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Reaching Out Or Overreaching: Judicial Ethics And Self-Represented Litigants

By Cynthia Gray*

INTRODUCTION

Since at least the 1990s, courts in the United States have risen to the challenge posed by the increasing number of litigants who are representing themselves in court.¹ Rather than ignoring the phenomenon or simply grumbling about it, local and state jurisdictions have developed innovative programs to make the courts less mystifying for self-represented litigants and are continuing to be inventive and resourceful particularly as they share their best practices in national forums.² Such programs include simplified

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1. See Goldschmidt, Mahoney, Solomon, and Green, Meeting the Challenge of Pro Se Litigation (AJS 1998).

forms and electronic filing, public information and assistance programs (for example, self-help web-sites and centers), training and support materials (for example, videos and Powerpoint presentations), community outreach and access programs, and training of court staff. Neither the intention nor the effect of the programs is to encourage litigants to come to court without an attorney; the efforts are a response to a trend that is caused by factors beyond the courts' control and that the courts cannot pretend is not happening or will go away. Most judges have supported these programs to improve access to justice, to prevent cases involving pro se litigants from bogging down the system, and to prevent unfair treatment of pro se litigants from undermining public confidence in the courts.

Most of these programs, however, deal with self-represented litigants outside the courtroom, and, regardless how much assistance the programs provide, in the end, it is the trial court judge who must figure out whether and how to depart from business as usual in pleadings, motion practice, hearings, and other procedures when one or both of the parties is unrepresented.

Many judges otherwise sympathetic to the plight of self-represented litigants are reluctant to deviate from their usual procedures out of concern they will compromise their impartiality or make represented litigants feel they are helping the other side. One judge wrote:

I respect the generous impulse that prompts my siblings to grant [the plaintiff] special indulgence as a pro se litigant . . . . Nor do I doubt that justice in the case is served thereby; it is. Well and very well, for the short run. But the run of justice according to law is a long one, and I doubt that it is well served by offering incentives to pro se litigation. Nor do I see how, once the judge is cast in the role of counsel for the pro se litigant in one respect and reversed for failing to ascertain that role and embrace it, we can

www.selfhelpsupport.org. The best way to keep track of the innovations is to visit the American Judicature Society pro se forum at www.ajs.org/prose/home.asp and to subscribe to www.selfhelpsupport.org.
easily cut steps in the slippery slope onto which we have advanced....

. . . The role of Scrooge is one that I assume unhappily, but once we begin to confect a general set of rules more favorable to those who proceed without counsel than to those who do, I know of no principled way to stop. I would not begin.\(^3\)

In Canon 2, the code of judicial conduct requires a judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and to avoid conduct that would make an objective, reasonable observer question the judge’s impartiality even if the judge is not actually biased.

As basic as impartiality is to the ethical standards for judges, however, it is not the only principle in the code of judicial conduct.

Perhaps because judicial neutrality and impartiality so often are extolled, . . . judges who have before them pro se litigants whose pleadings or presentations are deficient in some minor way, sometimes take an unnecessarily strict approach, and, in the name of strict neutrality, compromise fairness, courtesy, and efficiency, which are also hallmarks of an honorable judicial system required by the code of judicial conduct.\(^4\)

Any judge who agrees that fairness, courtesy, and efficiency are also hallmarks of an honorable judicial system – and most do –

\(^3\) Barker v. Norman, 651 F.2d 1107, 1133 (5th Circuit 1981) (Gee, concurring in part and dissenting in part). See also Gordon v. Leeke, 574 F.2d 1147, 1156 (4th Circuit), cert. denied, 439 U.S. 970 (1978) (Hall, dissenting) (“no matter how well-intentioned a judge may be, once he assumes the role of an ‘advocate’ for a pro se litigant, he or she will lose the respect of either the pro se prisoner litigant, or the defendants whom he has sued or both”); State v. Jackson, 141 S.W.3d 391, 392 (Missouri Court of Appeals 2004) (inability to relax standards for non-lawyers “is not for lack of sympathy, but rather it is necessitated by the requirement of judicial impartiality, judicial economy and fairness to all parties”).

\(^4\) Indiana Advisory Opinion 1-97 (www.in.gov/judiciary/admin/judqual/opinions.html).
should recognize that the judge’s role in any case, but particularly in a case involving one or more self-represented litigants, is more than simply “calling balls and strikes.”

The thesis of this paper is that, under the code of judicial conduct, no reasonable question is raised about a judge’s impartiality when the judge, in an exercise of discretion, makes procedural accommodations that will provide a diligent self-represented litigant acting in good faith the opportunity to have his or her case fairly heard — and, therefore, that a judge should do so. This paper proposes that the model code of judicial conduct and the state and federal codes of conduct be amended to make the appropriateness of such conduct explicit.

The paper begins by discussing some of the premises underlying this proposition, as well as some of the objections raised to granting latitude toward self-represented litigants, and describes the techniques recommended for cases involving self-represented litigants. Some of these practices – treating litigants courteously, liberally construing pleadings, liberally allowing amendments, and asking questions to clarify evidence – cannot even be considered accommodations for self-represented litigants; they are requirements in all cases and for all litigants although they take on greater urgency in cases involving self-represented litigants. Other techniques – such as giving clear, plain English explanations for decisions and explaining how the case will proceed – simply remove some of the mystery from a system that is supposed to serve its citizens, not baffle them. Even the more ambitious suggestions – relaxing some of the rules of evidence and instructing a self-represented litigant in the proper way to accomplish a procedural step – are logical extensions of the principle that fundamental justice should not be sacrificed to procedural rules, stopping far short of turning the judge into an advocate. To suggest techniques judges may effectively and ethically use to fairly handle litigation involving self-represented parties, this paper includes Proposed Best Practices for Cases Involving Self-

5. John Greacen, a former court administrator and currently a consultant on court management, reports that in talking with judges about cases involving self-represented litigants, he has “often heard the phrase, ‘The job of the judge is to call the balls and strikes, not to throw the pitches.’” Greacen, “Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts,” 44 Judges’ Journal 24, 26 (ABA winter 2005).
Represented Litigants to be considered and adapted by jurisdictions as guidance for their judges.\(^6\)

**THE SAME BUT DIFFERENT**

Uncertainty among trial judges about how to treat self-represented litigants is understandable given the mixed signals sent by appellate courts. Case after case announces "the hoary but still vigorous rule"\(^7\) that self-represented litigants are held to the same standard as attorneys – and then case after case, often the same cases, describes exceptions to that rule and the special treatment trial judges should accord to those without attorneys.

One way to reconcile these competing holdings affirms that attorneys and self-represented litigants are held to the same standard – courts should be lenient with both when appropriate to promote the goal of deciding cases on the merits. The New Mexico Supreme Court took this approach recently when it proposed a new rule regarding unbundled legal services. The court reiterated the rule that "in New Mexico courts, attorneys and self-represented litigants are held to the same standards" but continued: "New Mexico courts are lenient with both attorneys and self-represented litigants when deemed appropriate so that cases may be decided on their merits."\(^8\)

To illustrate, consider the following story recounted by former Florida Chief Justice Major Harding:

A trial judge was hearing a divorce petition in which the respondent had defaulted. The wife presented the matter without counsel and failed to offer any evidence bearing on the court's jurisdiction to hear the matter. The judge told the wife that he could not grant

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her a divorce because she had failed to establish her entitlement to one, advising her to consult a lawyer. The woman left the courtroom in tears. In the next case, a lawyer for a wife in a defaulted divorce failed to elicit any evidence of the court's jurisdiction. The judge noted that counsel had failed to do so, and the attorney immediately recalled the client to the stand and asked her how long she had lived in the county. The judge granted the requested divorce. Suddenly aware of his double standard, the judge called his bailiff and asked him to quickly search the courthouse to find the woman whose case he had just dismissed. The bailiff succeeded. The judge reopened the case on the record, placed the woman under oath, asked how long she had lived in the county, and, after receiving an acceptable response, granted her divorce.9

Trial courts possess "a discretionary range of control over parties and proceedings" that allows reasonable accommodations to self-represented litigants.10 Court have recognized that the "'proper scope of the court's responsibility to pro se litigants is necessarily an expression of careful exercise of judicial discretion' . . . . Each case presents a wholly different set of circumstances which require careful attention so as to preserve the rights of all parties."11

Thus, while stating that "rules apply to uncounseled litigants and must be enforced," the United States Court of Appeals for the 7th Circuit also recognized that "implementation of many procedural rules entails exercise of discretion."12 The court concluded, "discretion implies the power to say no, but when deciding whether to grant or deny . . . a motion a judge is entitled to consider all

circumstances, including lack of counsel, that may have contributed” to a self-represented litigant’s error. A judge may abuse his or her discretion if he or she fails to take into account a litigant’s self-represented status.

Of course, it would be improper for a judge to consider a party’s gender, for example, in deciding a discretionary matter. The difference between considering a litigant’s gender and considering a litigant’s pro se status is that gender does not inevitably affect a represented party’s ability to present his or her case while lack of representation does. Thus, taking pro se status into consideration does not indicate partiality but addresses “a categorical disparity between the parties’ abilities to obtain a just resolution to their dispute.”

Because making reasonable accommodations for self-represented litigants is a matter of discretion, inevitably, exactly what a judge should do “cannot be fully described by specific formula” by anyone other than the judge or at any time prior to when the decision must be made. “Each case presents a wholly different set of circumstances which require careful attention so as to preserve the rights of all parties.” “The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. . . . 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.” But exercising discretion – not calling balls and strikes – is the nature of judging, from granting motions for extension of time to handing out sentences, and with some guidance and support, most judges are capable of doing so with the interests of justice in mind.

13. Id.
BASIC PRINCIPLES

Rather than being "wholly indifferent" to self-represented litigants' lack of formal legal training, numerous decisions direct judges to treat self-represented litigants with "understanding of the difficulties encountered by a self-represented litigant." The different treatment is variously described as providing reasonable accommodations, affording latitude or even great latitude, being lenient and solicitous, making allowances, applying less stringent standards, and giving self-represented litigants leeway and every consideration.

Providing reasonable accommodations for self-represented litigants is consistent with the principle that the "rules of procedure do not require sacrifice of the rules of fundamental justice."
The fundamental tenet that the rules of procedure should work to do substantial justice, ... commands that judges painstakingly strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules. ... Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not. This "reasonable accommodation" is purposed upon protecting the meaningful exercise of a litigant's constitutional right of access to the courts.\(^{31}\)

Moreover, intervening to ensure that a pro se litigant gets at least a fair chance to present his or her case is consistent with the proper role of a judge.

Whether a party is represented by counsel at a trial or represents himself, the judge's role remains the same. The judge's function at any trial is to be "the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings."\(^{32}\)

"A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits,"\(^{33}\) and the function of a trial judge "is not that of an umpire or moderator at a town meeting."\(^{34}\)

Impartiality does not require passivity.\(^{35}\)


\(^{33}\) Garnet v. Blanchard, 111 Cal. Rptr. 2d 439, 445 (California 4th District Court of Appeal 2001).

\(^{34}\) Simon v. United States, 123 F.2d 80, 83 (4th Circuit 1941).

"Affording pro se litigants the procedural protection of the court serves the interest not only of the litigants but also of the court itself" because "courts, no less than the parties to a dispute, have an interest in the quality of justice."36 (Many of the persuasive arguments for accommodating pro se litigants are found in dissenting arguments in cases taking a more inflexible approach.)

The courts do not treat a litigant fairly when they insist that the litigant — unaided and unable to obtain the services of a lawyer — negotiate a thicket of legal formalities at peril of losing his or her right to be heard. Such a practice manifestly excludes the poor and the unpopular, who may be unable to obtain counsel, from access to justice.

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Meaningful access requires some tolerance by courts toward litigants unrepresented by counsel. Pro per litigants are by no means exempt from the governing rules of procedure. But neither should courts allow those rules to operate as hidden, lethal traps for those unversed in law. This may require some degree of extra care and effort on the part of trial judges who already labor long and hard at a mushrooming caseload. But the alternative slams the courthouse door in the face of those who may be in greatest need of judicial relief, all for the sake of ease of administration. This latter course is one which I believe our Constitution does not permit and that we as judges should not tolerate.37

Public confidence in the justice system is undermined if litigants are confronted with a system "dominated by forms and mysterious

rituals” and told “they lose because they did not know how to play the game . . .” 38

Cases that reject accommodations maintain that requiring a judge to, for example, notify a self-represented litigant of the necessity of responding to a motion for summary judgment would improperly “inject” the trial court into the adversary process to help one side and not the other. 39 Contrary to that reasoning, however, explaining procedures does not transform the judge into an advocate; a lawyer, after all, would not only tell a client that a response to a motion needs to be made but would actually prepare and file the response. The reasonable accommodations do not make the judge “a player in the adversary process” but make the adversary process function more equitably. 40

Some courts have argued that their refusal to extend any leniency towards self-represented litigants is justified because it was the litigant’s choice to appear without counsel, suggesting, in effect, that these litigants do not deserve any solicitude because they brought their problems on themselves by their error in judgment in disdaining counsel.

The hazards which beset a layman when he seeks to represent himself are obvious. He who proceeds pro se with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to become an “advocate” for or to assist and guide the pro se layman through the trial thicket. 41

Trial courts generally do not intervene to save litigants from their choice of counsel, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses himself as legal representative should be treated no differently. In both cases, the remedy to the party injured by his representative’s

40. Id. at 1369-70 (Reinhardt, dissenting).
error is to move to reconsider or to set aside; it is not for the trial court to inject itself into the adversary process on behalf of one class of litigant.\textsuperscript{42}

These courts identify "choice" as the element that distinguishes pro se prisoner cases in which leniency has been mandated from suits involving unincarcerated pro se litigants, noting that detention makes it almost impossible for a prisoner to retain counsel and limits the prisoner's access to legal materials.\textsuperscript{43} A more realistic approach refuses to ignore that the inability to obtain affordable legal representation is one of the primary reasons many pro se litigants appear without a lawyer. Thus, some courts recognize that many litigants "have no more 'freedom of choice' as to legal representation than do prisoners."\textsuperscript{44} A litigant's unrepresented status is often "not the product of choice," but "the result of necessity and economic reality . . . ."\textsuperscript{45} Competent legal representation is beyond the means of even many middle class individuals, much less the indigent.\textsuperscript{46} Moreover, decades of failed attempts to significantly increase pro bono participation and legal aid funding demonstrate that assuming increased attorney representation will solve the problem is a counterproductive pipedream even in the long run.\textsuperscript{47} In the short run, individuals who cannot afford attorneys

\begin{itemize}
\item \textsuperscript{42} Jacobsen \textit{v. Filler}, 790 F.2d 1362, 1365 (9th Circuit 1985). \textit{See also} Bullard \textit{v. Morris}, 547 So. 2d 789, 790 (Mississippi 1989) (person who elects to proceed without an attorney "acts at his peril"); Dozier \textit{v. Ford Motor Co.}, 702 F.2d 1189, 1195 (D.C. Circuit 1985) (self-represented litigant cannot "avoid the risks of failure that attend his decision to forgo expert assistance").
\item \textsuperscript{43} \textit{See also}, e.g., Brock \textit{v. Hendershott}, 840 F.2d 339, 343 (6th Circuit 1988); Jacobsen \textit{v. Filler}, 790 F.2d 1362, 1364-65 (9th Circuit 1985); Waushara County \textit{v. Graf}, 480 N.W.2d 16, 19 (Wisconsin 1992).
\item \textsuperscript{44} Timms \textit{v. Frank}, 953 F.2d 281, 285 (7th Circuit 1992).
\item \textsuperscript{45} Jacobsen \textit{v. Filler}, 790 F.2d 1362, 1367-68 (9th Circuit 1985) (Reinhardt, dissenting).
\item \textsuperscript{46} A 2003 study in Washington state, for example, reported that only 12% of low income people obtain the legal help they need, and the situation is hardly better for middle income people. Task Force on Civil Equal Justice Funding of the Washington State Supreme Court, \textit{The Washington State Civil Needs Study} at 25(2003), www.courts.wa.gov/newsinfo/CivilLegalNeeds%20093003.pdf.
\item \textsuperscript{47} \textit{See} M. Sue Talia, Engaging the Private Bar: A Path to Reducing the Need for Self-Represented Litigation Support (2005) and Michael Hertz and Karla Gray, A Comment on Engaging the Private Bar: Other Paths (2005), papers prepared for
but are currently involved in the litigation are subject to injustice that simple adjustments by the court system could prevent.

Moreover, distinguishing between prisoners and other self-represented litigants "creates two classes of indigent litigants, those who are poor and law abiding, and those who are poor and not. It then affords lesser rights and protections to the former." The effect of that distinction is that convicted felons are treated more solicitously in court than, for example, a woman seeking an order of protection.

Although some litigants do choose to appear without an attorney for reasons other than necessity and economic reality, forbidding latitude for all self-represented litigants because some have made the "wrong" choice is unfair to the most vulnerable individuals in the courtroom, those who have no choice but to proceed without counsel. On the other hand, distinguishing between those who voluntarily choose to proceed pro se and those who have no choice would require an additional hearing on a party's assets and liabilities that would further complicate and delay proceedings and require a judge to make a decision about what a litigant's spending priorities should be. That distinction also creates four classes of litigants with procedures fluctuating depending on whether a party is represented, a pro se inmate, an unincarcerated pro se litigant who has no economic choice, and an unincarcerated pro se litigant who could afford an attorney if he or she chose. A judge's ethical obligations do not vary depending on whether the judge believes a litigant has made wise choices. The emphasis on choice also suggests that judges as lawyers may, unconsciously at least, be reflecting a resentment that

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49. Other factors include increased literacy rates; increased sense of consumerism; increased sense of individualism and belief in one's own abilities; anti-lawyer sentiment; a mistrust of the legal system; in criminal cases, a belief that the public defender is overburdened; a belief that the court will do what is right regardless whether the party is represented; a belief that litigation has been simplified so that attorneys are not needed; and a trial strategy designed to gain either sympathy or a procedural advantage over represented parties. Swank, "The Pro Se Phenomenon," 19 Brigham Young University Journal of Public Law 373, 378-79 (2005).
laypersons would presume to represent themselves and not pay to hire attorneys, a consideration that is antithetical to maintaining impartiality.

Finally, focusing on the “choice” to appear pro se ignores that many people who appear without an attorney are not even in court by “choice” because they are the defendant or respondent in a case or because there is no other way to, for example, escape an abusive marriage, resolve conflicts about children, or appeal the denial of a workers compensation claim.

PROGRAMS

Despite the number of cases involving self-represented litigants and the number of programs developed to deal with the phenomena, there are very few judicial ethics advisory opinions that address such programs. The few opinions regarding pro se litigation indicate that judges may support such programs.

*Florida Advisory Opinion 93-850* stated that a judge may assist pro se litigants by providing them with appropriate forms. The inquiring judge wanted to distribute a brochure entitled “Family Law Division, Pro Se Pointers” that was drafted to assist pro se litigants in uncontested dissolution of marriage cases. The brochure contained a checklist of 12 required documents with explanations of the forms and procedures necessary to obtain a final judgment. The opinion recognized “that particularly in urban courts there is an increasingly large number of pro se litigants seeking uncontested dissolutions of marriage. Judges in these urban family courts need to provide informational assistance to pro se litigants so that the judges can promptly dispense the business of the court...” The opinion concluded that the brochure did not constitute the practice of law because it was generic and not directed toward specific litigants or cases. The opinion also stated that the brochure was an activity that improves the administration of justice. In addition, five members of the 10-member committee agreed a judge could provide an explanation on how to complete the forms and generally how to proceed in court.

50. www.jud6.org/LegalPractice/opinions/judicialethicsadvisoryopinions
Arizona Advisory Opinion 88-551 advised that judges may allow court clerks to assist the public to fill out forms and pleadings as long as the judges cautioned the clerks not to give substantive advice but only clerical assistance. Clerks, the opinion noted, need to be careful not to advise the public as to its legal rights and responsibilities or engage in the unauthorized practice of law. The committee concluded:

If clerks of the court were prohibited from lending assistance to the public, the result would be a judiciary that is only accessible to those individuals able to afford counsel. Clearly, such an effect would not be desirable nor constitutional. Furthermore, assistance in filling out forms is desirable by allowing for an efficient flow of an individual's case through the system.

Similarly, although New York Advisory Opinion 88-3652 stated that a judge should not assist a party to prepare pleadings, the opinion noted that it is not "intended to prohibit non-judicial personnel from extending appropriate assistance to pro se litigants."

Finally, Indiana Advisory Opinion 1-97 emphasized that, at least in a nonadversarial setting, where a pro se "litigant has failed in some minor or technical way, or on an uncontroverted or easily established issue, to submit every point technically required or which would be required from an attorney, the judge violates the Code by refusing to make any effort to help that litigant along, instead choosing to deny the litigant's request or relief."

For example, if a pro se litigant seeking a name change pays the required fees, submits proof of publication, establishes the basis for the request, but inadvertently or for lack of experience does not state an element which the judge requires, such as that the name change is not sought for a fraudulent purpose,

51. www.supreme.state.az.us/ethics/Judicial_Ethics_Advisory_Committee.htm
52. www.nycourts.gov/ip/judicialethics/.
the judge should make that simple inquiry during the litigant’s presentation to the court rather than simply deny the petition on that basis alone. Neither the interests of the court nor of the litigant are served by rejecting the petition on the basis of this type of deficiency. Similarly, for example, a married couple seeking a divorce, each acting pro se, with no contest or issues in dispute, might unknowingly omit from their pleadings their county of residence. A judge should make inquiry of the parties to establish this element of their petition, and proceed appropriately, rather than deny the petition and excuse the parties from the courtroom on the basis of their omission.

The opinion concluded that “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.”

**Demeanor**

“Judicial intemperance invariably conveys the message of a closed mind. . . . Participants will never accept that a decision rendered by a combatant is fair.”54 A judge is required to treat self-represented litigants with the same patience, dignity, and courtesy mandated for everyone with whom the judge deals in an official capacity, and several judges have been sanctioned for failing to do so.55 “People appearing pro se and without legal training are the ones least able to defend themselves against rude, intimidating, or incompetent judges.”56

Judicial intemperance was found in a judge’s treatment of an unrepresented mother in a family court case beginning with his refusal to continue a hearing to allow her to obtain counsel even

55. Canon 3B(4), American Bar Association Model Code of Judicial Conduct (1990). All states and the code of conduct for federal judges have a similar provision.
though she had appeared in court expecting the matter to be mediated or continued. The judge cut off the mother's attempt to briefly cross-examine the father and did not give her an opportunity to present testimony or evidence. When the judge intimidated the parties' daughter during questioning, she began to cry and the mother tried to comfort her, but the judge directed the mother to "just leave her alone and let her listen." He threatened to transfer custody of the daughter to the father if the parties did not adhere to a visitation schedule, although the father did not request or want custody. After the judge directed the parties to agree to a schedule, the mother felt powerless to object but signed with the notation that she was agreeing under duress.

The Vermont Supreme Court explained: "We cannot let the judiciary become an impersonal and authoritarian institution, relying for legitimacy solely on its power. We can never tolerate the intemperate use of power; we must go out of our way to understand, explain and persuade." Moreover, the court emphasized that appropriate judicial demeanor is most significant in the adjudication of family matters.

The need for institutional acceptance and respect is highest in family matters, where the damage that can be inflicted by judicial rudeness and intemperance is the greatest. At the same time, we must acknowledge that the stresses on the judge are also heightened in family court. It takes superhuman patience to sit through a long day of personal conflict, exacerbated by raw emotion and attitudes that put greater effort on inflicting personal pain than on resolving disputes. The essence of judicial temperament, however, is the ability to diffuse emotional responses and facilitate reasonable ends, voluntarily accepted, especially where children are involved. Judicial intemperance will only undermine the effectiveness of the decisions that the court renders.

58. Id. (public reprimand for this and other misconduct).
In another discipline case, a judge's angry and sarcastic conduct in the courtroom was found to have intimidated self-represented litigants and discouraged some of them from presenting their testimony or their positions. On several occasions, the judge had warned pro se parties that if they “want to lose, annoy me” or “if you annoy me, that would be a bad thing” or words to that effect. The judge chastised, belittled, and berated several self-represented litigants and prevented some litigants from fully presenting their case by interrupting them without justification.59

Another judge agreed that, in hindsight, his comments, tone, and manner to self-represented litigants in several cases could be perceived as inappropriate, harsh, or rude. The judge stated that he had not intended to humiliate the litigants but had been trying to ensure compliance with court rules and to convey the seriousness of the proceedings. The statement of charges had alleged that the judge repeatedly interrupted self-represented defendants; refused to allow them to answer his questions; and engaged in angry, disdainful, and/or protracted dialogues with them regarding the exercise of their rights, which was humiliating and intimidating.60

Another judge admitted he should not have repeatedly admonished a litigant to obtain an attorney and made negative comments about the ability of pro se litigants.61 The judge stated that he had been “exasperated” with the litigant because she did not engage counsel when he thought she should and for her other conduct.62

59. In re Eiler, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct February 4, 2005) (www.cjc.state.wa.us) (reprimand; audio recording of portions of one hearing is on Commission website).

60. In re Lukevich, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct December 1, 2000) (www.cjc.state.wa.us) (admonishment pursuant to agreement).

61. In re O'Brien, 650 A.2d 134 (Rhode Island 1994) (censure for this and other misconduct).

62. Id. at 137. See also Inquiry Concerning Newton, 758 So. 2d 107 (Florida 2000) (public reprimand pursuant to stipulation for, in addition to other misconduct, telling a self-represented litigant “she'd better be prepared, because she was not going to get by on her good looks” and responding “that is not good enough” when the litigant stated she was trying the best she could); Inquiry Concerning Ormsby, Decision and Order (California Commission on Judicial
The code of judicial conduct also provides in Canon 3B(6) that a judge “shall require” patient, dignified and courteous conduct by “lawyers, and of staff, court officials and others subject to the judge’s direction and control,” which obliges a judge “to exercise reasonable direction and control over the conduct of those persons subject to the judge’s direction and control.” That provision places an affirmative obligation on a judge both to set an example of courtesy toward self-represented litigants for others to follow and to ensure that court staff receive the training and supervision necessary to help them in the often difficult task of providing patient service to self-represented litigants. In addition, the provision requires judges to exercise their authority in the courtroom to prevent attorneys from bullying or misleading conduct meant to take advantage of a self-represented litigant.

According to the Massachusetts Court of Appeals, failure to intervene under those circumstances is an abdication of the proper role of a judge.63 The court emphasized that it was not ruling that “a judge must become a lawyer for an unrepresented defendant,” but instructed judges to recognize when counsel opposing a self-represented litigant is “engaging in improper tactics and taking advantage of the defendant’s unrepresented status.”64 In those circumstances, a judge’s prompt intervention is “not to be of assistance to the defendant, but to assert a judge’s traditional role of making sure that all the parties receive a fair trial.”65

Similarly, the Indiana Supreme Court has warned that a trial court “cannot sit idly by” but “must be especially acute and vigilant in governing the conduct of counsel and witnesses” and “actively direct

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64. Id.
65. Id.
the course of the trial so as to protect the ultimate purpose of that trial. . . .”66

The Proposed Best Practices contains the following suggestions on how to run a courteous courtroom in cases involving self-represented litigants:

9. Start court on time (required in all cases); if delay is unavoidable, apologize and offer a brief explanation.

10. Explain to self-represented litigants that the rude conduct displayed on television shows like *Judge Judy* is not acceptable in a real courtroom, either from them or directed to them.

11. Treat self-represented litigants with patience, dignity, and courtesy (required toward all participants in all court proceedings).
   - Do not make comments or use a tone and manner that are rude, intimidating, harsh, threatening, angry, sarcastic, discouraging, belittling, humiliating, or disdainful.
   - Do not interrupt self-represented litigants unless necessary to control proceedings or prevent discourtesy.
   - Do not engage in protracted dialogues or make off-hand, negative comments regarding their pro se status.
   - Address self-represented litigants with titles comparable to those used for counsel.
   - Avoid over-familiar conduct toward attorneys (for example, using first names, sharing in-jokes, referring to other proceedings or bar events, inviting attorneys into chambers, chatting casually before or after court proceedings).

12. Require court staff and attorneys to treat self-represented litigants (and everyone else) with patience, dignity, and courtesy.

13. Pay attention and act like you are paying attention.
   - If you take notes or refer to books or information on a computer screen during a proceeding, explain what you are doing so the litigants understand that they have your attention.

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APPEARANCE OF BIAS

Another unquestioned obligation of a judge toward self-represented litigants is to avoid creating the appearance of bias in favor of attorneys or represented parties. Respectful demeanor toward all participants in court proceedings is the primary method of ensuring self-represented litigants do not experience or perceive bias, particularly by refraining from harping on a litigant’s pro se status and by addressing self-represented “with titles connoting equal respect to that afforded opposing counsel.”

Moreover, conduct commissions indicate they receive many complaints after pro se parties observe the judges in their cases engaged with attorneys in conversations that exclude them. The Wyoming Commission on Judicial Conduct and Ethics thought it important to bring this matter to the attention of the judges of the state.

Pro se litigants . . . may be waiting in the hall for their respective proceedings. It is during these times that many judges and attorneys are seen conversing and laughing with one another before or even after court proceedings. Attorneys who may be personal friends of the judge are often invited to the judge’s chambers for coffee. It is precisely this seemingly benign behavior that makes a judge subject to the appearance of impropriety. Citizens often view this innocent exchange of conversation as a discussion of their case without the benefit of knowing what is said.

* * *

The average citizen does not fully understand the legal system and why it works the way it does. Most citizens who appear in court are usually there on a one-time-only basis. It is from this first and perhaps only experience, that a citizen forms an opinion of the judicial system — be it good or bad. That opinion can undoubtedly have a snowball effect. Through the public grapevine, a citizen can plant the seed for

perceived favorable or unfavorable treatment by the courts and the attorneys, thus, in turn, prompting a barrage of complaints against judges and attorneys. Improved localized communication may help citizens to better understand and respect the judicial and legal system. The experience of the Commission is that when a citizen sees a judge and an attorney talking outside the courtroom, a citizen is most likely to think the worst. Thought should be given to conducting these courthouse social conversations at other more appropriate times and out of view of the public. . . . The judge and the attorney may be talking about current events, but the citizen does not know that, and this might be a simple way to avoid creating an appearance of impropriety or bias. 68

Similarly, the Alabama Judicial Inquiry Commission has warned that "judges should not create an appearance that a represented party is in a special position to influence him (Canon 2C). Calling a represented party's attorney by his or her first name, or granting the attorney casual access to judicial chambers, may give an improper impression to an unrepresented opponent." 69

TECHNICALITIES

Taking pains to protect self-represented litigants against the consequences of technical errors is one of the accommodations courts


69. Childers, "Conduct Challenges With the Pro Se Litigants," Alabama Judicial Inquiry Commission Judicial Conduct Letter (summer 2004), reprinted in Judicial Conduct Reporter (AJS spring 2005). See also Kennick v. Commission on Judicial Performance, 787 P.2d 591 (California 1990) (finding violation of code of judicial conduct where judge "met privately with [two] attorneys in chambers on days when the attorneys were appearing before [him] as counsel in a case on his calendar, thereby giving the appearance of impropriety"); In re Slusher, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct April 1, 1994) (www.cjc.state.wa.us) (finding violation of code of judicial conduct where judge engaged in a casual and cordial conversation in the courtroom with one of the parties in a case that the other party observed).
have approved for self-represented litigants to prevent "inadvertent forfeiture of important rights because of their lack of legal training."70 "Legal technicalities must... be tempered by justice."71 "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."72

Thus, judges have been warned not to harshly or inflexibly apply technical rules to self-represented litigants73 or to sanction self-represented litigants for "a procedural misstep here or there."74 Instead, they have been encouraged "to overlook, in the interest of justice and the speedy adjudication of claims, minor errors in the adherence to court rules and procedures"75 and to grant self-represented litigants leniency in technical matters and mere formalities.76

The United States Court of Appeals for the 2nd Circuit, for example, held that it was an abuse of discretion for a trial court to dismiss a complaint that failed to include a caption, identified cause of action, and prayer for relief where those failures did not interfere with the defendant's ability to understand the claims or otherwise prejudice the adverse party.77 Similarly, the United States Court of Appeals for the 9th Circuit held that a claimant's technical non-
compliance with the rule regarding service of process on officers of the United States did not mandate dismissal. 78

The Proposed Best Practices contains the following suggestion regarding technicalities in cases involving self-represented litigants:

21. Follow the principle that cases should be disposed of on the merits, rather than with strict regard to technical rules of procedure.

PROVIDING CLEAR EXPLANATIONS

There are several actions that judges unquestionably can take in cases involving self-represented litigants – and, therefore, arguably should take – without raising reasonable questions about impartiality under the code of judicial conduct.

For example, nothing in the code of judicial conduct (or elsewhere) requires a judge to use the jargon, abbreviations, acronyms, shorthand, and slang that frequently mark communications among legal professionals but inevitably leave a self-represented litigant feeling confused and left out. Moreover, the careless use of jargon may mislead a self-represented litigant and ultimately result "in not only a miscarriage of justice, but the undermining of confidence in the judicial system." 79 On the other hand, a judge’s eschewing of legalese neither gives an advantage to self-represented litigants nor prejudices represented litigants.

Thus, a judge should take “affirmative steps” in cases involving a self-represented litigant, “for example, spending a few minutes editing a letter or minute order from the court — to make sure any communication . . . is clear, understand-able, and does not require translation into normal-speak.” 80 This would include making a self-represented litigant aware of the possible consequences of violating an order entered by the court, for example, that violation of an order to appear for a deposition may result in a dismissal with prejudice. 81

80. Id.
and providing a self-represented litigant with a notice of trial that describes the nature of proceedings in unambiguous terms.\(^8\) Taking special care to make sure that verbal instructions and written notices are clear and understandable by a layperson “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.”\(^8\)

Furthermore, “notions of simple fairness” suggest that a judge should give an explanation for a ruling to a self-represented litigant, if not to every litigant.\(^8\) Giving a rationale for a decision is inherently part of the duty of a judge, and doing so in a case involving a self-represented litigant could not reasonably be considered evidence of partiality. That is true even if explaining the basis for a ruling incidentally assists a self-represented litigant to prepare an amended pleading.\(^8\) By explaining a ruling either in writing or orally on the record, a judge avoids conveying to self-represented litigants “the impression that their efforts to studiously prepare their case were not worthy of comment” or that the judge is biased towards the other side.\(^8\)

Indeed, if judges undertake in every case the challenge of explaining their actions in a way that is comprehensible to non-lawyers, they will ensure that their orders and decisions are understood not just by self-represented litigants but by poorly represented litigants, inexperienced lawyers, represented litigants, the public, and the media. Such a result cannot help but improve party and public confidence in the justice system without any sacrifice of impartiality or the appearance of impartiality.

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82. *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983) (reversing judgment for plaintiff where notice of trial described nature of proceedings against unrepresented defendant in such ambiguous terms that it deprived him of adequate time to prepare for his defense in violation of his right to due process).


The Proposed Best Practices contains the following suggestions regarding providing clear explanations in cases involving self-represented litigants:

17. Give the rationale for a decision either in writing or orally on the record.
18. When announcing a decision or entering an order, do not use legal jargon, abbreviations, acronyms, shorthand, or slang.
19. If possible, after each court appearance, provide all litigants with clear written notice of further hearings, referrals, or other obligations.
20. Ensure that all orders (for example, regarding discovery) clearly explain the possible consequences of failure to comply.

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31. Ensure that the notice of hearing unambiguously describes in a way a self-represented litigant can understand that a hearing on the merits is being scheduled and the litigant should be prepared with evidence and witnesses to present the case or defense.

LIBERAL CONSTRUCTION

Judges are not simply allowed but required to liberally construe pleadings filed by self-represented litigants. In fact, this is not a special accommodation for self-represented litigants but simply an application of the rule applied to all pleadings in the modern notice-pleading practice.87 Even less stringent standards are permissible for self-represented litigants.88

That injunction applies to all types of pleadings, including briefs, but most importantly when dismissal of a complaint is considered. A judge should not dismiss a complaint drafted by a self-represented litigant unless it appears beyond doubt that the plaintiff cannot prove any set of facts that will support a claim that would entitle the plaintiff to relief. The goal of liberal construction is to "credit not so well pleaded allegations" so that a self-represented litigant's meritorious complaint will not be lost because it is inartfully drafted, to afford a self-represented litigant every reasonable opportunity to demonstrate that he or she has a valid claim, and to ensure that a self-represented litigant is not "precluded from resorting to the courts merely for want of sophistication." A judge should construe a self-represented litigant's complaint in a way that permits the litigant's claim to be considered within the proper legal framework "if the essence of an allegation is discernible, even though it is not pleaded with legal nicety," affording a self-represented litigant the benefit of any doubt.

The liberal construction rule requires that a judge give effect to the substance, rather than the form or terminology, of a self-represented litigant's papers. A judge should look beyond the label that a self-represented litigant attaches to a pleading and re-characterize it to correspond to the substance and underlying legal basis of the claim. Thus, for example, a judge should treat as an answer a document titled "Motion to Dismiss on Plea of Res Adjudicata" or a timely letter that responds to the allegations in a

96. Brown v. City of Manchester, 722 S.W.2d 394, 397 (Tennessee Court of Appeals 1986); Usrey v. Lewis, 553 S.W.2d 612, 614 (Tennessee Court of Appeals 1977).
petition and provides fair notice of the defense, and may re-characterize a habeas corpus complaint as a civil rights claim if it names the correct defendants and seeks the correct relief.

In addition, liberal construction requires that a judge overlook that a self-represented litigant’s pleadings may not be “neatly parsed” and may include “a great deal of irrelevant detail.” A judge should also ignore poor syntax and sentence construction (probably occasionally necessary even in pleadings filed by attorneys). The duty to liberally construe a self-represented litigant’s pleadings includes a duty to consider allegations found in other documents filed by the litigant.

Moreover, the liberal construction rule means that a judge should apply the relevant law regardless whether a self-represented litigant has mentioned it by name. Although a court cannot create a claim or a defense for a self-represented litigant where none exists, a judge should interpret a self-represented litigant’s papers to raise the

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99. Wright v. Shorten, 964 P.2d 441, 444 (Alaska 1998). See also Kennedy v. First Bank of Fairbanks, 637 P.2d 297, 298 (Alaska 1981) (refusal to set aside default was abuse of discretion where self-represented debtor’s prompt response to complaint, although technically inadequate to prevent entry of default, was due to lack of familiarity with rules and not gross neglect and the adequacy of the creditor’s case against the debtor was debatable).

100. Glaus v. Anderson, 408 F.3d 382, 388 (7th Circuit, 2005). The court instructed judges to warn pro se litigants “of the consequences of the conversion and provide[ ] an opportunity for the litigant to withdraw or amend his or her complaint.”


104. Holley v. Department of Veteran Affairs, 165 F.3d 244, 247-48 (3rd Circuit 1999) (self-represented plaintiff’s complaint should not have been dismissed for citing wrong statutory provision); Dluhos v. Strasberg, 321 F.3d 365, 373 (3rd Circuit 2003).

105. Rampy v. ICI Acrylics, Inc., 898 S.W.2d 196, 198 (Tennessee Court of Appeals 1994).
strongest arguments they suggest\textsuperscript{106} and to give effect to a pleading in conformity with the general theory that it was intended to follow.\textsuperscript{107}

Furthermore, the liberal construction rule "means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority [and] his confusion of various legal theories . . . ."\textsuperscript{108}

The United States Court of Appeals for the 2nd Circuit has noted that, under the federal rules of civil procedures, a plaintiff is not required "to plead the legal theory, facts, or elements underlying his claim."

This is especially true in the case of \textit{pro se} litigants, who cannot be expected to know all of the legal theories on which they might ultimately recover. It is enough that they allege that they were injured, and that their allegations can conceivably give rise to a viable claim. . . . In [determining what claims have been raised], the court's imagination should be limited only by [the plaintiff's] factual allegations, not by the legal claims set out in his pleadings.\textsuperscript{109}

Thus, the liberal construction rule means a judge should not ignore any obvious possible cause of action or defense suggested by the facts alleged in the pleadings even if the litigant does not expressly invoke that theory. However, it does not mean a trial judge has "to conjure up questions never squarely presented to them."\textsuperscript{110}

District judges are not mind readers. Even in the case of \textit{pro se} litigants, they cannot be expected to construct full blown claims from sentence fragments.

\textsuperscript{106} Burgos v. Hopkins, 14 F.3d 787, 790 (2nd Circuit 1994).
\textsuperscript{107} Hill v. Williams, 813 A.2d 130, 132 (Connecticut Appellate Court 2003), \textit{cert. denied}, 222 A.2d 242 (Connecticut 2003) (giving effect to allegations sounding in contract as well as those sounding in tort).
\textsuperscript{108} Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Circuit 1991).
To do so would not only strain judicial resources by requiring those courts to explore exhaustively all potential claims of a pro se plaintiff, but would also transform the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party.111

Moreover, the liberal construction rule does not relieve a self-represented litigant of the responsibility of making sufficient factual allegations to give the other side fair notice of the claim or request.112 Although not every fact must be described in specific detail,113 a self-represented plaintiff "requires no special legal training to recount the facts surrounding his alleged injury . . . ."114 Thus, a judge does not have discretion to overlook when a complaint does not allege a sufficient factual basis to give a defendant adequate notice of the circumstances surrounding the controversy.115 Moreover, a judge should not infer, assume, or supply facts to round out a plaintiff's complaint116 or accept conclusory allegations.117 Further, the liberal construction rule does not give a judge "license to . . . rewrite an otherwise deficient pleading in order to sustain an action."118

Moreover, the liberal construction rule does not require or even permit a judge to apply a more sympathetic view of the substantive law and to relieve a self-represented litigant of the usual burden of proof or standard of proof. In a fraud case, for example, if the

111. Id. at 1277-78. However, if subsequent proceedings "reveal that ambiguous fragments in the complaint represent the heart of a litigant's concern," a district court should consider those additional claims.
112. Commonwealth v. Miller, 416 S.W.2d 358, 360 (Kentucky 1967); Beecham v. Commonwealth, 657 S.W.2d 234, 236 (Kentucky 1983).
118. See GJR Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1368 (11th Circuit 1998); Paulson v. Evander, 633 So. 2d 540, 541 (Florida 5th District Court of Appeal 1994).
plaintiff did not allege or prove by clear and convincing evidence that the defendant misrepresented a material fact during the transaction, a judge must rule in favor of the defendant however underhanded the judge may consider the defendant and however legitimate the self-represented plaintiff’s outrage may be.

The Proposed Best Practices contains the following suggestions regarding liberal construction of pleadings in cases involving self-represented litigants:

   - Look behind the label of a document filed by a self-represented litigant and give effect to the substance, rather than the form or terminology.
   - Do not ignore an obvious possible cause of action or defense suggested by the facts alleged in the pleadings even if the litigant does not expressly refer to that theory.
   - Consider information in other documents filed by a self-represented litigant.
   - Allow amendment freely.

LIBERAL AMENDMENT

Self-represented litigants must be freely afforded an opportunity to amend a complaint to add sufficient factual allegations, although, again, this is not a special accommodation for self-represented litigants but a requirement in all cases.\textsuperscript{119} “The rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel.”\textsuperscript{120}

A judge should not dismiss a complaint filed by a self-represented litigant without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.\textsuperscript{121} A self-represented plaintiff whose


\textsuperscript{120} Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Circuit 1987).

\textsuperscript{121} Branum v. Clark, 927 F.2d 698, 705 (2nd Circuit 1991).
factual allegations are "close to stating a claim but are missing some important element that may not have occurred" to the litigant should be allowed to amend the complaint,122 "particularly where the deficiencies are attributable to oversights likely the result of an untutored pro se litigant's ignorance of special pleading requirements."123 For example, dismissal should be without prejudice and with leave to amend to give a self-represented litigant an opportunity to attempt to allege an injury124 or to name the proper parties.125

Moreover, in dismissing a complaint with leave to amend, a trial judge has the duty to "draft a few sentences" explaining the deficiencies in a self-represented litigant's allegations to help ensure that the litigant can use the opportunity to amend effectively without simply repeating previous errors.126 A judge must do more "than simply advise the pro se plaintiff that his complaint needs to be shorter and more concise,"127 but the "statement of deficiencies need not provide great detail or require district courts to act as legal advisors to pro se plaintiffs..."128 For example, a judge is required to point out if the dismissal of a civil rights complaint is based on the failure to allege that the defendant acted under color of state law129 or to allege receipt of a right-to-sue letter.130

The United States Court of Appeals for the 9th Circuit in Noll v. Carlson held that a trial judge abused his discretion by dismissing a self-represented prisoner's second amended complaint without leave to amend where his previous amendments were "without the benefit

130. Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 627 (9th Circuit 1988).
of the court notifying him of any deficiencies in his previous pleadings.”  

Stating it was not absolutely clear that the plaintiff could not amend his complaint to allege constitutional violations, the court noted, for example, that although his allegations that he was placed in prison with “known enemies” were conclusory, “he may be able to amend his complaint to allege facts showing that prison officials acted with ‘deliberate indifference’ to his physical safety in violation of the eighth amendment.”

However, a judge is not required to give a self-represented litigant unlimited chances to successfully amend a complaint. In *Barrett v. City of Margate*, the Florida Court of Appeals upheld the dismissal with prejudice of the plaintiffs’ third amended complaint. The trial judge had twice granted the self-represented plaintiffs leave to amend a complaint that had not set forth a short and plain statement of the ultimate facts showing entitlement to relief, contrary to the rules of civil procedure. The trial judge had advised them to set forth a “short concise statement of the facts” and warned them that their action would not survive if the complaint was not substantially edited. Finding the plaintiffs’ third amended complaint to be “manuscript in size” and contrary to the pleading standards previously explained, the trial judge dismissed the third amended complaint with prejudice.

The appellate court stated that “although there is no magical number of amendments which are allowed, dismissal of a complaint that is before the court on a third attempt at proper pleading is generally not an abuse of discretion.”

It is not permissible for any litigant to submit a disorganized assortment of allegations and argument in hope that a legal premise will materialize on its own. The trial court provided the [plaintiffs] with appropriate direction and reasonable opportunities to

132. *Id.* at 1449 n.4. *See also Eldridge v. Block*, 832 F.2d 1132, 1136-37 (9th Circuit 1987) (dismissal of amended complaint was abuse of discretion where initial complaint was dismissed for failure to comply in form with local rules of court in form without an explanation of how the complaint was deficient).
133. 743 So. 2d 1160 (Florida 4th District Court of Appeal 1999).
134. *Id.* at 1162
cure the deficiencies in their pleadings. The [plaintiffs'] convoluted, verbose, narrative style pleading, coupled with their refusal to comply with either the trial court's directives or the mandate of [the rules of civil procedure] clearly demonstrates the need for the rule and exemplifies the potential for abuse of the judicial process when the rule is not enforced.  

The Proposed Best Practices contains the following suggestion regarding amendment of pleadings in cases involving self-represented litigants:

15. Give a self-represented litigant notice of any substantive defect in a pleading and an opportunity to remedy the defect unless it is absolutely clear that no adequate amendment is possible.

EXPLAINING THE PROCESS

One of the recommended accommodations for cases with pro se litigants is to explain to all parties in the case how the proceedings will be conducted. The Minnesota Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants, for example, suggests that a judge explain the process, the

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135. Id. at 1163.
137. See ajs.org/prose/pdfs/Proposed_Protocol.pdf. The protocol was proposed by the Minnesota Conference of Chief Judges Pro Se Implementation Committee.
138. “For example, ‘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.’”
elements,\textsuperscript{139} that the party bringing the action has the burden to present evidence in support of the relief sought,\textsuperscript{140} the kind of evidence that may be presented,\textsuperscript{141} and the kind of evidence that cannot be considered.\textsuperscript{142} The Minnesota Protocol then directs the judge to “ask both parties whether they understand the process and the procedure.”

It does not raise reasonable questions about a judge’s impartiality for the judge to ensure that all the litigants, represented and unrepresented alike, understand how the proceedings will unfold. It may eliminate confusion on the part of a self-represented litigant that

\begin{quote}
139. “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.’”

140. “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.’”

141. “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.”

142. “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.”
\end{quote}
normally benefits a represented party, but attorneys or represented litigants cannot argue that they have a right to a clueless opponent if the opponent is unrepresented. Moreover, the case law demonstrates that there can be no objection on ethical or other grounds to a judge explaining procedures.

The Indiana Supreme Court, for example, instructed trial judges in cases involving self-represented litigants to continually bring to the litigant’s attention “that important procedural points in the trial have been reached,” for example, when the accused should question a prospective juror, cross examine a witness, or make opening and closing statements. The court stated, “only by vigorously assuming this responsibility can there be any assurance that the trial will serve the purposes for which it is held.”

Similarly, the Illinois Appellate Court noted that, in order for a trial involving a self-represented litigant to proceed with fairness, a judge “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.” Courts have also held that a judge should provide a self-represented litigant with meaningful notice of what is expected of him or her and advise a self-represented litigant of the right to cross-examine witnesses and to produce witnesses.

Descriptions in appellate cases indicate that many trial court judges are already outlining the proceedings for self-represented litigants with no suggested adverse effect on their impartiality. The appellate courts speak approvingly of these efforts without censure (although, as the efforts are discussed in the context of rejecting a self-represented litigant’s argument that even more leniency should have been shown, there is no explicit holding that the accommodations are required or permitted).

For example, rejecting a self-represented litigant’s claim that a trial judge’s “frustration with the pro se representation prevented him from being an impartial fact finder in this jury-waived trial,” the United States Court of Appeals for the 1st Circuit stated that the judge treated the self-represented litigant “with respect and compassion and bent over backwards to explain . . . the legal principles which formed the basis for his evidentiary rulings.”\textsuperscript{147} Similarly, the Minnesota Appellate Court noted that a trial judge had “explained, and appellant understood, the necessity of presenting evidence at trial,” before concluding that the trial judge did not err by finding that appellant failed to prove her claim by a preponderance of the evidence.\textsuperscript{148}

The New Hampshire Supreme Court commended the way a judge conducted a trial in a quiet title action and rejected the self-represented plaintiff’s charge of bias. The court noted that the trial judge had “made a special effort to explain to the plaintiff proper courtroom procedures in order to facilitate the plaintiff’s presentation of his case.”\textsuperscript{149} Similarly, rejecting a pro se litigant’s argument that he was entitled to special assistance, the Alaska Supreme Court held that the trial court had gone far enough by advising the litigant of procedures and attempting to focus his attention on the relevant issues at the hearing.\textsuperscript{150}

The Proposed Best Practices contains the following suggestions for judges regarding explaining the process in cases involving self-represented litigants:

5. Give a basic introduction to courtroom protocol, for example, the importance of timeliness, checking in with the clerk (if that is necessary), who sits where, directing arguments to you, not other parties or attorneys, rising when you enter, and other matters you consider important (attire, gum chewing, reading while court is in session, etc.).

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\textsuperscript{148} Fitzgerald v. Fitzgerald, 629 N.W.2d 115, 120 (Minnesota Court of Appeals 2001).

\textsuperscript{149} Austin v. Ellis, 408 A.2d 784, 785 (New Hampshire 1979).

27. Explain the process and ground rules (e.g., that you will hear from both sides, who goes first, everything said will be recorded, witnesses will be sworn in, witnesses may be cross-examined, how to make an objection).
28. Explain the elements and the burden of proof.
29. Explain the kinds of evidence that can be presented and the kinds of evidence that cannot be considered.
   - Explain that you will make your decision based only on the evidence presented.
   - Encourage the parties to stipulate to uncontested facts and the admission of as much of the documentary evidence as possible.

INSTRUCTING SELF-REPRESENTED LITIGANTS

In most jurisdictions that have addressed the issue, a judge has a duty in all cases to ensure that a self-represented litigant has been informed how to properly respond to a motion for summary judgment.151 If opposing counsel has not provided the necessary notice (as required by the federal rule and rules in many states), the failure of the judge to do so prior to entering summary judgment ordinarily results in reversal.152 The rationale for the rule is that the

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152. See, e.g., Ruotolo v. Internal Revenue Service, 28 F.3d 6 (2nd Circuit 1994); Hudson v. Hardy, 412 F.2d 1091 (D.C. Circuit 1968). See also Ford v. Hubbard, 305 F.3d 875 (9th Circuit 2002) (district court was obligated to inform
necessity for a response might only not be obvious to a layperson but contrary to intuition and "it would not be realistic to impute to [a self-represented litigant] an instinctual awareness that the purpose of a motion for summary judgment is to head off a full-scale trial . . . so that not submitting counter affidavits is the equivalent of not presenting any evidence at trial."153

The required notice informs the litigant that the failure to respond to the motion for summary judgment might result in entry of judgment against him or her154 and that, absent a response, the factual assertions of the movant's affidavits will be taken as true.155 The notice also informs the litigant of the right to file opposing affidavits or other responsive material to defeat a motion for summary judgment156 or to file an amended complaint.157 The notice includes the text of the rule158 and a short and plain statement in ordinary English,159 sufficiently clear and understandable to fairly apprise a self-represented litigant of what is required.160 The notice rule, however, does not relieve a self-represented litigant of "the burden of establishing a genuine issue of material fact."161

The United States Court of Appeals for the 5th Circuit has taken this requirement one step further and held that a judge "has ample

pro se prisoner of his options with respect to his mixed habeas petitions, in other words, to advise him that it would have the power to consider his stay motions only if he opted to proceed with his exhausted claims and dismiss the unexhausted claims).

153. Lewis v. Faulkner, 689 F.2d 100, 102 (7th Circuit 1982).


155. Lewis v. Faulkner, 689 F.2d 100, 102 (7th Circuit 1982).


158. Lewis v. Faulkner, 689 F.2d 100, 102 (7th Circuit 1982).

159. Id.


discretion” to give a self-represented litigant a meaningful opportunity to remedy obvious defects in summary judgment materials.\textsuperscript{162} In \textit{Barker v. Norman}, the 5th Circuit held that a trial court abused its discretion by failing to afford a self-represented plaintiff an opportunity to properly respond to a motion for summary judgment where the response he did file contained specific, non-conclusory, hearsay allegations that would have precluded summary judgment if he had filed a properly verified affidavit by someone with first-hand knowledge. The court noted that “such an opportunity could well be afforded through the court’s comments in the context of a hearing in which the court receives oral argument on a summary judgment motion.”\textsuperscript{163} Similarly, in \textit{Gordon v. Watson}, the court held that a trial judge should have given a self-represented pre-trial detainee an opportunity to file a sworn statement before ruling on a motion for summary judgment where his “answer to defendant’s motion for summary judgment” would have raised a genuine issue as to the material fact if it had been sworn.\textsuperscript{164}

In a logical extension of the majority rule that a self-represented litigant should be instructed how to respond to a motion for summary judgment, the Alaska Supreme Court has held that a trial judge should instruct a self-represented litigant in the proper procedures for any action he or she is obviously attempting to accomplish in other contexts as well.\textsuperscript{165} The court has stated, for example, that a trial court should have instructed a self-represented mother on the proper procedures for intervention when a state agency moved for a decrease in the father’s child support obligation. The mother, who had a right to intervene, had sent a letter to the trial judge specifically asking whether she had to “make this request by a formal pleading.”\textsuperscript{166}

\footnotesize

\begin{itemize}
  \item \textsuperscript{162} \textit{Barker v. Norman}, 651 F.2d 1107, 1129 (5th Circuit 1981).
  \item \textsuperscript{163} \textit{Id}.
  \item \textsuperscript{164} 622 F.2d 120, 123 (5th Circuit 1980). The court noted that “although pro se litigants are not held to the same standards of compliance with formal or technical pleading rules applied to attorneys, we have never allowed such litigants to oppose summary judgments by the use of unsworn materials.” Interestingly, the represented moving party had also filed papers that the court of appeals found inadequate.
  \item \textsuperscript{166} \textit{Keating v. Traynor}, 833 P.2d 695 (Alaska 1992).
\end{itemize}
Similarly, in *Genaro v. Municipality of Anchorage*, the court applied the rule in a case in which a self-represented plaintiff clearly wanted to withdraw admissions she was deemed to have made when she had failed to respond to discovery requests. The court noted that numerous statements by the plaintiff made it apparent that she was attempting to contest the admissions. The court noted that the plaintiff “never made an express request for help from the court on how to undo her deemed admissions or how to rescue her case.”

However, the court concluded:

While Genaro did not expressly move to withdraw her admissions and did not mention [the rule allowing for motions to withdraw or amend], we have acknowledged that the rules of court “may be models of clarity to one schooled in the law, [but] a pro se litigant might not find them so.” Although we recognize that it is often difficult for a trial court to find the correct balance between the need to remain neutral and impartial and the need to inform pro se litigants of the proper procedures for their attempted actions, we conclude that in this instance it was an abuse of discretion not to inform Genaro of “the proper procedure for the action . . . she [was] obviously attempting to accomplish,” namely, using a . . . motion to preclude summary judgment. Because this would not require “open-ended participation by the court [that] would be difficult to contain,” informing Genaro of “the technical defects in [her] pro se pleadings [would not] compromise the superior court’s impartiality.”

In *Gilbert v. Nina Plaza Condo Association*, the court held that the trial court abused its discretion in dismissing a self-represented litigant’s case for failing to comply with discovery “without explaining basic steps she could take to comply with the pretrial

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167. 76 P.3d 844 (Alaska 2003).
168. Id. at 846.
169. Id. at 846-47 (citations omitted).
order . . . and without then allowing her a reasonable opportunity to take those steps.”\textsuperscript{170} Both parties failed to comply with discovery, and the self-represented litigant made several efforts to notify the court that she was having problems and needed help and additional time to prepare. However, the trial judge did not attempt to explain the available procedures until he dismissed the case, stating only then “if you didn’t get discovery on a certain date, you should have filed a motion to compel.”\textsuperscript{171} The court has also explained that a trial judge is obligated to give self-represented litigants guidance to ensure that they understand how to correct technical or procedural flaws that prevent them from meeting formal requirements that apply to actions they attempt to take in the ordinary course of their cases.\textsuperscript{172}

However:

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.\textsuperscript{173}

The Proposed Best Practices contains the following suggestions regarding instructions to self-represented litigants:

\begin{itemize}
\item \textsuperscript{\textsuperscript{170}} 170. 64 P.3d 126, 129 (Alaska 2003).
\item \textsuperscript{\textsuperscript{171}} Id.
\item \textsuperscript{\textsuperscript{172}} Sandidge v. Alaska Professional Teaching Practices Commission (Alaska Supreme Court October 6, 2004).
\item \textsuperscript{\textsuperscript{173}} Albrecht, Greacen, Hough, Zorza, “Judicial Techniques for Cases Involving Self-Represented Litigants,”
\item \textsuperscript{\textsuperscript{41}} Judges’ Journal 16, 44 (ABA winter 2003).
\end{itemize}
22. Instruct a self-represented litigant how to accomplish a procedural action he or she is obviously attempting or direct them to resources that will provide instructions
   • Do not tell a self-represented litigant what tactic to use, but explain how to accomplish the procedural move he or she has chosen.

23. If a motion for summary judgment is filed, advise a self-represented litigant that he or she has the right to file counter-affidavits or other responsive material and that failure to respond might result in the entry of judgment against the litigant.

ASKING QUESTIONS

Judges indisputably have the discretion to question witnesses in all hearings or trials, and hundreds of cases hold that such questioning does not indicate partiality, even in jury trials in criminal cases where the defendant claims the questioning assisted the prosecution. That discretion is inherent in the role of the judge.

He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other. . . . He has no interest except to see that justice is done, and he has no more important duty than to see that the facts are properly developed and that their bearing upon the question at issue are clearly understood by the jury.174

Thus, a trial judge “should not hesitate to ask questions for purpose of developing the facts.”175

175. Id.
Moreover, "the trial judge has an obligation, on his own initiative, at proper times and in a dignified, and impartial manner, to inject certain matters into the trial which he deems important in the search for truth."  

In addition to the important right to have access to the courts, it is equally important that the court be a fair and impartial one, committed to the purpose of seeking truth and doing justice, without bias or prejudice, fear or favor. . . . The judge does have a function beyond sitting as a comparatively silent monitor of the proceedings. In order to discharge his responsibility of carrying out the above-stated objective, it is within his prerogative to ask whatever questions of witnesses as in his judgment is necessary or desirable to clarify, explain or add to the evidence as it relates to the disputed issues.

Because a judge may ask questions in jury trials in criminal cases without raising reasonable questions about impartiality, logically, a judge also has the discretion in cases involving self-represented litigants to ask questions to clarify testimony, develop facts, save time, or prevent a miscarriage of justice, particularly when the judge is the trier-of-fact. For example, in Paulding-Putnam Co-op., Inc. v. Kuhlman, the Ohio Appellate Court rejected a utility company’s argument that the trial judge’s impartiality was “reasonably questioned by the extent and manner in which he interrogated” the self-represented plaintiff and his witness.

During a trial, “[t]he court may interrogate witnesses, in an impartial manner, whether called by itself or by a party.” . . . A review of the trial transcript reveals that the trial judge’s interrogation of the witnesses in the case was not improper and, thus, not an abuse of discretion. . . . The trial judge merely assisted the parties through the trial with explanations of how a

trial was procedurally conducted. Questions asked by the judge to the witnesses were merely to assist the judge, as the trier of fact, in making a correct and impartial decision.\textsuperscript{178}

Similarly, the Appellate Division of the New York Supreme Court rejected a pro se defendant’s contention in a civil case that the trial judge prejudiced his direct case by interruptions throughout the trial. The court noted that the “purposes of these interjections included identifying or admitting evidence, clarifying issues for . . . a pro se litigant, and instructing the jury. Such interjections were not only beneficial to defendants, but were a legitimate exercise of the court’s discretionary power to control the case.”\textsuperscript{179}

A judge’s clarifying questions do not unfairly disadvantage the represented party by altering the evidence but simply eliminate the unfair advantage a represented party might gain if a self-represented party is unable to present the facts in a way the judge or jury can comprehend. Moreover, the answer to a judge’s questions will not inevitably assist the self-represented litigant, and a judge is also free to ask questions that clarify the represented litigant’s case if counsel is not providing adequate representation. Commentators recommend that “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)” to reduce the chances that questions will be raised about their impartiality.\textsuperscript{180}

Thus, in a matter involving a self-represented litigant, a judge may ask questions that clarify and develop the issues to be decided,\textsuperscript{181} identify or admit evidence and clarify issues for the self-

\textsuperscript{178} 690 N.E.2d 52, 56 (Ohio 3rd District Appellate Court 1997) (citations omitted).

\textsuperscript{179} Thaler \& Thaler v. Rourke, 629 N.Y.S.2d 855, 857 (New York Supreme Court, Appellate Division 1995).


\textsuperscript{181} Lapeyrouse v. Barbaree, 836 So. 2d 417, 423 (Louisiana 2002).
represented litigant,\textsuperscript{182} clarify the litigant's own questions and witnesses' responses to them,\textsuperscript{183} and elicit material facts.\textsuperscript{184}

The discretion to ask questions is not unlimited, but it is impossible, of course, to specify how many questions a judge may ask before the questions become an abuse of discretion; the number that is appropriate in a particular case will depend on how many it takes to clarify the issue. A judge does need to take care that his or her language, tone, and manner remain neutral during questioning so that the judge displays no attitude towards the merits of the case or the credibility of the witness. Because questioning is within a judge's discretion, questioning is only likely to be considered inappropriate if it is done in the manner of an advocate, casts aspersions or ridicule upon a witness, or is on matters collateral or entirely relevant to the case.\textsuperscript{185}

A judge may also use questions to fill a gap in the evidence that is likely to result in a decision other than on the merits.\textsuperscript{186} A judge in a city court in New York, for example, concluded that case law and common sense require a judge to ask unrepresented litigants whatever questions about damages are necessary to permit a recovery if the litigants established a cause of action at trial in a small claims case.\textsuperscript{187} Emphasizing that many litigants, despite instructions, do not submit evidence of damages, the court stated:

Yet if we grant judgment dismissing the complaint or as defense counsel suggests, to the plaintiff in the

\textsuperscript{182} Thaler & Thaler v. Rourke, 629 N.Y.S.2d 855, 857 (New York Supreme Court, Appellate Division 1995).

\textsuperscript{183} State v. Hutch, 861 P.2d 11, 15 (Hawaii 1993).

\textsuperscript{184} Id.

\textsuperscript{185} See, e.g., McCartney v. Commission on Judicial Qualifications, 526 P.2d 268 (California 1974).

\textsuperscript{186} See Lombardi v. Citizens National Trust & Savings Bank, 289 P.2d 823 (California Second District Court of Appeal 1955) (judge should call to the attention of a self-represented litigant omissions in the evidence or defects in the pleadings that are likely to result in a decision other than on the merits); Gonzalez v. Long, 889 F. Supp. 639 (E.D. New York 1995) (judge should recommend that self-represented litigant familiarize himself or herself with cases that set forth the evidentiary burden that a plaintiff must sustain to establish a \textit{prima facie} case).

\textsuperscript{187} Webster v. Farmer, 514 N.Y.S.2d 165, 168 (City Court of Oswego, New York 1987).
amount of $1.00, can anyone rationally suggest in this day and age that we have done “substantial justice between the parties” when it is clear that the plaintiff has obviously sustained damages well in excess of $1.00? To do so at this point would not be “substantial justice”— it would be a travesty on justice.

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Yet does even one out of a hundred unrepresented plaintiffs know enough to articulate the magic words “the value of my property at the time it was damaged was...”? Is Small Claims to become something akin to the old Groucho Marx Show wherein the contestant must say the “magic words”, in order to receive their reward? Shall we, as was done in that show, provide a duck to descend from the ceiling to award the unrepresented litigant his judgment if and only if he mouths these magic words? Assuredly the duck would not often be needed for, as with the old show, very few contestants will know enough to say the “magic words.”

To do what is reasonably necessary to prevent obvious injustice, the judge concluded, he “must direct the claimants’ attention to those precise questions which our case law, with which the unrepresented litigant could not possibly be expected to be familiar, requires be answered in order for the claimant to recover his judgment.”

The Proposed Best Practices contains the following suggestions regarding asking questions in cases involving self-represented litigants:

34. Call breaks where necessary if a litigant is becoming confused or tempers on either side are becoming frayed (or your patience is running low).

35. Question any witness for clarification when the facts are confused, undeveloped, or misleading.
   • Explain at the beginning of a hearing that you will ask questions if necessary to make sure you understand the testimony and have the information you need to make a decision.
Ask the same type of questions of witnesses called by a represented party if warranted. Take care that your language and tone when asking questions does not indicate your attitude towards the merits or the credibility of the witness.

**EVIDENCE**

Strict enforcement of the rules of evidence in cases involving self-represented litigants can lead to unjust results as illustrated by the following real life examples.\(^\text{188}\)

- A pro se plaintiff in a protection from harassment case offers the defendant’s recent jury-trial conviction for assaulting her as proof that he harassed her. Proof of the conviction is inadmissible because in Maine criminal assault is a misdemeanor and, therefore, not within the hearsay exception that permits proof of conviction for a crime “punishable by death or imprisonment of one year or more.” The defendant’s lawyer successfully objects. The plaintiff failed to bring witnesses to support her complaint because she assumed that the conviction would suffice. Her case is reduced to a swearing contest between herself and the defendant.

- In a protection from abuse case, the pro se plaintiff has prepared a statement about the incident to read because she knows that she is too scared of the defendant to testify in front of him from memory alone. The defendant’s attorney successfully objects to her reading the statement because it does not qualify under the recorded recollection exception to the hearsay rule. The plaintiff is too upset to testify without the statement, and the case is dismissed for her failure of proof.

- In a protection from abuse hearing, the pro se plaintiff seeks to introduce hospital records showing her injuries, treatment, and expenses. She fails to lay a foundation for the records’ admissibility as required by the business records exception to

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188. Sheldon, Murray, “Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials,” 86 *Judicature* 227, 229-30 (AJS March-April 2003). The examples were drawn from one of the author’s “actual experiences in Maine state courts, in each of which a pro se litigant opposes a party represented by counsel.” Mr. Sheldon is a former judge of the Maine District Court.
the hearsay rule. Following the defendant's lawyer's objection, the judge rules the records inadmissible.

Used against pro se litigants, the rules of evidence do not act as tools for discovering the truth but as "weapons that the lawyer can use to gain an advantage that has nothing to do with the merits of the case." 189

Moreover, in most cases involving self-represented litigants, many evidentiary rules may be superfluous. The rules of evidence are primarily designed "to prevent lay jurors from getting information that might prejudice them against a party, or distract them from the core issues of the case, or confuse them, or otherwise cause them to settle on a verdict for the wrong reasons." 190 Admission of inadmissible evidence is almost always considered harmless error even in jury cases. Therefore, at least in cases in which the judge is the trier-of-fact, there seems little reason to enforce the rules of evidence as long as the evidence being presented is reliable and not subject to privilege. Of course, to be fair, the same relaxation of the rules should also apply to any party represented by counsel in the case.

It has been recommended that judges "create an informal atmosphere for the acceptance of evidence and testimony," relaxing the formal rules of procedure and evidence in cases involving self-represented litigants. 191

[T]he 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

189. *Id.* at 228.
190. *Id.* at 227.
question and answer format, establishing a foundation for introducing documents and exhibits, qualifying an expert, and the like.\textsuperscript{192}

Courts have at least tacitly approved such procedures. The New Hampshire Supreme Court commended the way a trial judge conducted a non-jury trial in a quiet title action, rejecting the self-represented plaintiff’s charge of bias. The court noted that the trial judge had “relaxed the rules of evidence and made a special effort to explain to the plaintiff proper courtroom procedures in order to facilitate the plaintiff’s presentation of his case.”\textsuperscript{193}

In \textit{Wilkerson v. Ekelem}, a dispute between a property owner and a contractor, the Tennessee Court of Appeals rejected the property owner’s argument that the trial court’s judgment resulted from “some sort of bias against pro se litigants.” The court noted that the trial court had been “exceedingly solicitous in its treatment” of the pro se plaintiff, overruling sound objections by the contractor’s counsel, allowing the pro se plaintiff to repeatedly ask the same question, and reining him in “only when he strayed far, far beyond testimony and conduct that would be tolerated in a case where a party was represented by counsel.”\textsuperscript{194}

Indeed, relaxed rules have been approved even in jury cases. The Illinois Appellate Court upheld a verdict in favor of the self-represented surgeon-defendant in a malpractice action despite the represented plaintiff’s argument that she had been denied a fair trial by the judge’s attempt to assist the defendant in presenting his case. The judge had “guided the defendant through parts of his own testimony in order to avoid a long narrative on irrelevant matters” and “carefully explain[ed] to the defendant why certain objections were being sustained.” Despite this assistance, the appellate court held that there was no evidence that the judge had conducted the defendant’s case for him or failed to remain impartial.\textsuperscript{195}

\textsuperscript{192} \textit{Id.} See also Goldschmidt, "The Pro Se Litigant’s Struggle for Access to Justice," 40 \textit{Family Court Review} 36 (January 2002).

\textsuperscript{193} Austin v. Ellis, 408 A.2d 784, 785 (New Hampshire 1979).

\textsuperscript{194} Wilkerson v. Ekelem, 2004 WL 578600 (Tennessee Court of Appeals March 24, 2004).

There is one judicial discipline case in which a judge was criticized for using an alternative procedure in a case involving a self-represented litigant. In Inquiry Concerning Broadman, the California Commission on Judicial Performance publicly censured a judge for denying due process in a civil trial in which the plaintiff was not represented. After calling the case for trial, the judge had asked the parties to tell him what the case was about. After the plaintiff spoke, the defendant’s attorney gave a version of his opening statement, and the defendant made a statement. The judge then alternated asking the parties questions. No one was placed under oath. After questioning the plaintiff and the defendant, the judge asked if either of them had anything to add. He then told them that he was taking the case under submission and asked the defendant’s attorney to prepare a statement of decision and judgment. The judge had not stated that he was going to follow an alternative procedure nor that the parties could have a traditional trial if they wanted one.

Judge Broadman’s conduct went further than any accommodations advocated for cases involving self-represented litigants. No one recommends that, to accommodate pro se litigants, judges should proceed, like Judge Broadman did, without explanations to or the permission of the parties or the protection of putting parties under oath. Moreover, Judge Broadman took the steps he did, not to facilitate presentation of evidence by a self-represented litigant, but, according to the Commission, because he was “focused on his vision of efficiency with little regard for the values that underlie the usual procedures for presenting evidence and cross-examining witnesses.”

Although a judge may facilitate the presentation of evidence by a self-represented litigant and by questioning point out gaps in the evidence that should be filled, a judge should not engage in independent investigations to assist a self-represented litigant gather the evidence necessary to present the case. Such an investigation violates the prohibition on ex parte communications, which is one of the core provisions of the code of judicial conduct. Investigating


facts, although it is something lawyers do, is not a uniquely lawyerly
skill that is taught exclusively in law school. Particularly when a
judge explains matters such as the elements that need to be proven
and what types of evidence are acceptable, diligent pro se litigants
should be just as capable of assembling the facts to prove their
damages or other elements of their case as they are of making a claim
to an insurance company or applying for a job or mortgage, the types
of activities in which most individuals routinely engage without
assistance from lawyers. Moreover, expecting a judge to conduct an
independent investigation for only one side of a case invites open-
ended involvement in the process that looks more like advocacy,
imposes an unfair burden on the judge, and creates unreasonable
expectations on the part of self-represented litigants. It then becomes
the judge’s fault if the litigant is unable to produce the evidence
necessary to win the case. Once a judge is told he or she can verify
facts by telephone or make simple, factual inquires, where does a
judge faced with hundreds of cases stop?

The Proposed Best Practices contains the following suggestions
on relaxing rules of evidence and procedure in cases involving self-
represented litigants:

36. Follow the rules of evidence that go to reliability but use
discretion and overrule objections on technical matters
such as establishing a foundation for introducing
documents and exhibits, qualifying an expert, and the form of
questions or testimony.
• If you relax a rule for a self-represented party, relax it for a
represented party as well.
• Require counsel to explain objections in detail.
• If counsel objects, ask if he or she is arguing that the
evidence is unreliable.
• Explain rulings on evidence.

37. If necessary to prevent obvious injustice, allow a brief recess
or adjourn for the day (or longer) to allow a self-
represented litigant (or even a represented litigant) to
obtain additional evidence or witnesses.
SETTLEMENT

A judge may set aside a settlement in order to prevent injustice upon a showing of good cause such as fraud. The better practice, of course, would be to ensure that the settlement is not unjust before it is entered. When a settlement results in an order by the court, a judge should ensure that the settlement is not unduly one-sided before signing it. No reasonable questions can be raised about a judge's impartiality when the judge tries to ensure that any court order is not memorializing and implementing an injustice. Analogies are to the obligations to ensure that plea bargains are knowingly entered into in criminal cases and to review the terms of settlements in class actions.

"A party’s lack of representation at the time of entry into the stipulation is a significant factor to be considered in determining whether good cause exists to vacate the stipulation."198 Thus, when presented with a settlement order for signature, a judge should engage in an allocution designed to elicit whether the settlement is a fair resolution. In housing court, for example, before signing a settlement, a judge should ask questions to determine whether an unrepresented tenant had a defense to a landlord’s rent claims, made an informed or knowing choice to proceed without counsel, had a basic understanding about legal rights and defenses, understands the legal consequences of the enforcement remedies provided in the stipulation, and is aware that stipulations are supposed to be the result of negotiations and that they are not required to sign the stipulations as drafted by the landlords’ attorneys.199

Settlements are often beneficial to all parties in a case, both represented and pro se, and a judge may encourage parties to discuss settlement or to resort to mediation programs. Self-represented litigants may not understand the benefits of settlement and mediation, and a judge may explain to pro se plaintiffs that agreeing to accept less than they want may facilitate their collection of something and to pro se defendants that agreeing to pay something may allow them to avoid onerous collection procedures. However, as in all cases, in cases involving pro se litigants, a judge should not make “parties feel

198. 144 Woodruff Corp. v. LaCrette, 585 N.Y.S.2d 956, 958 (Civil Court, City of Kings County, New York 1992).
199. Id.
The Proposed Best Practices contains the following suggestions regarding settlements in cases involving self-represented litigants:

25. At a pre-trial or status conference, bring up the possibility of settling the matter or referring it to mediation.
   • Encourage, but do not try to coerce, settlement or mediation.

26. If the parties present you with an agreed order settling a case, engage in allocution to determine whether the self-represented litigant understands the agreement and entered into it voluntarily.
   • Explain that if an agreement is approved, it becomes an order of the court with which both parties will be required to comply.
   • Determine that any waiver of substantive rights is knowing and voluntary.

Diligent Self-Represented Litigant Acting in Good Faith

A judge’s ability to make reasonable accommodations for pro se litigants does not oblige a judge to overlook a self-represented litigant’s violation of a clear order, to repeatedly excuse a self-represented litigant’s failure to comply with deadlines, or to allow a self-represented litigant to use the process to harass the other side.201

For example, in *Newsome v. Farer*,202 the trial judge had dismissed with prejudice a records inspection suit against a university after the self-represented plaintiff failed three times to attend the production of documents that he had requested and the trial judge had ordered. Although noting that dismissal with prejudice should be used sparingly, the New Mexico Supreme Court concluded that the plaintiff’s “rigidity” and “obdurate position” prevented progress in the case and justified the drastic sanction.203 The court found that the

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200. Commentary to Canon 3B(7), ABA Model Code of Judicial Conduct
201. In *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975), the United States Supreme Court explained that “the right of self-representation is not a license to abuse the dignity of the courtroom.”
203. *Id.* at 333.
judge’s order was clear and specific and, therefore, the plaintiff’s failure to attend was willful rather than negligent or the result of misunderstanding. The court also found that the plaintiff did not notify the court or the university of his intention not to attend and offered no satisfactory explanation for his conduct despite several opportunities and a warning of the possible consequences of failing to do so. Noting the plaintiff’s “insistence that only he would dictate the progress of this action,” the court stated that a “litigant is not free to disregard an order of the court simply because he disagrees with it.” The court rejected the plaintiff’s “disingenuous attempt to invoke special privilege because of his pro se status.”

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. [The plaintiff’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.

Similarly, although acknowledging that the trial judge had a duty to recognize the defendants’ self-represented status and treat them accordingly, the United States Court of Appeals for the 7th Circuit, in Downs v. Westphal, held that a default judgment foreclosing the defendants’ interest in some land was warranted as a sanction for

204. Id. at 331.
205. Id. at 333. See also Bobal v. Rensselaer Polytechnic Institute, 916 F.2d 759, 763 (2nd Circuit 1990) (dismissal for failure to attend deposition was not abuse of discretion where self-represented litigant received adequate warning of consequences of non-compliance).
violations of discovery rules and court orders.\textsuperscript{206} Noting that the case was the result of a "long, drawn-out family feud," the court stated that "being a pro se litigant does not give a party unbridled license to disregard clearly communicated court orders . . . [or] give the pro se litigant the discretion to choose which of the court's rules and orders it will follow, and which it will willfully disregard."\textsuperscript{207}

The [defendants] did not disobey court orders because of innocent misunderstanding or lack of familiarity with the law. Their communications with the court make clear that they understood those orders and chose to defy them. The district court more than fulfilled its duty to [defendants] as pro se litigants. The court warned them that more severe sanctions would be forthcoming, even though the "district court is not required to fire a warning shot" before it defaults an offending party. The court explained that its previous efforts to force the [defendants] to comply had failed, and that there was "no reason to believe that further orders would be obeyed." The [defendants] were given numerous opportunities to correct their sanctionable conduct and comply with discovery rules and court orders.\textsuperscript{208}

The court concluded that the trial judge had "demonstrated remarkable patience in dealing with this troupe of unruly litigants [who] . . . worked overtime to try that patience, and they went too far."\textsuperscript{209}

Stating that "pro se litigants should not be precluded from resorting to the courts merely for want of sophistication," the United States Court of Appeals for the 6th Circuit nevertheless upheld a trial judge's dismissal of a prisoner's civil rights suit for want of prosecution.\textsuperscript{210} The district court had twice granted motions for

\textsuperscript{206} 78 F.3d 1252, 1257 (7th Circuit), \textit{opinion amended on denial of rehearing}, 87 F.3d 202 (1996).
\textsuperscript{207} \textit{Id}.
\textsuperscript{208} \textit{Id}.
\textsuperscript{209} \textit{Id}.
extensions of the discovery and motion cut-offs, but denied a motion for a third extension. In addition, the plaintiff did not submit a required pretrial statement although the defendant did.

On appeal, the 6th Circuit found "no persuasive reason has been posited why [the plaintiff] should be accorded special consideration under the circumstances of this case."\textsuperscript{211}

His action was not dismissed as the result of inartful pleading or any lack of legal training, but rather because he failed to adhere to readily comprehended court deadlines of which he was well-aware. That he comprehended their significance is evidenced by his having sought their extension. The district court was generous in granting extensions which [the plaintiff] failed to utilize. Furthermore, there has been no demonstration that his incarceration was responsible for any inability to proceed in a timely fashion.\textsuperscript{212}

In \textit{Coffland v. Coffland},\textsuperscript{213} the Alaska Supreme Court affirmed a trial judge’s order sanctioning the husband in a divorce action for his failure to comply with a discovery order. (The sanction precluded him from proving the existence of several promissory notes that he claimed were marital debts.) The husband contended that his failure to comply could be explained by his pro se status and the demands of running a Subway franchise and teaching survival classes. The Supreme Court acknowledged that a trial judge has an obligation to "inform a pro se litigant of the proper procedure for the action he or she is obviously attempting to accomplish." However, the court noted that the husband had made no effort to cooperate with the trial judge or to request assistance in complying with its orders and that the pretrial order put him on notice that a failure to cooperate in discovery could result in sanctions.\textsuperscript{214} The court concluded that "a

\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} 4 P.3d 317 (Alaska 2000).
\textsuperscript{214} \textit{Id.} at 321.
pro se litigant must make some attempt to comply with the court’s procedures before receiving the benefit of the court’s leniency.”

In other cases as well, the Alaska Supreme Court has announced that absent a “good faith attempt to comply with judicial procedures and to acquire general familiarity with and attempt to comply with the rules of procedure,” a self-represented litigant “may be denied the leniency otherwise afforded pro se litigants,” at least when the pro se litigant initiated the action.

THE MINIMUM

At a minimum, judges are required to give self-represented litigants fair and equal treatment and are prohibited from placing self-represented litigants at a disadvantage other than whatever disadvantage arises from proceeding without the assistance of counsel. Unfortunately, there are many judicial discipline cases that indicate some judges have used the absence of an attorney to take advantage of self-represented litigants in blatantly unfair proceedings.

For example, in *In the Matter of Walsh*, the judge established two special procedures for unrepresented litigants in criminal cases. In one procedure, the judge required defendants who requested jury trials to appear and answer a “jury trial roll call” once a week, even when no jury trials were scheduled, until their case was disposed of or they got an attorney. Some defendants had to travel long distances and be absent from their jobs to attend the weekly roll calls. At least three defendants who did not appear were tried and convicted in their absence.

The judge maintained that the purpose of the roll calls was to “keep track” of defendants, noting that, while awaiting roll call, many defendants determined that the judge was fair and withdrew

215. *Id.*


219. 587 S.E.2d 356 (South Carolina 2003).
their request for a jury trial. During the disciplinary proceedings, the judge recognized that the procedure deterred persons from exercising their right to a jury trial and that it was inappropriate to treat defendants without attorneys different from those with attorneys.\footnote{220}

In the second procedure, prior to a jury trial, unrepresented defendants were served with subpoenas requiring that they attend pre-trial conferences to enter into plea discussions with the prosecutor. The court noted that the judge came to recognize that this arrangement suggested a bias toward the state.\footnote{221}

Pursuant to the judge’s agreement, the California Commission on Judicial Performance publicly admonished a judge for nine incidents in which he failed to respect the rights of unrepresented individuals.\footnote{222}

1. The judge did not allow an unrepresented defendant to cross-examine the police officer in a trial on a speeding ticket, resulting in reversal of the conviction.

2. The judge insisted that a defendant charged with driving a vehicle with an expired registration sell his car.

3. When a defendant requested an extension of time to complete community service, the judge sentenced her to 44 days in the county jail without informing her that he was conducting a violation of probation hearing or otherwise advising her of her rights.

4. The judge found a juror who was late in contempt and remanded him without citing him for contempt or otherwise informing him that he was conducting a contempt hearing.

5. The judge sentenced one defendant in the absence of a plea or conviction.

6. After a defendant asked for an attorney in a misdemeanor case, the judge suggested to the defendant that “(a) you use that tax return money to get an attorney; and (b) that you go out and find a job right away, okay?”

\footnote{220}{Id. at 358.}
\footnote{221}{Id. at 360.}
\footnote{222}{Inquiring Concerning Henne, Decision and Order Imposing Public Censure (California Commission on Judicial Performance October 13, 1999) (cjp.ca.gov).}
7. At a probation revocation hearing, the judge added 30 days to an unrepresented defendant's jail sentence without advising him that he had the constitutional right to an attorney and a hearing.

8. At a probation revocation hearing, the judge reinstated and modified the terms of an unrepresented defendant's probation by imposing community service hours in lieu of a fine without advising her of her constitutional rights regarding revocation of probation.

9. During a preliminary hearing in a rape case, after the alleged victim testified that she had given the police information that was not true, the judge ordered that she be taken into custody. When the district attorney noted several times that no charges were pending against the victim, the judge stated that she had admitted a crime in court. Approximately 10 minutes later, the judge released the victim upon the condition that she not leave the courthouse. After the preliminary hearing and a lunch recess, the judge had the alleged victim brought into the courtroom and told her that he was ordering a transcript to be prepared for the district attorneys' office to review to possibly file criminal charges. The judge stated that he was going to order the alleged victim to return to court, then withdrew the order at the deputy district attorney's request. He then told the victim she was free to leave.

The Florida Supreme Court sanctioned a judge who had required employees of a domestic abuse shelter to submit affidavits swearing that they had not furnished any assistance to pro se petitioners with domestic violence complaints, which chilled the willingness of victims and staff to come forward with legitimate claims and limited the rights of the petitioners.223

223. Inquiry Concerning Shea, 759 So. 2d 631, 632-33 (Florida), cert. denied, 531 U.S. 826 (2000) (removal for this and other misconduct). See also In the Matter of Meacham, Determination (New York State Commission on Judicial Conduct October 28, 1993) (www.scjc.state.ny.us) (censure for, among other misconduct, accepting a guilty plea immediately after arraignment from a 16-year-old unrepresented defendant whose mental stability the judge questioned, refusing to set bail as required by law, and denying repeated requests to allow the defendant to withdraw the plea and go to trial, even though the prosecutor consented); Inquiry Concerning Graham, 620 So. 2d 1273 (Florida 1993), cert. denied, 510 U.S. 1163
Abuses of authority in civil cases involving self-represented litigants have also been condemned by judicial discipline authorities. For example, the New York State Commission on Judicial Conduct found that a non-lawyer judge’s handling of a small claims case filed by an unrepresented plaintiff “was fraught with errors as to basic procedures and conveyed the appearance that he prejudged the case based upon inappropriate, ex parte contacts.” Among other errors, on the scheduled trial date, the judge failed to administer an oath to the self-represented plaintiff before hearing his testimony about the substance of his claim. When the plaintiff objected that no one was present on behalf of the defendant, the judge read him a memorandum from the village attorney without providing a copy. At the conclusion of the proceeding, the judge told the plaintiff that he

224. In the Matter of Gori, Determination (New York State Commission on Judicial Conduct March 29, 2001) (www.scjc.state.ny.us). Gary Betters filed a small claims court action against the Village of Malone, seeking $1,588.60 in back wages for his previous employment as co-director of the Malone Memorial Recreation Park. The village attorney served a motion to dismiss Betters’ claim on the basis that the appropriate defendant was the Malone Recreation Commission and then telephoned the judge to ask about the status of his motion. The judge had ex parte conversations with the attorney for the village, the village treasurer, and the village budget officer.

(1994) (removal for, among other misconduct, ordering an unrepresented defendant charged with misdemeanor possession of marijuana to assist the county sheriff in “two buys and two sells” of drugs as a condition of his sentence and ordering an unrepresented defendant charged with misdemeanor possession of marijuana to “assist the State Attorney’s Office in catching a drug dealer” as a condition of his sentence); In the Matter of Winegard, Determination (New York State Commission on Judicial Conduct September 26, 1991) (www.scjc.state.ny.us) (removal for, among other misconduct, coercing guilty pleas in two cases involving an unrepresented, 19-year-old defendant); In the Matter of the Rock, Determination (New York State Commission on Judicial Conduct June 27, 2001) (www.scjc.state.ny.us) (censure pursuant to an agreement for, among other misconduct, repeatedly violating the rights of two unrepresented 16-year old defendants); In the Matter of Hise, Determination (New York State Commission on Judicial Conduct May 17, 2002) (www.scjc.state.ny.us) (admonition pursuant to agreement for convicting an unrepresented defendant and imposing a jail sentence after the defendant had pleaded not guilty, without a trial, relying on the defendant’s incriminating statements at arraignment, and without the defendant changing his plea to guilty or waiving his right to a trial); In the Matter of Smith, Determination (New York State Commission on Judicial Conduct June 16, 1994) (www.scjc.state.ny.us) (censure, for among other misconduct, violating the fundamental rights of a defendant in a criminal case).
could submit additional information in support of his claim before March 19, 1999. The plaintiff agreed to furnish the additional material by March 15, but on March 14, the judge sent his decision to the village attorney dismissing the claim, and on March 15, sent a similar decision to the plaintiff.

The New York Commission also concluded that a second judge (himself a non-lawyer) failed to comply with the law by signing a judgment on a landlord’s petition for eviction and back rent without holding a hearing on the contested issues or according the pro se tenants full opportunity to be heard.225 After a discussion at the bench, in which the tenants agreed to leave the premises but argued that the past due rents should be abated due to inadequate heat, the judge signed a judgment awarding the landlord possession and back rent in the full amount of the claim without according the tenants an opportunity to be heard on the issue of abatement.

The New York Commission found that another judge’s handling of a case repeatedly violated a third-party defendant’s rights, constituted an abuse of his judicial power, and suggested that he was biased against the unrepresented litigant.226 The judge had granted a default judgment against the third-party defendant, Ronald Loeber, a self-represented litigant, and ordered him to execute a deed to real property even though his time to answer the third-party complaint had not expired and he was not in default, he had appeared in court and expressed in writing and orally his intention to defend the action on the merits, and as the third party defendant, he would be held liable only if the defendant were ultimately found liable on the claim, and no such finding had been made. The judge found Loeber in contempt for refusing to sign and sentenced him to six months in jail. At sentencing, Loeber objected to the terms of the corrective deed but was not able to enunciate his position to the judge’s satisfaction. The judge did not explain how Loeber could purge himself of the contempt, which was required by statute. Loeber remained in the county jail for 45 days until another court acted on an application brought by his newly retained attorney.

An Ohio judge was sanctioned for implementing an improper procedure in debt collection cases in small claims court that reflected "a predisposition in favor of plaintiff-creditors."\textsuperscript{227} (The procedure was not confined to cases with self-represented defendants but presumably had a substantial effect on those without lawyers.) Under the procedure, the action to collect a small-claims judgment was taken upon the court’s initiative, not upon the request of the judgment creditor, and circumvented the protections afforded by law to small claims court judgment debtors by making freedom from incarceration dependent upon payment in full of a small claims judgment. The Ohio Supreme Court stated, "a judge may not blatantly disregard procedural rules simply to accomplish what he or she may unilaterally consider to be a speedier or more efficient administration of justice."

CONCLUSION

Judges’ allegiance to the concept of impartiality is laudatory and indeed required. Refusing to change anything in cases involving self-represented litigants is obviously the easiest way to ensure that judicial impartiality is not questioned, and judges’ hesitance to deviate from the procedures is understandable. Moreover, judges cannot eliminate the inherent advantage to a represented party of having (with luck) an articulate, knowledgeable, skillful, and diligent advocate. They are not so prescient and powerful that they can ensure the correct outcome in every case. To ask or expect them to level the playing field in cases involving self-represented litigants is not reasonable.

Judges can, however, by reasonable accommodations moderate the tilt of the playing field a little less against pro se litigants, remove hidden, lethal traps, and clearly explain the rules of the game. They can eliminate any unfair advantage a represented litigant has over a self-represented litigant and by vigilance ensure a fair chance. The case law indicates that many judges are already doing so without significant concerns being raised about their impartiality. Certain types of conduct toward pro se litigants are unquestionably prohibited (disrespectful demeanor, for example), some are

\textsuperscript{227} Disciplinary Counsel v. Medley, 819 N.E.2d 273, 280 (Ohio 2004).
unquestionably required (liberal construction of complaints, for example), some accommodations are unquestionably allowed (plain English explanations, for example), and other accommodations reasonably follow from these principles.

The concept of impartiality is not so inflexible and divorced from a sense of fair play that it precludes judges from taking such steps. Only reasonable questions about a judge's impartiality are relevant under the code of judicial conduct, and it cannot reasonably be said that impartiality requires a judge (indeed an entire court system) to stand by and watch helplessly while self-represented litigants flounder when simple procedural accommodations would at least enable them to be heard on the merits with evidence presented in a comprehensible fashion.

The adversary system is not ensconced in the code of judicial conduct, nor is the primary purpose of the code to protect the formalities of the adversary system. While judges may be more comfortable in the role reflected in the rare situation in which all parties are represented by competent, diligent counsel, their discomfort in a more involved role does not necessarily suggest the role reflects partiality, and the traditional role of the judge is in fact as a guiding force at a trial, not just a ceremonial presence or silent monitor presiding over rituals understandable only by the initiated.

Reasonable procedural accommodations for self-represented litigants do not unfairly disadvantage their represented opponents. Such leniency does not change the facts, the law, or the burden of proof or ensure a victory for the unrepresented. Requiring represented litigants to try cases on the merits rather than spring technical traps cannot be considered as affording self-represented litigants an unfair advantage. At most, it gives both represented and self-represented litigants a fair opportunity to tell their stories. In fact, the reasonable accommodations suggested by case law and commentators may also benefit represented parties by simplifying procedures, and a judge has the discretion to extend the accommodations to represented parties if an attorney is failing to provide adequate representation. A remedy is needed for the confusion about how much flexibility the concept of impartiality allows a judge to facilitate understandable, fair procedures in cases involving self-represented litigants. One change would be to amend the code of judicial conduct. The revised model code of judicial conduct adopted by the American Bar Association House of
Delegates in 2007 contains a new comment to Rule 2.2 that addresses the issue of self-represented litigants. The rule provides that "a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." The new comment 4 states: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." Others proposed similar additions on the topic. The American Judicature Society, for example, proposed a new comment:

A judge may make procedural accommodations to provide diligent pro se litigants the opportunity to have their cases fully heard, and such an exercise of judicial discretion does not raise a reasonable question about the judge's impartiality. Reasonable accommodations include liberally construing pleadings, explaining the basis for a ruling, refraining from using legal jargon, questioning witnesses for clarification, freely allowing amendment of pleadings, and explaining general matters such as the burden of proof and what types of evidence may and may not be presented.

In addition, proposed additions on the subject were recommended by Chief Justice Karla Gray of the Montana Supreme Court and Richard Zorza, a consultant to the courts on issues related to pro se litigants.

Moreover, it would assist trial judges if jurisdictions would adopt best practices to provide guidance for conducting cases involving self-represented litigants. The more routine these practices become, in all cases involving self-represented litigants and indeed most cases involving individual litigants regardless whether represented, the more likely they will be accepted and the less likely they might be

228. See http://www.abanet.org/judicialethics/approved_MCJC.html.
229. Comments available at http://www.abanet.org/judicialethics/resources/comm_rules_gray_090905_ddt.pdf and
construed as evidence of partiality. Proposed best practices for cases involving self-represented litigants follow.

Proposed Best Practices for Cases Involving Self-Represented Litigants

These practices are helpful, and many are required, in all cases, not just those involving self-represented litigants.

GENERAL

1. When a litigant appears without an attorney, verify that the litigant understands that he or she is entitled to be represented by an attorney; give information on pro bono or lawyer referral resources. Explain that self-representation is difficult, you as judge cannot act as an advocate for either side, and the other party’s attorney will not provide assistance or advice.
   • If an unrepresented litigant appears to be mentally disabled, take additional steps to involve counsel and other support services.
   • The difficulty of self-representation should be emphasized in cases that are particularly complex, cases where the stakes are very high, and jury cases.
   • Once it is clear a litigant does not intend to get an attorney, do not harp on pro se status or make negative comments that suggest prejudgment or disapproval.

230 The ideas in these best practices are based on the accompanying paper Reaching Out or Overreaching: Judicial Ethics and the Self-Represented Litigant; on the "Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants" from the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges; on the November 2004 draft of “Judicial Guidelines for Hearings Involving Self-Represented Litigants” proposed by the Subcommittee on Judicial Guidelines of the Massachusetts Supreme Court Steering Committee on Self-Represented Litigants; on "Judicial Techniques for Cases Involving Self-Represented Litigants" by Rebecca Albrecht, John Greacen, Bonnie Hough, and Richard Zorza, published in the winter 2003 Judges’ Journal; and on "Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts" by John Greacen, published in the winter 2005 Judges’ Journal.
2. Direct the litigant to the resources available for self-represented litigants.
   • Inform a self-represented litigant that he or she has the responsibility to become familiar with and attempt to comply with the rules of procedure.
   • Repeat information regarding resources at every stage in the process.
3. Be generous in granting extensions of time to self-represented litigants (and others) to prepare for a hearing, obtain counsel, or comply with other requirements as long as the litigant appears to be acting in good faith, making an effort, and giving notice to the other side.
4. Ensure that court interpreters are available for all court proceedings (including settlement discussions) involving self-represented litigants (and others) who have language barriers.
5. Give a basic introduction to courtroom protocol, for example, the importance of timeliness, checking in with the clerk (if that is necessary), who sits where, directing argument to you, not other parties or attorneys, rising when you enter, and other matters you consider important (attire, gum chewing, reading while court is in session, etc.).
6. Explain the prohibition on ex parte communications (you cannot talk to one side without the other side being present and litigants cannot file any papers with the court that are not served on the other side).
7. Actively manage and schedule cases involving self-represented litigants.
8. Insofar as possible, monitor counsel to ensure that a self-represented litigant is not being misled.

A COURTEOUS COURTROOM

9. Start court on time (required in all cases); if delay is unavoidable, apologize and offer a brief explanation.
10. Explain to self-represented litigants that the rude conduct displayed on television shows like *Judge Judy* is not acceptable in a real courtroom, either from them or directed to them.
11. Treat self-represented litigants with patience, dignity, and courtesy (required toward all participants in all court proceedings).
   • Do not make comments or use a tone and manner that are rude, intimidating, harsh, threatening, angry, sarcastic, discouraging, belittling, humiliating, or disdainful.
   • Do not interrupt self-represented litigants unless necessary to control proceedings or prevent discourtesy.
   • Do not engage in protracted dialogues or make off-hand, negative comments regarding their pro se status.
   • Address self-represented litigants with titles comparable to those used for counsel.
   • Avoid over-familiar conduct toward attorneys (for example, using first names, sharing in-jokes, referring to other proceedings or bar events, inviting attorneys into chambers, chatting casually before or after court proceedings).

12. Require court staff and attorneys to treat self-represented litigants (and everyone else) with patience, dignity, and courtesy.

13. Pay attention and act like you are paying attention.
   • If you take notes or refer to books or information on a computer screen during a proceeding, explain what you are doing so the litigants understand that they have your attention.

PLEADINGS

   • Look behind the label of a document filed by a self-represented litigant and give effect to the substance, rather than the form or terminology.
   • Do not ignore an obvious possible cause of action or defense suggested by the facts alleged in the pleadings even if the litigant does not expressly refer to that theory.
   • Consider information in other documents filed by a self-represented litigant.
   • Allow amendment freely.

15. Give a self-represented litigant notice of any substantive defect in a pleading and an opportunity to remedy the defect
unless it is absolutely clear that no adequate amendment is possible.

16. Read all relevant materials and announce that you have done so before making a ruling.

17. Give the rationale for a decision either in writing or orally on the record.

18. When announcing a decision or entering an order, do not use legal jargon, abbreviations, acronyms, shorthand, or slang.

19. If possible, after each court appearance, provide all litigants with clear written notice of further hearings, referrals, or other obligations.

20. Ensure that all orders (for example, regarding discovery) clearly explain the possible consequences of failure to comply.

21. Follow the principle that cases should be disposed of on the merits, rather than with strict regard to technical rules of procedure.

22. Instruct a self-represented litigant how to accomplish a procedural action he or she is obviously attempting or direct them to resources that will provide such instructions.
   • Do not tell a self-represented litigant what tactic to use, but explain how to accomplish the procedure he or she has chosen.

23. If a motion for summary judgment is filed, advise a self-represented litigant that he or she has the right to file counter-affidavits or other responsive material and that failure to respond might result in the entry of judgment against the litigant.

24. Decide all motions filed by a self-represented litigant without undue delay.

**SETTLEMENT**

25. At a pre-trial or status conference, bring up the possibility of settling the matter or referring it to mediation.
   • Encourage, but do not try to coerce, settlement or mediation.

26. If the parties present you with an agreed order settling a case, engage in allocution to determine whether the self-
represented litigant understands the agreement and entered into it voluntarily.
• Explain that if an agreement is approved, it becomes an order of the court with which both parties will be required to comply.
• Determine that any waiver of substantive rights is knowing and voluntary.

PRE-HEARING

27. Explain the process and ground rules (e.g., that you will hear from both sides, who goes first, everything said will be recorded, witnesses will be sworn in, witnesses may be cross examined, how to make an objection).
28. Explain the elements and the burden of proof.
29. Explain the kinds of evidence that can be presented and the kinds of evidence that cannot be considered.
• Explain that you will make your decision based only on the evidence presented.
• Encourage the parties to stipulate to uncontested facts and the admission of as much of the documentary evidence as possible.
30. Try to get all parties and counsel to agree to relax technical rules of procedure and evidence so that the hearing can proceed informally with an emphasis on both sides getting a chance to tell their story.

HEARING

31. Ensure that the notice of hearing unambiguously describes in a way a self-represented litigant can understand that a hearing on the merits is being scheduled and the litigant should be prepared with evidence and witnesses to present the case or defense.
32. Allow non-attorneys to sit at counsel table with either party to provide support but do not permit them to argue on behalf of a party or to question witnesses.
33. Before starting, ask both parties whether they understand the process and the procedures.
34. Call breaks where necessary if a litigant is becoming confused or tempers on either side are becoming frayed (or your patience is running low).

35. Question any witness for clarification when the facts are confused, undeveloped, or misleading.
   • Explain at the beginning of a hearing that you will ask questions if necessary to make sure you understand the testimony and have the information you need to make a decision.
   • Ask the same type of questions of witnesses called by a represented party if warranted.
   • Take care that your language and tone when asking questions does not indicate your attitude towards the merits or the credibility of the witness.

36. Follow the rules of evidence that go to reliability but use discretion and overrule objections on technical matters such as establishing a foundation for introducing documents and exhibits, qualifying an expert, and the form of questions or testimony.
   • If you relax a rule for a self-represented party, relax it for a represented party as well.
   • Require counsel to explain objections in detail.
   • If counsel objects, ask if he or she is arguing that the evidence is unreliable.
   • Explain rulings on evidence.

37. If necessary to prevent obvious injustice, allow a brief recess or adjourn for the day (or longer) to allow a self-represented litigant (or even a represented litigant) to obtain additional evidence or witnesses.

38. Do not allow counsel to bully or confuse self-represented litigants or their witnesses.

**The Decision**

39. Announce and explain your decision immediately from the bench with both parties present if possible unless the volatility of the proceedings suggests that a written decision would be preferable to prevent outbursts and attempts to re-argue the case.
40. If you decide to take a matter under advisement, inform the parties that you wish to consider their evidence and arguments and will issue a decision shortly.
   • If possible, announce a date by which a decision will be reached.
41. Reach a decision promptly (required in all cases).
42. Issue an order in plain English explaining the decision, addressing all material issues raised, resolving contested issues of fact, and announcing conclusions of law.
43. If asked about reconsideration or appeal, refer the litigant to resources for self-represented litigants on this topic.
44. If asked about enforcement of an order or collection of a judgment, refer the litigant to any resources for self-represented litigants on this topic.