedural rules can be used to ensure that there is such sufficient accuracy and fairness. Implicit in Turner is the perhaps obvious point that the many court opinions reiterating that the same rules must be applied, regardless of whether someone has a lawyer, do not and cannot mean that those rules have to be applied without taking into account the representation status of the parties. It must always be remembered that to refuse to consider an exercise of discretion is an abuse of discretion.

Moreover, judges might decide to remain alert in all cases to the possibility of insufficiency in meeting due-process standards. Moreover, to the extent that they viewed this (with good reason) as placing an impossible sua sponte burden on them, they might wish to ensure that the court has in place services and procedures sufficient to ensure that such standards are met, thereby freeing them of the ongoing review obligation.

Finally, they might find it constitutionally advisable to take appropriate action when they find, as suggested by Turner, that the facts, circumstances, and required procedures are such that without counsel it is not possible for them to manage the case in such a way as to provide the sufficient fairness and accuracy required by Turner. In such cases an appointment of counsel, using whatever inherent or other authority, and whatever financing mechanisms are available, is called for, and surely will be given deference by the rest of the system.

Judges and others responsible for judicial education might well regard Turner as an opportunity for a renewed focus on the many challenges involved in self-represented cases and for a sustained and multicomponent initiative on helping judges deal with those challenges. Such an initiative might, building on model resources already available, include developing state-specific bench books on the topic, presenting customized judicial educational programs, making videos about best practices, performing educational role playing of problems and best-practice solutions, and establishing judicial support networks for further discussion of these issues.

**Implications for the Management of Cases in the Courthouse**

While Turner identifies as “available” only two specific nonjudicial procedures that were desirable but absent in the facts of that case—notice of the key issue and forms—the analysis is clear that the totality of the procedures are to be considered in the due-process fairness-and-accuracy analysis.

Thus, the good news for court administrators is that there is already available and tested a wide range of effective innovations that can enhance fairness and accuracy. Many of these can be implemented at low or zero cost. Turner provides an opportunity to analyze court operations and to assess whether such innovations could enhance accuracy and fairness of outcomes in accordance with the requirements of the decision. Specifically:

- The deployment of plain-language forms, including easy-to-use, interactive online versions of those forms, can help ensure that needed information is provided to the court. This is far cheaper, both to deploy and maintain, if forms are standardized statewide. (In a time of financial crisis, statewide nonuniformity of such forms should be among the first casualties.)
- The provision or expansion of neutral, court-based, informational self-help services, already provided in some form in most states, can give litigants the kind of information and forms-completion assistance envisioned by Turner as helping ensure access and fairness. Such systems are most cost-effective when provided statewide through phone hotlines supplemented by online tools, as in Minnesota and Alaska.
- Courtroom-based services, integrated with the flow of the case, can help litigants focus on what is needed to move the case forward and provide the additional information needed by the court. Such assistance is now routine in states such as California and New Hampshire.
• The provision of unbundled or discrete task representation can be facilitated by the courts, in cooperation with the bar, through rules changes, training programs, and general promotion. The effect is low-cost representation for those cases in which it is most critical, responding to the concern of *Turner* that there may be cases in which attorney assistance is needed. Such programs cost the court nothing. Such programs are routine in Massachusetts and Maine, among many other states. New York is one state that has been effective in facilitating pro bono representation using this model.

Many of these innovations could easily be built into the reengineering programs that many courts are now starting. Indeed, they would help ensure that these reengineering efforts improve access as well as efficiency. (See the “Resources” section.)

**Implications for Justice System Coordination and Innovation**

The process of review and innovation envisioned by this article will not occur without leadership. For states with access-to-justice commissions, the choice of who should lead the process may be simple. The commissions have the credibility of being creatures of the court system, but also the leverage that comes from having members from a wide variety of constituencies. Moreover, they may be found to be more appropriate review vehicles than the state supreme court, given that the Court might ultimately be asked to rule on the sufficiency of the state’s procedures under *Turner* due-process standards.

In such states, indeed, the state supreme court might find it appropriate to formally ask the access-to-justice commission to work with the state administrative office of the courts to conduct such a comprehensive *Turner* review of key case types for the self-represented, with a particular focus on those in which the stake for the litigants is greatest, such as loss of home or family integrity. In states without a commission, the court might find it appropriate to create a special body, one which might indeed evolve into a commission.

**Conclusion**

*Turner v. Rogers* may turn out to be a highly significant decision for the day-to-day operations of the courts, one that plays a major role in fulfilling the core promise of courts as institutions that offer access to justice for all. Court leaders and staff at all levels have the opportunity to participate in giving life and meaning to this vision and these values.
RESOURCES


Justice Eileen C. Moore was charged with finding artwork for the new 4th District Court of Appeal building in Santa Ana, California with no budget. She contacted the school superintendent and then the probation department got involved. Students read court cases and depicted them in murals. This year’s Trends cover was created by a 17 year old at Juvenile Hall. The case involved gang violations and disfiguring a public place and the young artist had also been charged with graffiti crimes. The resulting mural hangs in the courthouse, along with more than a dozen other paintings depicting Orange County, California cases.
When Mental Illness Seems to be a Factor, Consider:

Prevalence:
- **Serious Mental Illness**: 17% of adults booked into jails (31% of women; 15% of men)
- **Substance Use Disorder**: 65% of adults in U.S. corrections systems
- **Co-Occurring Mental Illness/Substance Use Disorder**: 72% of adults with serious mental illnesses in jail also had co-occurring substance use disorders

**Contextualizing Observations:** While these categories of observation are provided to alert judges that an individual may have a mental illness that requires different judicial action and/or attention by a mental health professional, they are not definitive signs of mental illness. Certain contextual elements are important to remember:
- Appearing in court is an anxiety-provoking experience for most people.
- Individuals may not be prepared to navigate a system as complex and demanding as the criminal justice system.
- Individuals may bring to court skills that have allowed them to survive in their communities but are poor fits for interacting with the court (e.g., toughness, argumentativeness, silence).

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<tr>
<th>Categories of Observation:</th>
<th>Courtroom Observations:</th>
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<tbody>
<tr>
<td><strong>Do you see something in one of the following areas that does not make sense in the court context?</strong></td>
<td><strong>Examples of how behaviors in the observational areas can indicate that the individual may have a mental illness:</strong></td>
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| **Appearance:** Age, hygiene, attire, ticks/twitches | • Looks older/younger than the listed date of birth  
• Wears inappropriate attire (e.g., multiple layers of clothing in the summertime)  
• Trembles or shakes, is unable to sit or stand still |
| **Cognition:** Understanding/appreciation of situation, memory, concentration | • Does not understand where s/he is  
• Seems confused or disoriented  
• Has gaps in memory of events  
• Answers questions inappropriately |
| **Attitude:** Cooperativeness, appropriate participation in court hearing | • Stays distant from attorney or bench  
• Acts belligerent or disrespectful  
• Is not attentive to court proceedings |
| **Affect/Mood:** Eye contact, outbursts of emotion/indifference | • Does not make eye contact with judge or court staff  
• Appears sad/depressed, or too high-spirited  
• Switches emotions abruptly  
• Seems indifferent to severity of proceedings |
| **Speech:** Pace, continuity, vocabulary  
*(Note: Can this be explained by discomfort with English language?)* | • Speaks too quickly or too slowly  
• Misses words  
• Uses vocabulary inconsistent with level of education  
• Stutters or has long pauses in speech |
| **Thought Patterns and Logic:** Rationality, tempo, grasp of reality | • Seems to respond to voices/visions  
• Expresses racing thoughts that may not be connected to each other  
• Expresses bizarre or unusual ideas |
**JUDICIAL INTERACTIONS**

### Before Interacting with a Defendant, Consider:

- **How the courtroom environment is affecting the defendant:**
  - Are there noises or distractions in the courtroom that are negatively affecting the defendant?
  - Is there a family member or defense attorney who can help calm the person?
- **Safety** for yourself, the court staff, and the individual.
- **What is being asked and said in open court** and how this may affect future proceedings.

### While Interacting with a Defendant, Consider:

<table>
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<tr>
<th>Courtroom Situations: Examples of commonly-observed scenarios</th>
<th>Immediate Responses: Recommendations for immediate situation management</th>
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| **When a mental illness is affecting a defendant’s courtroom participation** | • Speak slowly and clearly  
• Avoid jargon  
• Explain what’s happening  
• Write instructions down if dates/address are involved  
• Treat individual with the respect you would give other adults  
• If appropriate, use principles of Motivational Interviewing:*  
  - Express empathy  
  - Point out discrepancies between goals and current behavior  
  - Roll with resistance  
  - Support self-efficacy |
| **Loss of Reality:** **When the defendant appears confused or disoriented** | • Ground defendant in the here and now** |
| **Loss of Hope:** **When the defendant appears sad, desperate** | • As appropriate, instill hope in positive end result  
• To extent possible, establish a personal connection |
| **Loss of Control:** **When the defendant appears angry, irritable** | • Listen, defuse, deflect  
• Ask defendant about why s/he is upset  
• Avoid threats and confrontation |
| **Loss of Perspective:** **When defendant appears anxious, panicky** | • Seek to understand  
• Reassure and calm defendant  
• Deflect concerns |

### When Taking Action, Consider:

- **Having defendant approach the bench**: Would this de-escalate the situation or create a safety risk?
- **Re-calling the case later in the session/calendar**: Could this help the defendant calm down?
- **Determining whether to proceed**: Is a fitness or competency evaluation appropriate?
- **Setting conditions of release**:  
  - Does defendant have capacity to understand conditions?  
  - Does defendant have ability to adhere to conditions?  
  - What effect will these conditions have on regularity of treatment?  
  - What effect will time in jail have on mental health, access to medication, benefits maintenance, etc.?  
  - How will conditions/time in jail affect the defendant’s access to a primary caregiver?
- **Requesting mental health information**: What exactly do you need to make the decision facing you?
- **Making a referral (to mental health services provider or other services)**:  
  - What are the goals of the referral?  
  - How might the defendant’s cultural background and linguistic needs impact access to services?  
  - What are the expectations for reporting back to the court?  

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* Motivational Interviewing is a counseling approach initially developed by William R. Miller and Stephen Rollnick.  
** The Loss of Reality, Hope, Control, and Perspective and the immediate responses are based on the LOSS Model developed by Paul Lilley.