

# IMPLEMENTATION TOOLS FOR

FAMILY  
JUSTICE  
REFORM



CIVIL  
JUSTICE  
REFORM



## ENSURING THE RIGHT TO BE HEARD: GUIDANCE FOR TRIAL JUDGES IN CASES INVOLVING SELF-REPRESENTED LITIGANTS



***These implementation tools were developed by IAALS to support real change on the ground. Each guide is designed to provide the information necessary to help judges, lawyers, court administrators, and others to understand the problems facing our system and the people who use it—and to make improvements that will increase access and bolster public trust and confidence.***

This guide stems from IAALS' work alongside the Conference of Chief Justices (CCJ), the Conference of State Court Administrators, the National Center for State Courts, and the National Council of Juvenile and Family Court Judges on the Civil Justice Initiative and the Family Justice Initiative. In recent years, CCJ launched both initiatives—and developed recommendations and principles—to guide state courts and family courts in better meeting the needs of those who need access to the courts, decreasing cost and delay, and improving case processing. IAALS has been a proud and long-time partner in these national civil and family justice reform projects.

As these sister efforts gain momentum, IAALS is working to support courts implementing these reforms by developing a variety of resource guides like this one, in partnership with national experts.

**ENSURING THE  
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GUIDANCE FOR TRIAL JUDGES  
IN CASES INVOLVING  
SELF-REPRESENTED LITIGANTS**

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November 2019

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INSTITUTE *for the* ADVANCEMENT  
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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a “think tank” that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative and practical solutions to problems within the American legal system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

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# ACKNOWLEDGEMENTS

We express our gratitude to the following judges, who lent their time, thoughts, and expertise for this guide.

- **Hon. Jennifer Bailey**, Eleventh Judicial Circuit, Florida
- **Hon. Gina Beovides**, Eleventh Judicial Circuit, Florida
- **Hon. Kevin Burke**, Fourth Judicial District, Minnesota
- **Hon. David Dreyer**, Superior Court of Marion County, Indiana
- **Hon. Sherrill Ellsworth (Ret.)**, Superior Court of Riverside County, California
- **Hon. Mark Juhas**, Superior Court of Los Angeles, California

# INTRODUCTION

The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) have adopted basic recommendations for improving the processing of both civil and family cases in state courts through their Civil Justice Initiative and Family Justice Initiative.<sup>1</sup> IAALS, the National Center for State Courts (NCSC), and the National Council of Juvenile and Family Court Judges (NCJFCJ) helped develop these initiatives and are supporting implementation of their recommendations in pilot jurisdictions around the country—and evaluating their efficacy. Alongside this work, IAALS is developing more detailed guidance for the pilot courts and others.

The research underpinning these efforts found that roughly three quarters of both civil and family cases today involve at least one self-represented party, someone who navigates the court system without a lawyer.<sup>2</sup> Yet, the rules, procedures, and practices of the general jurisdiction trial court assume the presence of lawyers on both sides of civil and family cases, and cases involving one or more self-represented litigants have been treated as the exception. The reality today is the reverse: cases with lawyers on both sides are in the minority in terms of the court's overall civil and family filings.

The CCJ/COSCA call to action to simplify and streamline court procedures is premised on the notion “that the courts ultimately must be responsible for ensuring access to civil [and family] justice. Once a case is filed in court, it becomes the court's responsibility to manage the case toward a just and timely resolution.”<sup>3</sup> Both sets of recommendations call for significant assistance for self-represented litigants, emphasizing the responsibility of every aspect of the court, and of all of its staff, to provide guidance to self-represented litigants at every phase of the process. For those cases that go to trial, it is essential that the trial judge be able to modify traditional courtroom practices to make it possible for self-represented litigants to present their cases—to give them the opportunity to be heard—even though they are completely unequipped to perform as experienced lawyers would.

The court systems of most states have not provided the guidance that trial judges need to meet this challenge.<sup>4</sup> The maxim “a person representing himself in court will be held to the same standard as a lawyer” still appears in appellate caselaw in almost every state—even though it is not an accurate summary of appellate decisions, and, if applied literally, would produce manifest injustice.

To help trial judges better manage cases involving self-represented litigants, with the ultimate goal of service to court users,<sup>5</sup> this paper summarizes what research and experience show to be effective practices for resolving cases with one or more self-represented litigants in the courtroom. We begin by summarizing the challenges facing self-represented litigants, followed by the challenges facing trial judges in adjudicating these cases. We then review the ethical standards governing a judge's handling of these cases, the 2011 Supreme Court decision in *Turner v. Rogers*, appellate caselaw in the various states, and other guidance materials available to trial judges. We end with an outline of the practices that have proven most effective for trial judges, giving specific examples of their application in the family law context. We hope this guide provides direction to judges facing the challenges associated with managing cases with self-represented litigants.

## CHALLENGES OF SELF-REPRESENTATION

The 2015 NCSC national study of civil dockets found that at least one party was self-represented, usually the defendant, in 76% of civil, non-family cases.<sup>6</sup> In only 24% of cases were both sides represented by counsel—a dramatic change from research findings less than 25 years ago.<sup>7</sup> A 2018 national study of domestic relations cases conducted by NCSC and IAALS yielded similar results: 72% of cases involved at least one self-represented party, with the petitioner more likely to be represented than the respondent.<sup>8</sup> This trend of increased self-representation in state courts has been noticed in some federal courts as well, and some have even created legal advice clinics, such as the United States District Court for the District of Colorado<sup>9</sup> and the United States District Court for the Eastern District of Missouri.<sup>10</sup>

Ongoing public opinion polls indicate that courts are not doing a good job serving this crucial user base of self-represented litigants. For example, NCSC’s annual surveys of American voters, *The State of State Courts*, gauges voters’ perceptions of state courts. The 2017 survey focused on customer service and found that only 52% of those questioned believe the state courts provide good customer service.<sup>11</sup> The poll demonstrates that litigants’ perceptions of customer service reflect their experiences with the entire court process, not just with judges. Respondents to the 2017 survey report that their most serious concerns are: not knowing where to turn for help with forms and procedures (37%); rude, unhelpful, and intimidating court staff (35%); not knowing where you need to go in the courthouse (29%); the amount of time spent at the courthouse (27%); and not being able to complete forms or pay fees online (24%).<sup>12</sup> Sixty-nine percent think that the customer service situation has not gotten better in recent years.<sup>13</sup> And unfortunately, by a margin of two to one, American voters feel judges are out of touch and do not understand the numerous challenges facing self-represented litigants who appear in their courtrooms.<sup>14</sup>

The 2018 *State of State Courts* survey asked voters questions about their confidence in proceeding in court without a lawyer. The polling company reported this finding:

A broad majority (59%) say “state courts are not doing enough to empower regular people to navigate the court system without an attorney.” Only a third (33%) believe courts are providing the information to do so. By similar margins, 61% of voters say they don’t believe they “could represent myself in court, regardless of what resources and information are provided” while just 36% feel confident in finding the information they need. No group feels empowered or confident on their own, even those with previous court experience or who have said it was easy to locate information in the past.<sup>15</sup>

NCSC’s telephone poll of voters was not large enough to produce meaningful results for individual states or even for regions of the country, so the findings are not necessarily applicable to any particular court. The authors’ experience is that the treatment of self-represented litigants varies significantly from state to state and even from jurisdiction to jurisdiction within the same state, with judges in many courts providing exceptionally good service to this customer base<sup>16</sup>—while others do not.



IAALS' 2016 *Cases Without Counsel* project interviewed self-represented litigants and court personnel in four different parts of the country, documenting the following litigant experiences.<sup>17</sup>

- Difficulty understanding the process, what to expect, and what is expected of them (“You kind of sit in the dark . . . when you don’t have a lawyer, and that’s kind of hard because you don’t really know what’s happening.”);<sup>18</sup>
- Difficulty completing paperwork (“[T]he mistakes I made partway through the process made me have to resubmit and re-document, and delay things.”);<sup>19</sup>
- Difficulty in preparing for trial, including gathering and organizing evidence for presentation (“How can I be prepared? What kind of questions are you going to ask me? What kind of stuff should I bring? What kind of proof do I need? You don’t really know any of that stuff going into it.”);<sup>20</sup>
- Difficulty presenting evidence to the court, including navigating courtroom procedures;
- Feelings of intimidation, isolation, and vulnerability (“I think that if I would not have represented myself and I would have had a lawyer do it, I would have not felt so vulnerable, so bullied, and so much like I had to give up everything.”);<sup>21</sup> and
- Feelings of lack of fairness.

Margaret Hagan of the Stanford University Institute of Design has conducted a series of “design sprints” to learn more about the experiences of people who had recently represented themselves in court. IAALS has sponsored several of these design sprints around the country as part of its *Court Compass* project. Out of these events, we learned that participants wish that the courts would:

- Give me a “sense of control” by making sure that I know what to expect;
- Be “responsive” to my individual needs;
- “Read my mind” to help me express myself in legally correct terminology;
- “Take the burden off me” of needing to know how to perform in a legal proceeding; and
- “Recognize my humanity” by not rebuking or shaming me in public.<sup>22</sup>

We also know that over many different case types, self-representation can adversely impact outcomes.<sup>23</sup> The potential extent of that negative impact was demonstrated dramatically in a recently released study by the Harvard Access to Justice Lab about the effectiveness of the Volunteers for the Indigent pro bono representation program in Philadelphia.<sup>24</sup> Researchers found that while almost half of the cases assigned an attorney had obtained a Philadelphia divorce decree after three years, only one of the 237 cases in which parties proceeded without an attorney had obtained a decree.<sup>25</sup>

# CHALLENGES FACING TRIAL COURT JUDGES IN HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS

Except for some small claims courts in which lawyers are not permitted, the processes of the American legal system presuppose that every party will be represented by a lawyer. The rules and procedures were created to provide for handling of the most complicated cases and are written using specialized legal language and legal concepts that are well understood by lawyers but are, for the most part, unintelligible to the general public.

Self-represented persons face major challenges in navigating these rules and processes. But judges also face significant challenges in dealing with people appearing in court without a lawyer. In the early 1990s, when high legal fees<sup>26</sup> and the “do it yourself” movement started bringing more and more people into court without a lawyer, judges and lawyers were completely unprepared and reacted negatively, with common refrains like:

- “You do not belong here.”
- “I cannot bend the rules because you choose not to have a lawyer.”
- “If I implement special procedures for you, it will just encourage more people like you to come to court without lawyers.”
- “How are lawyers going to make a living if this trend continues?”
- “If I ‘lean over the bench’ to help a self-represented person, I will cease being impartial.”
- “As a judge, I cannot give legal advice to any party.”
- “My role as a judge is to ‘call the balls and strikes,’ not to pitch and hit, run the bases, and shag flies in the outfield.”

As the new reality of litigants without lawyers has persisted over the past 30 years, most of those negative attitudes have dissipated. For instance, the bar in most states has come to accept that most people who self-represent simply cannot afford their services. They have also learned that having efficient court procedures for self-represented persons serves their own best interests because the courtroom moves more expeditiously for the cases in which they do appear. Most judges recognize that they have a duty to provide a fair environment for the resolution of cases in which counsel are not present or are present on only one side. Today’s courts are designing new systems and service offerings around court users’ needs: simplifying forms, providing self-help materials, hosting self-help classes, setting up physical or digital self-help centers, and providing a multitude of online resources and applications to support them.<sup>27</sup> And judges are adapting traditional courtroom practices and tailoring their procedures for persons appearing without lawyers, including most fundamentally the abandonment of their traditionally passive (just “call the balls and strikes”) judicial role.

Despite these changes, very real challenges remain for judges operating in this new environment.

- Lawyers perform many roles in the traditional courtroom process—e.g., selecting jurors, calling witnesses, submitting exhibits, making objections, educating the judge about the nuances of the law applicable to the case, submitting proposed instructions for the jury, and proposing (or arguing about) how a matter should proceed. How can the judge perform all these roles when no lawyers are present?
- When can violations of rules—for instance, those relating to timeliness of filings—be overlooked in the interests of fairness and when does fairness dictate that they must be enforced?
- How is it possible to maintain the appearance of impartiality when the judge is deeply involved in the proceeding? How can the judge ask questions to establish the foundation for evidence submitted by a party without appearing to disbelieve him or her?
- Judges do not give legal advice to a party. Doing so jeopardizes impartiality. What can the judge do when a party is unaware of the law applicable to the matter at hand?
- The U.S. Supreme Court has explained that courts are obligated to provide some help to self-represented litigants. In what situations must the judge provide assistance?
- What happens when one party is self-represented and the other has retained counsel? If there is a lawyer in the case, isn't the lawyer's client entitled to have the case handled in a formal manner?

The remainder of this guide attempts to marshal various resources to provide helpful suggestions for dealing with each of these challenges.

# EXISTING GUIDANCE FOR TRIAL COURT JUDGES

## ETHICAL RULES AND CODES OF JUDICIAL CONDUCT

Rule 2.6 of the American Bar Association (ABA) Model Code of Judicial Conduct (Model Code) requires a judge to “accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law.”<sup>28</sup> Model Code Rule 2.2 requires the judge to “act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary.”<sup>29</sup>

The most fundamental mistake trial judges make is failing to guarantee the right “to be heard according to law” out of fear of losing their “impartiality.” The ABA Standards Relating to Trial Courts, promulgated in 1976, give predominant weight to ensuring the right to be heard: “When litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to insure a fair trial.”<sup>30</sup> Echoing the earlier trial court standards, in 2007 the ABA amended the Model Code, adding the following commentary to Rule 2.2 on impartiality:

To ensure impartiality and fairness to all parties, a judge must be objective and open-minded . . . . *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.*<sup>31</sup>

Some courts of last resort have expanded on this commentary to include a non-exclusive list of examples of such accommodations. Louisiana, for example, provides that judges may do the following:

- 1) Make referrals to resources available to assist the litigant in preparing the case;
- 2) Provide brief information about the proceeding and evidentiary and foundational requirements;
- 3) Ask neutral questions to elicit or clarify information;
- 4) Attempt to make legal concepts understandable by minimizing use of legal jargon; and
- 5) Explain the basis for a ruling.<sup>32</sup>

Richard Zorza, a prolific writer in the realm of access to justice, elegantly notes that judicial passivity is not synonymous with impartiality.<sup>33</sup> He explains that a judge can take an active role while treating both sides impartially and, conversely, that passivity in and of itself does not ensure impartiality (for instance, if one of the parties is being taken advantage of by the other).

## SUPREME COURT CASE LAW

In 2011, the U.S. Supreme Court was asked to hold that due process required the appointment of counsel in a child support enforcement matter in which a noncustodial parent was given six months in jail for contempt of court for non-payment of support.<sup>34</sup> The Court declined to do so. But the Court majority found that the trial court had violated the appellant’s due process rights by failing to employ “substitute procedural safeguards” that were available. It enumerated these safeguards:<sup>35</sup>

- Notice of the defense of inability to pay;
- A form to use for presenting the defense;
- An opportunity to address the issue in court; and
- An express finding on the issue.

Through its holding, the Court introduced the Fourteenth Amendment requirement of due process in analyzing a trial judge's obligations towards unrepresented persons. Although four justices dissented, no justice suggested that providing this information, which benefitted only one of the two parties before the court, violated the judicial duty of impartiality. And the decision, in even its most narrow interpretation, put to rest the notion that a judge may not give legal advice to a party; it held that the *failure* to give legal advice about the affirmative defense of inability to pay in a contempt proceeding for nonpayment of child support violated due process. Of course, there remains a significant line to be drawn between informing a party about the law and legal procedures and providing tactical advice on how to use the law to his or her personal advantage.

Although clearly beyond its precise holding, *Turner v. Rogers* provides the basis for articulating a right to “informational justice” for self-represented parties. In order to participate effectively in a legal matter, both parties need to have a clear understanding of:

- The procedural posture of the case—What is at stake in the hearing? What is the moving party seeking? What are the possible outcomes?
- The legal requirements for granting the moving party's request—What are the legal elements that must be established? What is the standard of proof that must be met? What sort and types of evidence can be presented to meet those requirements?
- The affirmative defenses available to the other side, if there are any.<sup>36</sup>
- How the hearing will be conducted and what rules must be followed.

Much of this information is currently available on court and civil legal aid websites in most states. Indeed, 48 states and all federal courts provide websites with some forms and self-help content.<sup>37</sup> Court staff can provide this information to self-represented litigants well in advance of a hearing so that they can use it to understand their situation and prepare for their presentation. But the trial judge cannot assume that self-represented parties have taken advantage of those resources or that they have understood the information presented there.<sup>38</sup> The judge should stay attuned to this issue during a hearing and briefly explain the law in a way that the parties will understand if they seem to be floundering. If an issue is common to multiple cases on the same docket—such as motions to modify custody and visitation or the amount of child or spousal support—the judge (or a short video) can present the information at the beginning of that calendar for all parties present. This is not a new process for trial judges who often give group advisements before arraignment and status conference calendars.

As will be explained later, laying this informational groundwork at the beginning of a calendar call, hearing, or trial significantly improves the likelihood of a just outcome to the proceeding. Additionally, it eliminates many of the procedural concerns that arise in appellate case law.

## STATE APPELLATE COURT CASE LAW

*Judicial Techniques for Handling Cases Involving Self-Represented Litigants*<sup>39</sup> explores exhaustively the appellate precedents at the time of its publication (2003) bearing on a judge's role in dealing with self-represented litigants in the courtroom. The authors point out that appellate courts' use of the maxim "self-represented litigants will be held to the standard to which attorneys will be held" is a classic case of "dictum"—the statement of a legal principle unnecessary to the holding of the case.<sup>40</sup> It is also a demonstrably incorrect summary of the court's analysis of the trial judge's actions in the cases under review.

Invariably, the appellate opinions explored in the article recited significant steps that the trial judge took to assist unrepresented parties, then recited the maxim to affirm the trial judge's decision not to provide even more assistance. Instead of criticizing the trial judges for taking the steps they took to assist self-represented litigants (which would be called for if the appellate court was serious that they should be treated the same as lawyers), the appellate judges invariably *praised* the trial judge for her or his efforts in providing special assistance. Unfortunately, today's appellate courts continue to recite the maxim and some trial judges take them literally. But, even though no appellate court appears to have expressly rejected the maxim, most trial judges today understand that it is, for the most part, obsolete and irrelevant to their handling of civil cases involving one or more self-represented litigants.

The New Mexico Supreme Court has interpreted the maxim in the opposite direction. In proposing a new rule regarding unbundled legal services in 2004, the court reiterated the rule that "in New Mexico courts, attorneys and self-represented litigants are held to the same standards." But, the court continued on to say that "New Mexico courts are lenient with both attorneys and self-represented litigants when deemed appropriate so that cases may be decided on their merits."<sup>41</sup>

There have been instances in which appellate opinions have created a mandatory obligation towards self-represented parties; the U.S. District Courts and Alaska trial courts require that the court advise a party responding to a motion for summary judgment that includes an affidavit that the party must submit a countervailing affidavit or the other party's affidavit will be deemed to have established the facts set forth in it.<sup>42</sup> But, for the most part, appellate courts have simply recognized a trial court's wide discretion to vary court processes to meet the needs of a person appearing without counsel. California's intermediate court of appeal has gone the farthest in holding that the failure to exercise discretion constitutes an abuse of discretion.<sup>43</sup>

In the last ten years, there have only been two appellate precedents finding that a trial judge went too far in assisting a self-represented litigant. In 2006, the Iowa Supreme Court, in *In the Matter of S.P.*, held that a trial judge had improperly taken an adversarial role when it ordered a person involuntarily committed for drug treatment based on evidence elicited by the judge's own questioning of the petitioners.<sup>44</sup> The court's opinion, while not prohibiting a trial judge's asking questions, stated that "any effective questioning will inevitably lead to the heart of the case. When the court itself directs the case in this way it is marshaling or assembling the evidence" with the judge necessarily losing impartiality.<sup>45</sup> In New York, the intermediate appellate court reversed a child support magistrate for using a report prepared for the court by the state child support enforcement agency as the evidentiary basis for determining the child support payment history and therefore how much support was still owed.<sup>46</sup> Neither of these decisions have been followed elsewhere.

## PROCEDURAL FAIRNESS CONSIDERATIONS

Judges and lawyers tend to judge the fairness of a proceeding by their perception of the fairness of the *outcome* of that proceeding. Did the right party prevail? Did she or he obtain an appropriate sentence or award of damages? One result of this sort of thinking is that most judges are convinced that, at best, only half of the litigants who appear before them will ever be satisfied with their decisions. The litigants who win will be happy and the litigants who lose will be unhappy. Judges perceive themselves to be in a “no win” situation—there is nothing they can do to change the fact that half of the participants in any case will leave the courthouse unhappy.

However, social science research shows that the general public, including litigants, do not view fairness in the same way. While they do care about the outcome of their case, they care more about the fairness of the *process* that produces the outcome. They understand that everyone cannot win in court and that there are at least two sides to most arguments. Consequently, it is possible that a winning party will leave the courtroom unhappy. Researchers have heard winning parties say things like, “I have never been so humiliated in my life; I will never subject myself to such abuse again.” And losing parties, including criminal defendants found guilty and sentenced to long prison terms, frequently rate their court experience as fair. So, judges are actually in a “win-win” situation; if they conduct a court proceeding in a way that all participants consider to be fair procedurally, judges can achieve very high levels of satisfaction with their rulings.

There is also some evidence that persons who perceive that they are treated more fairly during a proceeding are more likely to comply with an order resulting from the proceeding. For instance, parties in mediation sessions that they rated as being fairer were more likely to implement a mediated agreement six months after the session than parties who rated the session as less fair.<sup>47</sup>

The top four factors that contribute to perceptions of high levels of procedural justice are the same in all of the studies:<sup>48</sup>

- *Participation*—Did the party have the opportunity to participate in the process, such as by being able to present his or her case in court?<sup>49</sup>
- *Neutrality*—Did the judge treat all parties the same? Did the judge base the decision on objective factors, such as stated legal rules, or on the judge’s personal values and biases?
- *Trustworthiness*—Did the judge care about the case and the litigants? Was the judge concerned about the litigants’ situation? Was the judge trying to do what was right for the litigants? Was everything done in the open?
- *Treatment with dignity and respect*—Was the party treated as a person and as a valued member of society?

Judges Kevin Burke of Minnesota and Steve Leben of Kansas have written and spoken extensively on this topic. Their materials provide excellent guidance for trial judges dealing with self-represented litigants.<sup>50</sup>

## BENCH BOOKS AND RELATED MATERIALS

Some state courts of last resort have tried to provide better direction to their trial bench. Minnesota,<sup>51</sup> Massachusetts,<sup>52</sup> Delaware,<sup>53</sup> and Illinois<sup>54</sup> have provided general guidance for trial judges. Some of the guidance consists of broad statements and some is more specific. All of these policy statements inform trial judges that they have the *discretion* to assist self-represented litigants in a variety of ways; none delineate when a judge *must* provide such assistance.<sup>55</sup>

California has created a complete bench book for judges on the topic.<sup>56</sup>

The Self-Represented Litigation Network, the National Judicial College, NCJFCJ, NCSC, and individual state judicial education programs offer judicial training curricula on presiding over cases involving self-represented litigants, including video examples of effective judicial practices.<sup>57</sup>



# PROVEN PRACTICES AND GUIDELINES

## CASES INVOLVING SELF-REPRESENTED LITIGANTS GENERALLY

**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 the outcome of every matter should be directly related to the merits of each party's case. A self-represented litigant must not prevail simply because she or he does not have legal counsel. Just like a represented party, an unrepresented party must present evidence that meets the legal standards for obtaining a judicial remedy; she or he should not be relieved of making a sufficient showing because they did not hire a lawyer. The converse is also true. In every state, all persons have a fundamental legal right to bring their matters before the court without legal representation; exercise of that right cannot be a reason to prejudice the court against them.

**“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.** 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, including whether the parties are represented by counsel.

**Courts should grant leeway when self-represented litigants miss deadlines that do not represent “hard” procedural bars.** As the New Mexico Supreme Court noted in 2004, courts should always favor decisions that allow cases to be decided on their merits.<sup>58</sup> That includes excusing failures to file a timely answer, failures to identify witnesses and exhibits in advance, failures to comply with discovery requirements, etc. Of course, repeated failures to comply with the same requirement (e.g., continuing failure to produce required documents during discovery) can be seen as scorning the court's rules and directives, with appropriate negative consequences.

**Courts should grant self-represented litigants leeway in both form and content of the documents they file.** This standard is universally observed. Courts can inform the parties of the correct legal characterization of the relief being sought if the moving party has used incorrect legal terminology. The court can also allow a matter to be raised for the first time at a hearing. In some jurisdictions, this requires consent of the other party, and the other party will very often consent to avoid the need to come back to court to deal with the matter; if the other party does not consent, the court can allow a continuance so that both parties can address the newly asserted matter.<sup>59</sup>

**Many states have adopted rules that either relax or completely remove the rules of evidence.** The Idaho Supreme Court adopted special rules of civil procedure for family cases in 2015<sup>60</sup> that provide that the rules of evidence do not apply in family law matters unless both parties stipulate that they will apply. In Alaska, the rules of evidence can be disregarded in certain domestic relations trials unless one of the parties objects.<sup>61</sup>

In Oregon, the rules of evidence do not apply in “simplified trial” cases when both parties agree to use that mechanism.<sup>62</sup> While this degree of latitude is not incorporated into written rules across the county, overall, trial courts have a great deal of discretion whether and how to apply rules of evidence to ensure a fair trial on the merits.

**Courts are responsible for the legal sufficiency of their rulings.** The Supreme Court in *Turner v. Rogers* held that the court, not the defendant, had a duty to raise the defense of inability to pay and to educate the defendant sufficiently to enable him to present evidence to prove that the defense applied in his case. Similarly, the Conference of Chief Justices in its 2016 *Call to Action* report included the following recommendation: “Courts must implement systems to ensure that the entry of final judgments complies with basic procedural requirements for notice, standing, timeliness, and sufficiency of documentation supporting the relief sought.”<sup>63</sup> Further, recognizing that defendants may lack legal representation in certain collection cases, some states have adopted revised procedures requiring plaintiffs to plead the existence or not of applicable affirmative defenses, or requiring the court, not the debtor, to apply debtor exemptions.<sup>64</sup>

**The judge should be guided in her or his conduct of a hearing or trial by the model of an impartial officer attempting to obtain the information needed to render a fair judgment in the matter.** This will include the judge’s exploring—through neutral and open-ended questions—the relevant evidence that both parties present. The judge will, on rare occasions, face the need to ask follow-up questions to test the basis for and credibility of submitted testimony or evidence. The judge will also, on occasion, as justice requires, feel the need to explore the availability of alternative claims or evidentiary bases for relief and for the existence of additional affirmative and other defenses.

Judges presiding over dockets with large numbers of self-represented litigants will, in many ways, perform more in the form of the inquisitorial, rather than the adversarial, model.<sup>65</sup> This approach is not entirely free of complicating factors—Professor Anna Carpenter’s exploration of the judge’s role in workers’ compensation cases points out some of the difficulties that those judges face.<sup>66</sup> Her work shows the importance of research in this largely unexplored area of judicial practice.

**The court always has the ability to postpone a matter and refer a party to a source for assistance in understanding and preparing the case.** When a court has a self-help center in the courthouse, it may be possible simply to postpone a hearing until the end of a calendar, or to the afternoon, instructing one or both of the parties to consult with the self-help staff before returning to court. This process will be furthered significantly if the judge provides a written note to the self-help staff on the assistance needed by the referred party or parties.<sup>67</sup> If this resource is unavailable, the court can refer appropriate parties to legal aid or pro bono attorneys, to attorneys who are willing to provide unbundled services, to videos or live clinics for self-represented litigants, to law or public libraries, or to other special resources in the community.

## CASES IN WHICH ONE OF THE PARTIES IS REPRESENTED BY COUNSEL

A number of trial judges report that this situation gives them the most difficulty. They particularly seek to avoid counsel's objection that the judge has become the attorney for the self-represented litigant.

The most common mistake judges make is to opt into the formal process, rather than into the informal process, in this situation. Counsel can continue to function effectively in the informal process; the self-represented litigant is often crippled by being required to function within the formal trial process.

The most successful approach has been for the trial judge to treat any case with at least one self-represented litigant as if both parties are self-represented. The judge informs counsel that the court will proceed informally, explaining the law and the process to the unrepresented party, and asking questions of both parties and of any witnesses to elicit the information needed to reach a fair decision. The judge can give the attorney the option of presenting the client's case by posing the initial questions to the client and supporting witnesses or having the judge ask them. The judge may also give the attorney an opportunity to cross-examine the opposing party or that party's witnesses. The judge will always give counsel the opportunity to sum up the case on behalf of the client in closing argument. (Some judges will ask the represented party if there is anything that they wish to add at the end of their attorney's closing argument.)

When charged with "serving as co-counsel" for the opposing party, the judge will simply explain that it is the judge's obligation to ensure that the parties before the court understand the law and the process and have a fair opportunity to present whatever evidence the parties have to support their position. The judge can offer to give a similar explanation to the attorney or to the attorney's client if the attorney wishes and to have the judge elicit the client's testimony in the same fashion as the judge elicits the evidence of the self-represented party.

## CONDUCTING A HEARING

**Framing the subject matter of the hearing**—Judges should begin every hearing with a brief statement of the reason for the hearing and the issues that are presented for decision. This review may include a recitation of recent hearings in the case and the orders resulting from them. The framing process clarifies for litigants what the hearing will be about and why they are appearing before the court. It often elicits additional matters that one of the parties would like to raise and have the court decide. This also engenders confidence in the court by demonstrating that the court has prepared for the hearing.<sup>68</sup>

*Example: "This case is before the court this morning on Mr. Jones' request that this court increase his visitation with their four-year-old daughter Daphne from two hours supervised visitation to one night per week unsupervised visitation. The current supervised visitation program was included in an order of this court issued at the close of a hearing three months ago and we agreed to review how it is working out at this time. You were not able to reach an agreement on additional visitation for Mr. Jones during mediation. The mediator recommends that the court allow some unsupervised visitation but not yet on an overnight basis. I will want to hear from both Mr. Jones and Ms. Smith about how the current supervised visitation is going, from Mr. Jones about his 12-step program and why he feels that it is in Daphne's best interests for her to spend more time with him, and from Ms. Smith about her feelings about that same question."*

## Explaining the process to be followed or guiding the process—

*Building on the example above: “This court follows the general rule that a child does best in life if she has two involved parents. We have not followed that rule in this case because of our finding that Mr. Jones uses illegal drugs and, because of that, Daphne would be endangered by spending unsupervised time with him. In this hearing it will be up to Mr. Jones to prove to the court that he no longer uses drugs and is no longer a risk to Daphne’s safety. After hearing from both of you, the court will have to decide whether to allow his unsupervised contact with Daphne and, if so, under what terms. I will allow Mr. Jones to speak first. I will ask him questions. Then I will hear from Ms. Smith and ask her questions. If you have any evidence other than your own testimony I will receive and review it. You are not to interrupt each other. You are to address all of your remarks to me; you are not to argue with each other. You will each have an opportunity to let me know the ways in which you disagree with the other’s testimony. At the end of the hearing, I will give each of you an opportunity to add anything you have overlooked. If you do not raise a point during this hearing, you will not be allowed to raise it later in a further motion on the same subject. Do you have any questions before we start?”<sup>69</sup>*

**Eliciting needed information from the litigants**—Judges swear the parties as witnesses, let them make a statement of their case, and then guide them through the process of completing their case by asking questions.

- *Allowing litigants to make initial presentations to the court*—Judges turn to one of the litigants—usually, but not always, the moving party—to begin the hearing with a framing statement, such as, “Mr. Jones, I have read your petition. Is there anything that you want to add?” Litigants given this opportunity do not tend to abuse it but make the arguments they want the court to consider. The judge then turns to the other party and asks for his or her point of view. The judge uses these initial statements to identify the issues for discussion and resolution.
- *Breaking the hearing into topics*—Judges, in effect, create an agenda or outline for the hearing, letting the litigants know that the judge understands the issues that the litigants considered important and that they will be addressed in a particular order.
- *Moving back and forth between the parties*—In leading the discussion on each issue, judges make certain that both parties have an opportunity to address each of the topics before announcing the court’s resolution of that issue. Some judges have found it preferable to withhold decision on any issue until the end of the hearing.
- *Paraphrasing the testimony and arguments of the litigants*—Judges summarize very briefly the position of a party, using language such as, “I understand you to be saying \_\_\_\_\_, Ms. Smith. Is that correct?” “Mr. Jones, what is your position on that?” Judges use this technique to let a party know gently that they had heard enough information or argument on a point.
- *Maintaining control of the courtroom*—Notwithstanding the common refrain from judges around the country that self-represented litigants are hard to control in the courtroom, the judges following this process generally experience no difficulty with this issue. In fact, judges rarely have to say anything to stop a litigant from interrupting the other party or from running on. In the latter instance, the judge gently interjects by saying something like, “Let’s not get into that just yet. I would like to hear Ms. Smith’s views on \_\_\_\_\_ first.”

- *Giving litigants an opportunity to be heard while constraining the scope and length of their presentations*—It is relatively easy to limit a long-winded litigant by making it clear from the beginning of the hearing that the judge will be actively involved and that it will be more like a discussion involving three parties than a debate involving two parties. By paraphrasing what a party has said in seeking the other party’s point of view, the judge makes it clear to the first party that the judge understands his or her argument. If a litigant appears ready to launch into a repetitive argument, the judge can simply say, “Ms. Smith, I have already listened to your point of view and have all the information I need to decide this issue. Let’s move on.”
- *Giving litigants a last opportunity to add information before announcing a decision*—The judge can pause before making a ruling, look to each litigant in turn, and ask if there is anything that they have not said that they want to add before the court makes its decision. Instead of asking, “Is there anything else that you would like to say,” the judge asks, “Is there anything that you have not already said that I need to hear before making my decision?” Such questions on occasion bring forth highly relevant considerations that a litigant may have overlooked from nervousness.
- *Obtaining foundational information concerning a proposed exhibit or statement*—When a litigant offers a photograph or document to the court as evidence, the judge can say: “Before I can look at your photograph, I need to ask you a few questions about it. What is it a photograph of? Who took the photo? When was it taken? Have any changes been made to the photograph since it was taken? Thank you. Ms. Bailiff, will you hand me the photograph?”

**Engaging the litigants in the decision making**—A skilled judge can engage the litigants in creating the specific terms of an order. “And an overnight would be acceptable to you if . . . ? Please put it in your own words.” Using this process, the judge can, in effect, mediate the dispute in the courtroom, or at least give the parties the opportunity to agree on the details after the judge has given an intended ruling on a major issue.

**Articulating the decision from the bench**—While there may be emotionally charged hearings in which the judge may apprehend increased tension between the parties, even a physical altercation, if she or he announces the ruling from the bench, these situations are rare. In most cases, the process is enhanced for the litigants when the judge announces the decision at the close of the hearing. By announcing the ruling, the judge ensures the losing party that the court heard and considered all the arguments before ruling for the other party. The judge is able to use nonverbal behavior to present the ruling in a way that demonstrates compassion for both litigants—by moving eye contact and focus between the parties. And the parties have an opportunity to seek clarification of points in the order that the judge may have overlooked or that one of the litigants does not understand. The judge can quickly cut off a party who attempts at this point to reargue his or her position.

**Explaining the decision**—A written order after hearing merely states the decision. The judge may not have time in the written decision to recite the reasons for the different parts of the decision. When judges announce and explain their decisions as they work through each of the issues, both parties know what the judge has decided and how the various parts of the order relate to each other. The judge’s ultimate goal, particularly in family law matters, is for the litigants to comply with the court’s orders and to begin to resolve matters between themselves without having to return to court. Explaining briefly but clearly the court’s rationale for its decisions provides the parties with examples of principles they can apply between themselves in resolving future disputes. And the judge has the best opportunity to demonstrate all of the elements that go into the parties’ determination of the trustworthiness of the proceeding.

**Summarizing the terms of the order**—Judges who announce their rulings in the course of the hearing find it helpful to summarize the terms of the order at the close of the hearing—providing the courtroom staff as well as the parties with an opportunity to review and confirm all of the terms and conditions to be included in the court’s order.

**Providing instructions on how to appeal**—Appellate courts often struggle with how to handle cases with self-represented litigants. One of the challenges they face is the self-represented litigant’s lack of awareness of the proper steps needed to appeal their case. After summarizing the terms of the order, trial judges should provide self-represented litigants with instructions about what to do if they want to appeal their case.<sup>70</sup> The court can use a standard fact sheet written in plain English to assist in this process.

## CONCLUSION

Trial judges face significant challenges in handling courtroom proceedings involving self-represented litigants. However, judges overcome those challenges daily to help ensure that self-represented persons get the same justice as those who come to court with a lawyer. These judges realize that many perceived barriers to dealing with self-represented persons do not actually exist. Their example offers lessons for other judges.

The maxim that “self-represented persons are held to the same standards as lawyers” is honored more in the breach than in the observance. Judges are required in many instances to inform litigants what the law is (without advising them how to use it to their personal advantage). Judges may be proactive and actively engaged in hearings and trials to elicit the information they need to make a fair and legally correct ruling. Judges need not require self-represented litigants to adhere to the technicalities of the rules of evidence or to the precise manner required of lawyers in posing questions to witnesses. The timeliness rules can be divided relatively easily into a set that must be enforced and a set that can be treated flexibly. Cases with a lawyer on one side and a self-represented person on the other can be handled informally, giving the lawyer a role that preserves the lawyer’s client the benefit from retaining counsel but not unfairly incapacitate the self-represented person.

The research on procedural justice points trial judges in the same direction as the canons of judicial ethics—the primacy of the right to be heard, the importance of treating all parties equally and with respect, and the significance of performing consistently so as to earn trust in the integrity of the judge and the process over which the judge presides. And while there remains a large “grey area” concerning when judges must (rather than may) accommodate the particular needs of self-represented litigants, the lack of appellate precedent in this area may reflect that capable trial judges predominantly exercise common-sense.

# ENDNOTES

- 1 NAT'L CTR. FOR STATE COURTS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL, RECOMMENDATIONS TO THE CONFERENCE OF CHIEF JUSTICES BY THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE (2016), <https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/NCSC-CJI-Report-Web.ashx> [hereinafter CJI RECOMMENDATIONS]; NAT'L CTR. FOR STATE COURTS, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY JUSTICE INITIATIVE: PRINCIPLES FOR FAMILY JUSTICE REFORM (2019), [https://iaals.du.edu/sites/default/files/documents/publications/family\\_justice\\_initiative\\_principles.pdf](https://iaals.du.edu/sites/default/files/documents/publications/family_justice_initiative_principles.pdf). The resolution for the Civil Justice Initiative can be found at <https://ccj.ncsc.org/~media/microsites/files/ccj/resolutions/07272016-support-call-action-recommendations-cji.ashx>. The resolution for the Family Justice Initiative can be found at <https://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/02132019-Family-Justice-Initiative-Principals.ashx>.
- 2 NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [hereinafter CJI LANDSCAPE STUDY]; NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF DOMESTIC RELATIONS CASES IN STATE COURTS 20 (2018), <https://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/FJI/FJI%20Landscape%20Report%20mb.ashx> [hereinafter FJI LANDSCAPE STUDY]. This is also true in traffic and misdemeanor cases, where most defendants also appear without counsel.
- 3 CJI RECOMMENDATIONS, *supra* note 1, at 16.
- 4 With very few exceptions, the guidance given trial judges is, at best, general in nature and, in most states, entirely lacking. California, for example, provides its trial judges with a substantial benchbook on the topic. As noted below, Delaware, Illinois, Massachusetts, and Minnesota have issued policy statements on this topic, but they lack the detail of the California benchbook. Other states have training curricula for judges dealing with these cases, but they lack the support of precedents or policy statements from the appellate courts.
- 5 BRITTANY K.T. KAUFFMAN & NATALIE ANNE KNOWLTON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REDEFINING CASE MANAGEMENT 3 (2018), [https://iaals.du.edu/sites/default/files/documents/publications/redefining\\_case\\_management.pdf](https://iaals.du.edu/sites/default/files/documents/publications/redefining_case_management.pdf).
- 6 CJI LANDSCAPE STUDY, *supra* note 2.
- 7 *Id.* at 31. For comparison, a comparable 1992 *Civil Justice Survey of State Courts* study found that 95% of the cases disposed of in general jurisdiction courts involved attorneys on both sides. U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS. CIVIL JUSTICE SURVEY OF STATE COURTS (1992), <https://doi.org/10.3886/ICPSR06587.v5>.
- 8 FJI LANDSCAPE STUDY, *supra* note 2.
- 9 *Colorado Federal Pro Se Clinic*, COLO. BAR ASS'N, <http://www.cobar.org/fpsc> (last visited Oct. 10, 2019).
- 10 *Legal Advice Clinic/Self Help Resources*, U.S. DISTRICT CT. EASTERN DISTRICT OF MO., <https://www.moed.uscourts.gov/legal-advice-clinic-self-help-resources> (last visited Aug. 16, 2019).
- 11 Memorandum from Gerstein Bocian Agne Strategies to the Nat'l Ctr. for State Cts. 2 (Nov. 15, 2017), <https://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSc-2017-Survey-Analysis.ashx>.
- 12 *Id.* at 5.
- 13 *Id.* at 2.
- 14 *Id.* at 3. See also Memorandum from Gerstein Bocian Agne Strategies to the Nat'l Ctr. for State Cts. 3 (Dec. 3, 2018), [https://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC\\_2018\\_Survey\\_Analysis.ashx](https://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2018_Survey_Analysis.ashx) [hereinafter 2018 STATE OF THE STATE COURTS] (the 2018 State of the States survey found that while 48% of Whites expressed this concern, 68% of African Americans and 61% of Hispanics held this view).
- 15 2018 STATE OF THE STATE COURTS, *supra* note 14, at 5.
- 16 Each year, Utah assesses their courts' accessibility and fairness based on court customer survey responses. In 2017, 93% found the forms they needed were easy to understand, 88% noted they finished their court business in a reasonable time, 94% felt court staff paid attention to their needs, and 93% said they were satisfied with their experience at the court. The entire survey results from 2006 through 2017 are available at <https://www.utcourts.gov/performanceasures/access.html>.
- 17 NATALIE ANNE KNOWLTON ET AL., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 4 (2016), [https://iaals.du.edu/sites/default/files/documents/publications/cases\\_without\\_counsel\\_research\\_report.pdf](https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf).
- 18 *Id.* at 31.



- 19 *Id.* at 33.
- 20 *Id.* at 34.
- 21 *Id.* at 47.
- 22 Margaret Hagan, Director of the Legal Design Lab/Facilitator of Court Compass Design Sprints (remarks to the Maryland 2019 Self-Help Provider Conference in Annapolis, Maryland) (Sept. 27, 2019).
- 23 Eighty percent of Arkansas trial judges responding to a survey conducted by Chanley Painter, a student in the University of Arkansas Clinton School of Public Service, agreed that “self-representation has a negative impact on case outcomes.” One judge reported, “there have been times [SRLs] prevailed, but very, very seldom.” See CHANLEY PAINTER, EXPLORING THE PROBLEM OF SELF-REPRESENTED LITIGANTS IN ARKANSAS CIVIL COURTS 25 (2011), <https://arkansasjustice.org/wp-content/uploads/2017/04/Capstone-Report-AAJC-Final-1.pdf>. On the other hand, a random controlled study conducted by the Harvard Access to Justice Lab found no difference in the outcome of cases in the Massachusetts Housing Court in which tenants appeared with and without counsel. That court is known for accommodating the needs of self-represented litigants. See D. JAMES GREINER, CASSANDRA WOLOS PATTANAYAK & JONATHAN HENNESSY, HOW EFFECTIVE ARE LIMITED LEGAL ASSISTANCE PROGRAMS? A RANDOMIZED EXPERIMENT IN A MASSACHUSETTS HOUSING COURT (2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1880078](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078).
- 24 The Harvard team conducted a five-year study employing a “random controlled trial” methodology. Persons seeking help in obtaining a divorce were interviewed by a VIP program staff member. All persons found to be appropriate candidates for assistance from a volunteer attorney were then randomly sorted into a “treatment group”—for whom the program attempted to find a volunteer attorney—and a “control group”—who would be given a guide to self-representation prepared by the Women’s Law Project and a telephone number to call with questions. The size of the treatment group was limited to the number for whom the VIP program thought it could find volunteer attorneys. The study ultimately included 74 in the treatment group and 237 in the control group. ELLEN DEGNAN ET AL., TRAPPED IN MARRIAGE (Oct. 23, 2018), <http://dx.doi.org/10.2139/ssrn.3277900>.
- 25 The study identified multiple procedural obstacles facing the self-represented persons. There is no evidence that their lack of success was attributable to adverse treatment in the courtroom; almost none of them were able to succeed in even filing a divorce petition, even though these were the simplest divorces—no children and no property. Interestingly, 14 additional control group cases did obtain a divorce in a nearby county that had a lower filing fee and simpler processes. Courts in those counties overlooked the inappropriate venue. *Id.* at 36.
- 26 The literature shows that most persons in Florida representing themselves in court are poor, but—for one reason or another—not eligible for free legal services. See JOHN M. GREACEN, SELF-REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 4 (2003), <https://drive.google.com/file/d/0B-vVAXlirwl5Ym5MdzVhd21oQ3M/view>. Rebecca Sandefur’s study of civil legal needs in a Midwestern city reached a different conclusion—that the cost of a lawyer was not the most important barrier for persons with a civil legal need to invoke legal remedies to address it; lack of understanding that they had a legal issue, or lack of will to take action to address it, were more significant. Some appellate cases seem to hold a self-represented litigant to her or his “choice” to proceed without an attorney. As noted above, to the extent this is in fact a choice—that the party could have afforded counsel—it is a constitutionally protected choice and cannot be used as a reason for treating her or him more harshly in the courtroom. REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (2014), [http://www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa\\_aug\\_2014.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf).
- 27 See JOHN M. GREACEN, EIGHTEEN WAYS COURTS SHOULD USE TECHNOLOGY TO BETTER SERVE THEIR CUSTOMERS (2018), [https://iaals.du.edu/sites/default/files/documents/publications/eighteen\\_ways\\_courts\\_should\\_use\\_technology.pdf](https://iaals.du.edu/sites/default/files/documents/publications/eighteen_ways_courts_should_use_technology.pdf) (examples of new systems and service courts are offering its users).
- 28 MODEL CODE OF JUD. CONDUCT r. 2.6 (2013).
- 29 MODEL CODE OF JUD. CONDUCT r. 2.2 (2013).
- 30 STANDARDS RELATING TO TRIAL CTS. § 2.23 (1992).
- 31 MODEL CODE OF JUD. CONDUCT r. 2.2 cmt. (2013) (emphasis added).
- 32 LA. CODE OF JUD. CONDUCT Canon 3A(4) cmt. (2013). The American Bar Association maintains a current list of all state rules implementing the Model Code of Judicial Conduct at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2\\_2.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_2.pdf).
- 33 Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 423-54 (2004).
- 34 *Turner v. Rogers*, 564 U.S. 431 (2011).
- 35 *Id.* at 444.

- 36 This is the specific element omitted by the trial judge in *Turner*.
- 37 REBECCA LOVE KOURLIS & RIYAZ SAMNANI, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., COURT COMPASS: MAPPING THE FUTURE OF USER ACCESS THROUGH TECHNOLOGY 3 (2017), [https://iaals.du.edu/sites/default/files/documents/publications/court\\_compass\\_mapping\\_the\\_future.pdf](https://iaals.du.edu/sites/default/files/documents/publications/court_compass_mapping_the_future.pdf).
- 38 For very helpful information on how to make legal information most easily understandable to lay persons, see LOIS LUPICA, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., GUIDELINES FOR CREATING EFFECTIVE SELF-HELP INFORMATION (2019).
- 39 Rebecca Albrecht, John Greacen, Bonnie Hough & Richard Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 THE JUDGES' J. 16 (Winter 2003), <https://www.srln.org/system/files/attachments/JudicialTech.JJWi03.pdf>.
- 40 *Id.* at 44.
- 41 N.M. Sup. Ct., *Proposed amendments to Committee commentary for 16-303 NMRA*, N.M. STATE BAR BULL., VOLUME 43, No. 43 at page 15 (October 28, 2004).
- 42 *Hudson v. Hardy* (D.C. Circuit 1968) 412 F.2d 1091; *Breck v. Ulmer* (Alaska 1987) 745 P.2d 66.
- 43 *Holloway v. Quetel*, 242 Cal.App. 4th 1425 (Court of Appeal, Second Dist., Div. 7 2015).
- 44 *In re SP*, 719 N.W.2d 535 (Iowa 2006).
- 45 *Id.* at 539.
- 46 *Washington v. Edwards*, 137 A.D.3d 1378 (2016).
- 47 Pruitt, D.G., Peirce, R.S., McGillicuddy, N.B., Welton, G.L. & Castrianno, L.M., Long-term Success in Mediation, 17 *Law and Human Behavior* 313-330 (1993). See also Emery, R.E., Matthews, S.G., and Kitzmann, K.M., Child Custody Mediation and Litigation: Parents' Satisfaction and Functioning One Year After Settlement, Volume 62, No. 1, *Journal of Consulting and Clinical Psychology*, 124-129 (1994) (noting that fathers were found to be more likely to pay child support as a result of mediation, which they rated fairer, than litigation, which they rated less fair); Paternoster, F., Brame, R., Bachman, R., & Sherman, L.W., Do Fair Procedures Matter?: The Effect of Procedural Justice on Spouse Assault, 31 *Law and Society Review*, 163-204 (1997) (noting that men who dealt with police officers called to their homes to investigate claims of domestic violence were more likely to comply with the law in the future when they felt that they were treated fairly by the responding officers).
- 48 Tyler, T., Social Justice: Outcome and Procedure, Volume 35, Number 2 *International Journal of Psychology* 117, at 12 (2000).
- 49 Which has an interesting linguistic twist in the legal context. The research emphasizes the importance of having an opportunity to "speak." But the judicial canons go beyond the right to speak to encompass the right to "be heard," which focuses attention on the judge's need to demonstrate to the parties her or his perception of what was said.
- 50 KEVIN BURKE & STEVE LEBEN, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION, 44 CT. REV. 4 (2007), [http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/Burke\\_Leben.ashx](http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/Burke_Leben.ashx).
- 51 Albrecht et al., *supra* note 39, at 19 (reprinted).
- 52 JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS (WITH COMMENTARY), <https://www.mass.gov/guides/judicial-guidelines-for-civil-hearings-involving-self-represented-litigants-with-commentary> (last visited Apr. 18, 2019).
- 53 DELAWARE'S JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS, <https://courts.delaware.gov/Supreme/AdmDir/ad178guidelines.pdf> (last visited Apr. 18, 2019).
- 54 ADMIN. OFF. OF THE ILL. CTS., ACCESS TO JUSTICE SPIRAL: A COMPILATION OF POLICIES, RULES, TIPS & BEST PRACTICES, [https://courts.illinois.gov/CivilJustice/Training\\_Education/Spiral.pdf](https://courts.illinois.gov/CivilJustice/Training_Education/Spiral.pdf) (last visited Apr. 18, 2019). California will make the benchbook available in an editable electronic format to any state that would like to provide such a resource to its trial bench.
- 55 See generally Cynthia Gray, *Pro Se Litigants in the Code of Judicial Conduct*, 36 JUD. CONDUCT REP. 1 (Fall 2014), <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR%20Fall%202014.ashx>.
- 56 JUD. COUNCIL OF CAL. CTR. FOR FAMILIES, CHILD. & THE CTS., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A BENCHGUIDE FOR JUDICIAL OFFICERS (2007), [https://www.courts.ca.gov/documents/benchguide\\_self\\_rep\\_litigants.pdf](https://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf).

- 57 For an introduction to the training modules, view the webinar at <https://www.ncsc.org/microsites/access-to-justice/home/Webinars.aspx>. See also AM. JUDGES ASS'N ET AL., *PROCEDURAL FAIRNESS/PROCEDURAL JUSTICE: A BENCH CARD FOR TRIAL JUDGES*, <http://www.amjudges.org/publications/courtrv/cr53-4/PJ-Bench-Card-Full-Final.pdf>; HON. MARK JUHAS, ASS'N OF FAMILY & CONCILIATION CTS., *WORKING WITH PRO-SE LITIGANTS: A GUIDE FOR FAMILY COURT BENCH OFFICERS* (2017), <https://www.afcnet.org/Portals/0/Guide%20for%20Judges%20SRLs.pdf>.
- 58 N.M. Sup. Ct., *supra* note 41.
- 59 Some trial judges, however, will be limited in this regard. For example, Florida small claims case law suggests that it is the court's obligation to determine all theories relied upon based on the statement of the plaintiff in a Statement of the Claim.
- 60 IDAHO R. FAMILY LAW P. (2018), <http://isc.idaho.gov/irflp>.
- 61 AK R. CIV. P. 16.2.
- 62 See William J. Howe & Jeffrey E. Hall, *Oregon's Informal Domestic Relations Trial: A New Tool to Efficiently and Fairly Manage Family Court Trials*, 55 FAM. CT. REV. 70, 71 (2017), <https://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Children%20Families/FJI/Oregons%20Informal%20Domestic%20Relations%20Trial%20A%20New%20Tool%20to%20Efficiently%20and%20Fairly%20Manage%20Family%20Court%20Trials.ashx>.
- 63 CJI RECOMMENDATIONS, *supra* note 1, at 33.
- 64 In *Indiana, Branham v. Varble*, 952 N.E2d 744 (Ind. 2011), the court found a state constitutional right to exemptions that the court must protect. In 2014, New York reformed their consumer credit rules. Under the reform, the plaintiff's attorney must provide with the complaint an affirmation of non-expiration of statute of limitations, absolving the defendant from needing to raise statute of limitations as an affirmative defense. Regarding lack of standing, when the plaintiff is a debt buyer and not the original creditor, the plaintiff must provide an "Affidavit of Facts and Sale of Account by Original Creditor," which is an affidavit signed by an employee/officer/member of the original creditor swearing that the original creditor assigned all of its interest in the account to the debt buyer, and providing a copy of that written assignment of the account.
- 65 See Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 L. & SOC. INQUIRY 1058 (2017), [https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2427&context=faculty\\_publications](https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2427&context=faculty_publications) (Jessica Steinberg's interesting description of the DC Housing Court).
- 66 Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647 (2018), <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4764&context=ndlr>.
- 67 A number of courts have created a form for the judge to use to jot down what the party needs. The judge may refer to a missing or incomplete form or describe the problem the party encountered in the courtroom.
- 68 The process of preparing for this "framing" also alerts the judge to potential legal issues s/he needs to review or research before the hearing. Presiding over cases involving self-represented litigants necessarily imposes on the judge the obligation of being fully versed in the law applicable to the matter at hand because s/he cannot expect help from a self-represented party in identifying or explicating legal issues.
- 69 In some courts, a court attendant plays a short videotape or PowerPoint presentation before the judge takes the bench providing more detailed background information on the type of proceeding that will be held (for instance, explanation of the procedures for domestic violence restraining orders).
- 70 See *Robinson v. Sweeny*, 794 F.3d 782, 784 (7th Cir. 2015) ("...consideration should be given to requiring district judges to accompany their judgments in pro se cases with a statement of the options and associated deadlines for reconsideration or appeal of the judgment").



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