Judicial Techniques for Cases Involving Self-Represented Litigants

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

This article is an attempt to stimulate a national dialogue about how judges can best structure and manage their courtrooms to accommodate the needs of self-represented litigants. The four authors of this article have worked with and written extensively about the judiciary's response to self-represented litigants—persons choosing to appear in court without a lawyer.[1] The numbers of such persons have increased significantly during the past decade. In most states the majority of family law matters now include at least one unrepresented party. Although the situation in Maricopa County, Arizona (where one of us presides), may be extreme, it is instructive: in recent years, roughly 60 percent of all domestic relations cases involve two unrepresented parties, 30 percent of the cases have a lawyer representing one side, and only 10 percent of the cases have lawyers on both sides.

Some laypersons are able to prepare court documents and present their positions effectively in court, but many others are not. Their lack of knowledge of the law and its rules imposes burdens on the judges and court staff. Courts throughout the country have responded by providing assistance such as easy-to-use forms; simplified instructions; printed and online information about substantive and procedural law; and direct assistance from court staff, often referred to as courthouse or family law facilitators. Much has been written about these programs, and many of them have been evaluated and found to be valuable to both litigants and the courts.[2]

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

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

This is not the first article to address this issue. In 2002 Dr. Jona Goldschmidt published an article entitled "The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance" in *Family Court Review*.[3] He views judicial reluctance to assist self-represented litigants as arising from the traditional passive role of the judge in the adversary process and judges' basic antipathy, as lawyers, to self-representation. We discuss Dr. Goldschmidt's approach and recommendations later in this article. We hope that these two discussions will serve as the foundation of a rich written literature on this difficult topic—and that trial judges will participate actively in building this body of work.

As will become clear in the discussion of the case law, many judicial statements say that self-represented litigants should be held to the same rules as attorneys. For example, in promulgating a new set of forms for use in uncontested divorce and paternity cases in New Mexico, the New Mexico Supreme Court recently included the following statement: "A self-represented person must abide by the same rules of procedure and rules of evidence as lawyers. It is the responsibility of self-represented parties to determine what needs to be done and to take the necessary action."[4] Taken literally, this

requirement would bring to a grinding halt every domestic relations case involving a self-represented litigant in New Mexico. Trial judges would wait for unrepresented litigants to present their cases as lawyers—with opening statements, qualified witnesses, direct and cross-examinations of witnesses using classic question and answer techniques, properly introduced and identified documents, and completely proven cases—before ordering relief. In fact, this standard is widely ignored by trial judges, who need to hear litigants' testimony, resolve disputed issues, enter appropriate orders, and remove the cases from their court calendars. The alternative is to routinely dismiss every case filed without a lawyer.

In fact, trial judges do not even apply this approach to cases involving attorneys. Several years ago, former Florida Chief Justice Major Harding recounted the following story in convening a statewide conference on self-represented litigants. 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 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.

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

Why would this common-sense approach to dispensing justice leave judges feeling as though they have departed from their proper judicial role? Let us review the Canons of Judicial Ethics and the decided cases to shed light on the problem.

The Canons of Judicial Ethics

Canon 3 of the American Bar Association's Model Code of Judicial Conduct (2000)[5] reads: "A judge shall perform the duties of judicial office impartially and diligently." Subsection 3B sets forth the following Adjudicative Responsibilities:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Note: Idaho has developed a draft protocol for its trial judges derived from the Minnesota protocol.

impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.]

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

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

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

In a 1999 Decision and Order Imposing Public Censure,[6] the California Commission on Judicial Performance reprimanded a San Bernadino County Superior Court judge for nine instances of failure to respect the rights of unrepresented individuals. All but one of the incidents arose in the context of criminal matters; the exception concerned a juror who was incarcerated for being late to court without being informed of his rights in a contempt hearing.

In a 1997 Advisory Opinion, the Indiana Commission on Judicial Qualifications[7] concluded, "a judge's ethical obligation to treat all litigants fairly obligates the judge to ensure that a pro se litigant in a non-adversarial setting is not denied the relief sought only on the basis of a minor or easily established deficiency in the litigant's presentation or pleadings." The opinion, limited to non-adversarial matters, addressed situations such as a litigant's failure to aver that a name change was not sought for a fraudulent purpose, or a married couple's inadvertent failure to plead their county of residence. The commission stressed that a judge has no obligation to "cater to a disrespectful or *unprepared pro se* litigant" or to "make any effort on behalf of any citizen which might put another at a disadvantage." It also stated that a judge should not "normally 'try a case' for a litigant who is wholly failing to accomplish the task."

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

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

Social science sheds some interesting light on this issue. In a 1988 study of what causes a litigant to view a proceeding as fair, Tom Tyler found that the ability to present one's case was much more important to the litigant than his or her perception of the judge's impartiality.[8]

Case Law

In *Faretta v. California*,[9] the U.S. Supreme Court recognized a Sixth Amendment right, made applicable to the states through the Fourteenth Amendment, of self-representation in a criminal matter. The Court limited that ruling in 2000 by holding, in *Martinez v. Court of Appeal of California*,[10] that a convicted person has no similar right to self-representation in a direct criminal appeal.

In a speech to the Massachusetts

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

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

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

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

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

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

***Bates v. Jean*, 745 F.2d 1146 (8th Cir. 1984).** The Federal Court of Appeals reversed a dismissal of a state prisoner's civil rights suit against a prison guard for cruel and unusual punishment on the grounds of inconsistency of special jury verdicts, even though the prisoner—representing himself—did not object to the inconsistent verdicts at trial. The court stated it "usually accord[ed] pro se litigants somewhat greater flexibility than attorneys" with regard to waiver of objections, noting that "the question of consistency of special verdicts in this case

requires a greater degree of legal sophistication than we ordinarily demand of pro se prisoner litigants." The court noted that the trial judge merely asked the prisoner, "Do you have anything at this time, Mr. Bates?" and compared the generality of the judge's question to the specificity of another judge's question in a previous case involving special verdicts. There, the trial judge, addressing counsel, stated, "Gentlemen, there seems to be a discrepancy between the answer to the interrogatory and the verdict. Do either of you desire that I explain this matter to the jury and to ask them to return to the jury room for further deliberation?" In a footnote, the *Bates* court stated:

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

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

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

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

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

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

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

Alaska has an interesting series of cases on these issues.

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

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

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

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

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

with affidavits or by amending the complaint." In *Sopko* the court found the court's advice proper.

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

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

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

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

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

> We further note that pro per litigants are not entitled to special exemptions from the California Rules of Court or Code of Civil Procedure. (*Rappelyea v. Campbell, supra.*) They are, however, entitled to treatment equal to that of a represented party. Trial judges must acknowledge that pro per litigants often do not have an attorney's level of knowledge about the legal system and are more prone to misunderstanding the court's requirements. When all parties are represented, the judge can depend on the adversary system to keep everyone on the straight and narrow. When one party is represented and the other is not, the lawyer, in his or her own client's interests, does not wish to educate the pro per. The judge should monitor to ensure the pro per is not inadvertently misled, either by the represented party or by the court. While attorneys and judges commonly speak (and often write) in legal shorthand, when a pro per is involved, special care should be used to make sure that verbal instructions given in court and written notices are clear and understandable by a layperson. This is the essence of equal and fair treatment, and it is not only important to serve the ends of justice, but to maintain public confidence in the judicial system.
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> The confusing, indeed misleading, nature of the various orders and communications that Gamet received from the trial court is particularly important in light of Gamet's (involuntary) pro per status. As noted above, pro per litigants are not entitled to any special treatment from the courts. But that doesn't mean trial judges should be wholly indifferent to their lack of formal legal training. Clarity is important when parties are represented by counsel. How much more important is it when one party may not be familiar with the legal shorthand which is so often bandied around the courtroom or put into minute orders?
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> There is no reason that a judge cannot take affirmative steps—for example, spending a few minutes editing a letter or minute order from the court—to make sure any communication from the court is clear and understandable, and does not require translation into normal-speak. Judges are charged with ascertaining the truth, not just playing the referee. A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits. Judges should recognize that a pro per litigant may be prone to misunderstanding court requirements or orders—that happens enough with lawyers—and take at least some care to assure their orders are plain and understandable. Unfortunately, the careless use of jargon may have the effect, as in the case before us, of misleading a pro per litigant. The ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system. (citations omitted)

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

> My colleagues recognize in one sentence the hoary but still vigorous rule that "pro per litigants are not entitled to any special treatment from the courts," but devote several paragraphs to setting out the kinds of special treatment trial judges will be obliged to accord them under this opinion.
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> Pro per litigants have become more common in recent years and seem destined to become a much larger portion of the trial court docket than they have been in the past. It may be time to reassess our case law regarding them. And while I agree with much that is said in the majority opinion, and might be prepared to

> give a second look to our rules regarding pro per litigants, I think an ad hoc reversal which tells trial judges to treat pro pers the same as they treat represented litigants—only different—accomplishes little in the way of addressing the problem and does a disservice to the people who must deal with pro pers every day.

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

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

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

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

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

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

***Brown v. City of St. Louis*, 842 S.W.2d 163 (1992).** The Missouri Court of Appeals, Eastern Division, reviewed a trial court's affirmance of a Labor and Industrial Relations Commission dismissal of a claim for workers' compensation. After noting that the appellant filed a "nonsensical" brief with "no discernible relationship to the orders from which appellant purports to appeal,"[15] the court noted in typical language that "[a]lthough an appellant has the right to act pro se on appeal, he or she is bound by the same rules of procedure as attorneys and is entitled to no indulgence that would not have been given if the appellant were represented by counsel," and that the appeal was subject to dismissal for failure to comply with the appellate rules. The court nonetheless proceeded to dispose of the appeal on the merits: it affirmed the trial court. The court also noted that the appellant had been notified that his original brief did not comply with the appellate rules and was given an opportunity to file an amended brief. In sum, while stating the opposite principle, the court in actuality accorded the self-represented litigant different treatment than he would have received had he been represented by counsel (the opportunity to amend his brief and not dismissing the appeal for failure to file an acceptable brief and record).

***Boyer v. Fisk*, 623 S.W.2d 28 (1981).** The same court reversed a trial court's vacating of a default judgment entered against a self-represented couple. The couple had partially filled in a form at the courthouse that stated "(no) cause of action" but did not sign it as an answer to a civil complaint, relying on assurance from the clerk's office that the filing was sufficient and they would be notified of a trial date. The court of appeals reinstated the default judgment, finding that the self-represented litigants did not exercise reasonable diligence in relying on the statements of the clerk and in failing to send a copy of their "answer" to plaintiff's counsel as required on the face of the summons.

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

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

continued on page 42

Judicial Techniques

(continued from page 23)

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

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

> While pro se litigants in some circumstances deserve some leniency with regard to waiver of rights, the rule applies only to *pro se* prisoners. . . . We recognize that the confinement of the prisoner and the necessary reasonable regulations of the prison, in addition to the fact that many prisoners are "unlettered" and most are indigent, make it difficult for a prisoner to obtain legal assistance or to know and observe jurisdictional and procedural requirements in submitting his grievances to a court. These concerns have not been extended to persons who are not incarcerated (internal citations omitted).

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

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

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

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

> **Majority:** Although the defendant on numerous occasions departed from the rules of trial court practice, his excursions were usually cut short by objections which were sustained and repeated until the defendant conformed to proper procedures. The defendant was not permitted to do as he pleased. Furthermore, the trial court took steps to make sure that the defendant's unorthodox questions did not confuse the jury. Whenever necessary, the trial judge would make his own brief and limited examination of a witness in order to clarify the testimony. The court also guided the defendant through parts of his own testimony in order to avoid a long narrative on irrelevant matters.
>
> Considerable latitude must be allowed a judge in conducting a trial. The conduct and remarks of the judge are grounds for reversal only if they are such as would ordinarily create prejudice in the minds of the jury. We find that the judge remained within his proper provinces in the present case. The judge gave due consideration to the defendant's pro se status but was never reluctant to sustain the plaintiff's objections when necessary. Although the judge would carefully explain to the defendant why certain objections were being sustained, there is no evidence that he conducted the defendant's case for him or failed to remain impartial.
>
> As any judge or lawyer knows, the conduct of a jury trial with a pro se litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. There is no law that requires a litigant to have a lawyer. The lawyer for the opposing side cannot be expected to advise the opposing party who is pro se. The judge cannot presume to represent the pro se party. In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides. We believe that Judge Cerri adequately faced up to that high responsibility in this case (footnote and citation omitted).
>
> **Dissent:** At the conclusion of her examination of defendant, the trial court explained to defendant the tactical alternatives available to him—

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

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

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

A Suggested Synthesis

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

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

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

These contrasting standards give very different messages to the trial judge attempting to cope with an

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

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

- The law must produce a consistent outcome for all litigants, regardless of their legal representation, based on the law and facts of their case. The real message behind the statement that self-represented litigants must follow the same rules as attorneys is the fundamental idea that an unrepresented litigant cannot obtain relief from the court in cases in which a party represented by an attorney would not prevail. The outcome of the matter should be directly related to the merits of a party's case. An unrepresented party must meet the same legal standards for obtaining a judicial remedy as a party represented by counsel and should receive no sympathy or other advantage because of choosing to proceed without a lawyer.
- The "hard" procedural bars—pertaining to statutes of limitations, availability of administrative remedies, and time limits for filing an appeal—apply equally to unrepresented and represented litigants. Some of the cases do not support this principle, but the majority do. These procedural bars are fundamental rules governing the legal process. For the most part, appellate courts are uncomfortable applying them differently to different parties for any reason—and particularly not because they are or are not represented by counsel.
- "Soft" procedural bars—pertaining to contemporaneous objection, raising issues on appeal, or vacating a default judgment—can be mitigated for unrepresented litigants. The issue becomes murkier when it involves failure to preserve error by stating an objection on the record in the trial court, or in applying the standard for relief from a default judgment. Whether or not to apply these matters falls within the equitable discretion of the trial court. An appellate court can always decide an issue not raised by a party when it discovers "fundamental error." It can waive the contemporaneous objection rule for the same reason. Relief from a default judgment does not create the same degree of prejudice to the other party as overturning a decision on the merits. So, in exercising inherently equitable principles, judges are more likely to consider the ignorance and inexperience of an unrepresented party. If the unrepresented party did all that a reasonable person in the situation could do, that factor will weigh in the person's favor. If the individual appeared to scorn the court's rules and directives, the facts will weigh in the other direction. This is as it should be.
- Courts will grant unrepresented litigants enormous leeway in both form and content of the documents they file. This standard is universally observed. Of course courts cannot and will not assert a claim for a party that the party has not raised. This is the point of the Alaska cases, imposing the duty to assert individual rights on the self represented litigant.
- Judges will help assure that a litigant has an opportunity to present evidence in court, so long as the judge does not prejudice the other side in doing so. The only reported case we discovered is *Oko v. Rogers.* We repeat the majority's analysis in that case:

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

- Judicial efforts to enable unrepresented litigants to present their cases should be limited to assistance to the party in accomplishing the party's own strategy, not in suggesting a different or better strategy. So long as the judge is merely facilitating the unrepresented litigant's presentation of his or her own case—as the litigant has conceived it—the judge can be seen to be giving the party "legal information" about how to do in court what the party seeks to accomplish. The judge would lose his or her impartiality and "become the advocate" for the unrepresented litigant if the judge gives "legal advice" such as tactical or strategic recommendations for how the case should be presented—what witnesses to call, what arguments to make, what additional evidence to seek.

As the majority in *Oko v. Rogers* pointed out, the trial judge can ensure the self-represented litigant's right to be heard without departing from the judge's duty to remain impartial. The duty of ensuring both parties' right to be heard is not inherently in conflict with the duty to remain impartial. We believe this position will be adopted by other appellate courts when and if they address the practical problems facing the trial judge in similar cases. We also believe that trial judges can use a number of practical techniques to reduce the appearance of such a conflict.

Judicial Techniques

As noted earlier, our analysis of issues facing the trial judge is somewhat different from that of Dr. Goldschmidt in his *Family Court Review* article. Although we agree that trial judges cannot maintain a passive role, we do not necessarily espouse all of his specific recommendations for a more active role for judges and court staff.[16] We address some of his recommendations in the following discussion, which is divided into three areas: general principles, specific approaches to cases involving two unrepresented litigants, and cases involving the more difficult situation where one party is represented and the other is not.

General Principles

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

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

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

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

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

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

Even if materials have been provided in advance, the hearing or trial should begin with the judge's review of all three topics—explaining how the proceeding will be conducted, the legal elements of the matter, and types and forms of acceptable evidence. Judge Albrecht explains that each party will have an opportunity to present its position (or tell its story), that she will ask questions as needed to obtain additional information, and that she will apply the rules of evidence in deciding what weight to give the evidence presented.[17] She also explains that she may interrupt either party—if she believes she does not understand the point being made, has heard enough on the point, or if she believes the party is going into an area that is not legally relevant—and ask that the individual move to the next point.

To the extent judges give general instructions in advance to both parties, they minimize the likelihood that their

instructions can be perceived as favoring one party. The Minnesota Protocol on page 18 provides an excellent outline for these preliminary instructions.

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

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

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

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

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

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

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

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

Cases Involving Two Unrepresented Parties

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

● Swear both parties at the beginning of the proceeding. When both parties are sworn, distinctions between their arguments and their testimony are not necessary. All statements made by the parties can now be considered as evidence. The judge should explain that the parties must remember they are

under oath throughout the hearing or trial and that anything they say—as a question, statement, or argument—must be truthful.

- Maintain strict control over the proceedings. Most self-represented litigants are respectful of the court and will conduct themselves in a dignified manner. However, especially in family law matters, emotions often flare, and the judge should quickly terminate arguments and calm anger. Recessing for a moment may be necessary to give the parties a chance to regain their composure. The judge must be alert and set and enforce clear ground rules, especially that the parties may not interrupt each other and that each will have an opportunity to be heard. The judge may need to use the contempt power or authority to dismiss the lawsuit for abuse of the legal process as a threat to restrain inappropriate behavior.
- Remain alert to imbalances of power in the courtroom. The judge must ensure that both sides have a full opportunity to present their points of view, especially where it is clear that one of the parties has more power (relationships involving domestic abuse, disputes in which one party is far more sophisticated than the other, or situations in which one of the parties has a limited knowledge of English). Judges should make a special effort here to ask the less powerful party its views on each issue or even to draw out those views with follow-up questions. The judge should not rely on the party's ability to take the initiative or to speak proactively. In extreme cases, the judge should continue the matter and seek pro bono legal representation for one or both parties.

Cases Involving Represented and Unrepresented Parties

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

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

- Convince the attorney of the benefits of proceeding informally. The judge can call the attorney to the bench, explain the reasons for the informal structure, and convince the lawyer to withdraw the objection. The judge can point out that going through the question and answer process will take much more time—for the judge, the attorney, and the attorney's client—and could be much more difficult and frustrating for everyone concerned.
- Overrule. The judge can overrule the objection on the grounds that it would be a waste of judicial resources to proceed in formal compliance with the rules of evidence.
- Set special ground rules for the conduct of the proceeding under the rules of evidence. The judge can inform counsel that if the matter proceeds under the formal rules of evidence, the lawyer will be required to explain to the unrepresented litigant the basis for any objection the attorney makes, with enough detail so that the unrepresented litigant can take whatever corrective steps are needed to proceed. For example, if the attorney objects to a leading question, the attorney would need to explain the objection sufficiently so the self-represented party would be able to pose an appropriate non-leading question.

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

- Refuse to uphold objections to the form of questions or testimony. The judge can decide not to entertain objections to the form of questions or testimony and limit such objections to only the admissibility of the evidence itself. For instance, if the attorney objects to the manner in which the self-represented litigant attempts to introduce a document, the judge can cut to the ultimate question: "Counsel, does your client contend

that this document is either inadmissible or something other than what it purports to be?" The lawyer thus can protect the client's interests without prolonging the process or requiring the judge to provide additional assistance to the litigant.

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

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

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

Conclusion

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

Notes

1. *See* John M. Greacen, *No Legal Advice from Court Personnel: What Does That Mean*, JUDGES' J., Winter 1995, at 10; J. Greacen, *Legal Information vs. Legal Advice: Developments during the Last Five Years*, JUDICATURE 84 (2001), at 198; Richard Zorza, *Reconceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*; 67 FORDHAM L. REV. 2659 (1999); R. ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (National Center for State Courts 2002).

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

3. FAM. CT. REV., vol. 40, no. 1 (Jan. 2002). *See also* Russell Engler, *And Justice for All–Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* (1988).

4. Form 4A-201 B, District Court Rules of Procedure for Domestic Relations Matters, Responsibility of Self-Represented Party.

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

6. State of California, Commission on Judicial Performance, Inquiry Concerning Judge Fred L. Heene, Jr., No. 153 (Oct. 13, 1999).

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

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

9. 422 U.S. 806 (1975).

10. 528 U.S. 152 (2000).

11.Margaret H. Marshall, Massachusetts Conference on Pro Se Litigants (Mar. 15, 2001) (unpublished speech) (on file with author).

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

13. Eagle Eye Fishing Corp. v. U.S. Dep't of Commerce, 20 F.3d 503 (1st Cir. 1994); Malik v. Coughlin, 506 N.Y.S.2d 844 (N.Y. Sup. 1986); Conn. Light & Power Co. v. Kluczinsky, 370 A.2d 1306 (Conn. 1976).

14. *See supra*, note 4

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

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

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

18. ZORZA, THE SELF-HELP FRIENDLY COURT, *supra* note 1, at 75.

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