6 For Judges to Consider

Many of the following constructive suggestions for judges were offered by court observers where community court-watcher programs are in place:

Explaining delays When in-chamber conferences run longer than expected, judges or their bailiffs, as a matter of courtesy, are encouraged to explain the delay to jurors and all others in the courtroom. Upon their return to the bench, judges might also briefly explain the nature of the activities that caused them to enter the courtroom later than the scheduled starting time. Court users appreciate explanations for unavoidable delays, since their time is as valuable as the court's.

Demeanor Court observers rarely complain about a judge being too stern, too firm, or too serious. But reports of citizen court watchers are often critical of judicial sarcasm, flippancy, rudeness, weakness, or extreme informality. An appropriate level of decorum enhances the legitimacy of the court and its rulings.

Undivided attention According to court-watcher reports, some judges on the bench look at paperwork instead of giving people appearing before them their undivided attention. Despite the often routine nature of their duties, judges are encouraged to address each person appearing before the court individually and personally.

Explaining sentences Judges who clearly explain in court what a criminal sentence means and the reasons for it enhance the confidence of victims, defendants, and spectators. For example, most lay people do not understand terms such as "supervision," "conditional discharge," and "order of

source: User-Friendly Justice: Making Courts More Accessible, Easier to Understand and Simpler to Use.

American Judicature Society

ensure the fairness of the outcomes in Housing Court.[366] The court's willingness to modify the traditional roles will reveal the extent to which the court's program truly "Breaks New Ground" or instead comprises an elaborate facelift.

CONCLUSION

In one sense, the "pro se problem" has been vastly understated. The flood of unrepresented litigants poses not simply a serious problem, but a fundamental challenge to many basic assumptions of our adversary system. The roles of judges, mediators, and clerks are defined in the context of an adversary system that generally assumes that both sides have lawyers. The reality of civil litigation not only in the "poor people's courts," but also in growing numbers of other courts, compels revision of our underlying assumptions.

Until and unless the courts make fundamental changes in their handling of unrepresented litigants, these litigants will continue to forfeit important legal rights due to their lack of representation. Improved information for unrepresented litigants, increased access to competent advice and assistance, and procedural reform to make the courts more accessible are important steps in helping unrepresented litigants. Yet, the effectiveness of changes such as these will be limited, if not undercut, as long as the traditional roles of the judges, clerks, and mediators remain unchanged.

As long as the rules reflect the traditional notion of impartiality, with actors limited by the traditional prohibition against giving legal advice, the actors will be unable to provide the necessary help. As long as the rules and practice further reflect a need to resolve cases, without concern for their outcomes, docket control will continue to reign supreme over fairness in courts handling cases involving the unrepresented poor. The assistance will have failed to provide the needed help.

The "pro se problem," however, is not only understated, but also misnamed. The courage to make changes necessary to help unrepresented litigants may require us to view the problem not as a *pro se* problem, but as a *judge* problem and an *attorney* problem. The rules of the game were crafted by judges and lawyers. Litigants not only have the right to appear without lawyers, but, in tremendous numbers of cases every day across the country, are forced to appear in court without counsel through no choice of their own. The lawyers and judges who establish the rules of the game have no right to make it

366. In light of all of the features of courts such as the New York City Housing Court, dramatic changes in the forum and roles of the players will provide insight into whether unrepresented litigants can achieve a fair result absent a civil right to counsel in certain contexts. *See, e.g.*, Scherer, *supra* note 261, at 562-87 (discussing federal and state constitutional due process arguments for recognizing a right to counsel for tenants faced with eviction).

impossible or difficult for unrepresented litigants to handle their own cases without forfeiting important rights for reasons unrelated to the merits of the cases.

Courts responding to the surge of unrepresented litigants likely will consider adding judges, mediators, clerks, and other court personnel as a partial response to the problem. Whether the addition of court personnel is a wise response will depend entirely on the roles of the added personnel. If the new judges will process cases without intervening in settlement and [illegible] as necessary to protect the unrepresented litigants, then the [illegible] resources is a poor one. If the new mediators are not required to protect the interests of the unrepresented parties, and the clerks are limited in the help they can provide, then the decisions to add mediators or clerks are poor ones. The resources squandered on new judges, mediators, and clerks should be redirected to the provision of skilled lay advocates and lawyers, starting with cases pitting unrepresented parties against represented ones. The re-examination of the roles of the key personnel is therefore intertwined with decisions about how to allocate scarce resources in the court system.

The changes urged in this Article will not be easy to implement, will not occur without conflict, and will not occur without affecting judges, lawyers, mediators, and clerks in their daily operations. Yet, the way in which courts currently handle their caseload harms the unrepresented poor. If the courts can do no better, they should say so. If reality dictates that the true goals of the legal system, as we head to the twenty-first century, are "Justice and Fairness to the Extent Permitted by Docket Control" or "Justice and Fairness for Those with Lawyers," we should say so. But, if Justice and Fairness are goals which the unrepresented poor are equally entitled to attain, it is time to face reality and start making changes.

protection." In addition, a full statement of the reasons for imposing a sentence or making a ruling favoring one party over another increases the public's understanding of and respect for the justice system.

Leaving the courtroom

For some proceedings, judges do not need to be present. Some court watchers have suggested that judges who need to leave the courtroom for any reason offer the courtesy of excusing themselves and explain to others in the courtroom the reason for their departure, even if it is brief.

Granting continuances

There are many reasons why continuances are necessary, but they can also be a nuisance to witnesses and to the litigants who did not request them. To the greatest extent possible, judges are encouraged to minimize the grant of continuances and to keep them short. Judges are also encouraged to require lawyers to provide a satisfactory reason for the request and make the reason for the continuance publicly known.

A word of thanks

"'Thank you' speaks volumes," says one judge who offered his advice on making courts user-friendly. He suggests that judges "thank witnesses for their testimony, thank jurors for their service, and thank court staff now and then for the good job they're doing."

step toward regaining control of the dispute resolution process of the court and curbing unethical lawyer conduct.[358]

Despite its breadth, the Program suffers from critical omissions. First, the Program is disturbingly silent on the role of judges both in settlement and at trial. As demonstrated above, the unrepresented litigant must receive assistance both during settlement negotiations and during trial if the courts are to have any hope of providing substantial justice for unrepresented litigants.[359] Second, while envisioning an important role for mediation,[360] the Program fails to define the role of the mediators. Whether the mediators are constrained by traditional notions of impartiality and the prohibition against giving legal advice, and whether they are responsible for producing a fair agreement, will determine whether mediators help or harm unrepresented litigants.[361] Third, although less troubling, is the Program's failure to detail the role of the clerks. Sufficient staffing of trained Housing Court Counselors, Volunteer Attorneys and Housing Court Associates, may obviate the need to broaden the role of the clerks. Where the resources are inadequate, however, the clerks should provide the needed assistance.

Fourth, the details of how the unmonitored negotiations will be eliminated remain obscure. Presumably, someone will be designated to monitor the negotiations. To the extent that role will be played by a judge or mediator, the failure to detail their roles in settlement becomes a more glaring omission. To the extent the negotiations will be monitored by someone else, such as law clerks, law assistants, or any other court personnel, those actors must similarly ensure the fairness of the negotiations and resulting agreements. Dedicating scarce resources to additional personnel not permitted or required to provide the necessary assistance to the unrepresented poor is an unwise response to the problem.

Beyond questions involving the roles of the personnel in programs set up by the court, other questions remain involving the various players and procedures. Whether the simplification of procedures will lead to an enhancement or an erosion of the rights of tenants will be an important component in assessing the wisdom of adopting various procedural changes.[362] Moreover, despite the impressive array of personnel to assist unrepresented litigants at various stages, the Program is silent on efforts to provide an advocate for the unrepresented litigant in settlement negotiations or at trial. The Program is also silent on the extent to which lay advocates will be permitted to assist unrepresented litigants in settlement or at trial,[363] or the court's views on approving or encouraging a move toward the provision of limited assistance by lawyers.[364]

At its root, the eviction cases in the New York City Housing Courts typically involve a more powerful, represented litigant confronting a less powerful, unrepresented one. The classic analysis by Professor Galanter suggests that despite changes to the forum and the rules the "Haves" nonetheless will come out ahead of the "Have Nots."[365] For these reasons, it is imperative that the changes in the forum be accompanied by significant shifts in the traditional roles of the players in the court. Unless trained and well-prepared lawyers or lay advocates are available not only in the early stages of the cases, but also during settlement and at trial, the burden will fall on judges and mediators to

358. *See* Engler, *supra* note 43, at 142-47.

359. As with the overall changes to the Housing Court, changes in the roles of the judges and other personnel should be recognized and endorsed at the top levels of the State's judicial administration.

360. *See* Kaye & Lippman, *supra* note 345, at 8.

361. The Program's premise with respect to the mediators, while undoubtedly true, does not resolve the concern. "In many instances, non-legal issues underlie Housing Court proceedings and hinder resolution of housing disputes, adding cases to the Court's calendar that can be resolved outside the courtroom." *Id.* at 11. Even assuming that many issues exist which most observers would agree are "non-legal," the distinction between a "legal" and "non-legal" issue is unlikely to be evident through a bright-line test. Moreover, even to the extent a clearly "non-legal" issue is present, there may be legal issues impeding resolution of the case as well. Unless the mediators are responsible for the fairness of the result, either the unrepresented litigants typically will be harmed in settlement or inefficiencies will be the result as judges are forced to correct for the shortcomings of mediation.

362. *See supra* notes 65, 255.

363. *See supra* Part II.B.4.

364. *See supra* Parts I.B, II.B.4. Although New York ethics opinions have approved the practice of providing limited assistance, they typically have done so with limitations and against the backdrop of concern about the practice. For example, in 1990 the Committee on Professional Ethics of the New York Bar Association addressed the question as to whether a lawyer, "without entering an appearance as attorney of record, [could] agree to counsel and advise an indigent pro se litigant to the extent of preparing pleadings for the litigant to sign and file with the court pro se." Committee on Prof'l Ethics, New York State Bar Ass'n., Op. 613, *reprinted in* N.Y. L.J., Oct. 15, 1990, at 4. The opinion ultimately approved the practice as long as the attorney disclosed in the pleadings that the papers were prepared by a lawyer, along with the name of the lawyer. *See id. reprinted in* N.Y. L.J., Oct. 15, 1990, at 4. The opinion first recounted the long history of decisions condemning the practice, including *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971); *Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699, 702-03 (S.D.N.Y. 1971); and *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 342-43 (S.D.N.Y. 1970). The decision observed that available ethics opinions were more lenient. *See id.* (citing ethics opinions from New York City, Maine, Virginia, and the ABA). The Committee was "not unmindful of the substantial abuses that may arise from sanctioning the conduct proposed" by the inquirer, but concluded that the courts and lawyers "subjected to such abuses will be vigilant to root them out." *Id.* The Committee "firmly believe[d] that the creation of barriers to the procurement of legal advice by those in need and who are unable to pay in the name of legal ethics ill serves the profession." *Id.* The opinion approved the conduct, with disclosure, along with the cautionary words that lawyers needed to provide "full and adequate disclosures" to the litigant; that "[t]he prohibition against limiting liability for malpractice was fully applicable . . . [and] no pleading should be drafted for a *pro se* litigant unless it is adequately investigated and can be prepared in good faith." *Id.*

365. *See generally* Galanter, *supra* note 253, at 149-51 (describing the level of change necessary to produce "tangible redistribution of benefits").

NONVERBAL COMMUNICATION CATEGORIES

Nonverbal communication occurs when receivers observe cues other than spoken and written words...and assign meaning to them.

BODY LANGUAGE (KINESICS)

- Includes the face, eyes, gesture, body posture
- Example: Defendant's slouched posture and avoidance of eye contact

VOCAL INFLECTION (PARALANGUAGE)

- Any vocal emphasis or variation that enhances or changes the meaning of the spoken words
- Example: Judges vocal emphasis in reprimanding counsel

ARTIFACTS (OBJECT LANGUAGE)

- Any physical object, including attire, to which receivers assign meaning
- Example: Inappropriate attire of courtroom participants

SPACE (PROXEMICS)

- Distance between people, and arrangement of furniture
- Example: Shortening distances to increase informality, candor

TOUCH AND SMELL

- Physical contact, body odor
- Example: In full view of jury, defense attorney touches the shoulder of client; witness smells of liquor

TIME (CHRONEMICS)

- Meanings assigned to the length of a transaction (duration) or the point in time when something occurs
- Example: Judge spends several minutes with each defendant during plea-taking

SILENCE

- Meanings assigned to the absence of oral speech, or to pauses
- Example: Defendant does not respond to judge's question

staff information tables outside the clerk's office to provide assistance. The personnel at the tables, however, are prohibited from giving legal advice, and the existence of the tables themselves was the subject of litigation against the housing courts by landlords' organizations.[347] Although some cases are referred to mediators for resolution, observers have noted that "landlords' attorneys completely dominate the mediation process in all boroughs."[348] The problems of unrepresented litigants in New York Housing Court are so vast that this forum has been the subject of repeated articles and reports—including periodic calls for its elimination—over its twenty-five years of existence.[349]

In 1997, top New York State court officials announced sweeping changes in a new Housing Court Program (the "Program").[350] The court implemented a new case management system,[351] designed, in part, to eliminate unmonitored hallway settlements and increase the use of mediation.[352] To improve access for Housing Court litigants, the Program proposes creating Night Housing Court; expanding the hours of the clerks' offices; creating a Telephone Reference Service with information about the court and its procedures; and Simplified Proceedings and Procedures.[353] The Program further envisions creating Resource Centers, an expanded information network including computer programs in user-friendly format to prepare court forms, small libraries, with publications and forms, and information from the

347. *See* Miller v. Silbermann, 832 F. Supp. 663, 667 (S.D.N.Y. 1993) (describing allegations of landlords' groups that the systemic operation of the Housing Court deprives landlords of their due process and equal protection rights).

348. 5 Minute Justice, *supra* note 110, at 43.

349. *See, e.g.*, Engler, *supra* note 43, at 104-15 nn.104-55 (citing criticism of New York housing courts); *see also* Matthew Goldstein, *State Legislator Urges Abolition of Housing Court*, N.Y. L.J., May 20, 1997, at 1 (reporting Manhattan Assemblyman Scott M. Stringer's proposal to phase out current housing court judges and redistribute their case loads to an expanded New York City Civil Court).

350. *See* Kaye & Lippman, supra note 345, at 3. The judges asserted that "[t]he Housing Court Program will immediately and dramatically change the Housing Court—replacing a system of triage with orderly procedures, modern technology and services to ensure fulfillment of the Court's stated mission while simultaneously providing for proceedings that are . . . quick, simple and inexpensive." *Id.*

351. The features included "Expedited Case Initiation"; creation of new "Resolution Parts," providing "court forum for the orderly negotiation of settlements under the Court's supervision"; a "Motion Part," designed to "offer an opportunity for prompt oral argument and hearings"; "Trial Ready Parts," available "for cases in which a trial is necessary"; and a "Housing Court Mediation Program," designed to begin in some counties in 1998. *Id.* at 8-11. The Program also "dispenses with outmoded procedures, bringing in updated case management and specialized approaches to particular case types to housing matters." *Id.* at 12.

352. *See id.* at 8 ("Settlements in the hallway . . . will be eliminated and judges, aided by trained staff, will maintain control over all aspects of the calendar. Moreover, an effective alternative dispute resolution program will be available to those who seek settlement outside the traditional court process.").

353. *See id.* at 14-17. The simplified pleadings are to be accompanied by supplemental instruction sheets available in six languages. *See id.* at 15.

court's database.[354] The number of pro se attorneys, renamed "Housing Court Counselors," would be expanded and supported by a corps of non-lawyer volunteers.[355] Volunteer attorneys would staff a Housing Hotline to answer questions of self-represented litigants, assist in the preparing of pleadings and "guide the litigants through the proceedings—answering questions and providing advice at the various stages of the litigation."[356]

Only time will tell the extent to which the planned changes actually will be implemented, and what their impact will be. Yet the Program itself was an important first step. The Program, issued by the state's top court officials, includes a frank acknowledgment of many of the Housing Court's shortcomings,[357] and attempts to address the problems rather than simply to defend the status quo. The Program examines the problems systemically, draws from a rich menu of assistance programs, and outlines a series of changes designed to work in combination. The Program's effort to eliminate the unmonitored negotiation between lawyers and unrepresented litigants is an important

354. *See id.* at 15.

355. *See id.* at 16-17. The increase in the number of Housing Court Counselors is "to ensure that self-represented litigants have access to attorneys who can provide assistance regarding court procedures during the course of their housing matter." *Id.* at 16. A Housing Court Counselor also will staff each Resource Center to answer questions and provide information. *See id.* at 15. The non-lawyer volunteers, who will include law or paralegal students, will be called "Housing Court Associates." *Id.* at 17.

356. *Id.* at 16. The attorneys will be organized into a new Citywide Volunteer Lawyers Project. *See id.* Beyond caseflow and access changes, the Program announced the submission of a constitutional amendment to restructure the New York State trial courts, *see id.* at 6-7; an intent to explore the concept of decentralizing the courts and create Community Housing Courts, *see id.* at 17; technological innovations to provide an integrated, sophisticated computer technology into daily operations, *see id.* at 18; and enhanced court resources through budget requests supporting additional judgeships, new and improved facilities, resource assistants, an expanded Interpreter Staff, and additional training seminars for Housing Court judges, *see id.* at 22-24.

357. The report frankly acknowledged that the court's primary function had been to process the large volume of eviction proceedings in a manner consistent with the picture described by the numerous reports and articles. *See id.* at 2.

> The combination of massive caseloads, litigants largely unfamiliar with the legal process and limited judicial resources has resulted in an environment that more closely resembles a hospital emergency room than a court. Courthouse decorum is noticeably lacking, with facilities ill equipped to accommodate the large number of litigants that appear daily. Landlords and tenants come to the courthouse either to commence a proceeding or to respond to a petition, forming long lines in the Clerks' Offices and seeking out the pro se attorneys for assistance. . . . Throughout the process, settlement negotiations take place in every corner of the courthouse—resulting in stipulated agreements . . . .

Id. at 2. The report anticipated that the problems would only get worse in light of changes in Federal and State law. "[I]mplementation of the Federal welfare reform bill is expected to increase the number of nonpayment proceedings, as public entitlements are reduced or terminated." *Id.* The report also referred to changes in the State Rent Regulation Reform Act of 1997, requiring "rent deposits in all summary proceedings upon a tenant's request for a second adjournment unless, at an immediate hearing, the tenant can establish one of several enumerated defenses." *Id.* at 3.

PRO SE EXPECTATIONS

Pro se expectations are frequently based upon ignorance of the law and of the judges' role. Listed below are potential assumptions the pro se might make. Mark each one with a "yes" or "no," regarding whether the pro se should expect or have a right to it.

_____ 1. The judge will explain the procedure in simple language.

_____ 2. The judge will help me in preparation and completion of legal forms.

_____ 3. If I ask questions of a witness, the judge will help me out if I'm doing it incorrectly.

_____ 4. The court staff will treat me with courtesy and respect.

_____ 5. If a lawyer tries to dominate or control me, the judge will step in to protect my interests.

_____ 6. After the proceedings begin, if I decide I need a lawyer, the judge will continue the case until I can get one.

_____ 7. Because the judge knows that I'm not a lawyer, he/she should be tolerant if I make legal errors.

_____ 8. Because I don't know the rules of evidence, I should be able to present anything in my favor and the judge can filter out whatever may be inadmissible.

_____ 9. If the judge is convinced that I really need legal counsel, he/she will tell me, and why.

_____ 10. One way or another, the judge will make sure that he/she gets all relevant information before making a decision.

_____ 11. Assuming I behave courteously and respectfully, the judge will treat me with patience and respect.

_____ 12. If there are documents or witnesses that I've overlooked that would help me make my case, the judge will tell me what I need.

Massachusetts Supreme Judicial Court, the Housing Court made clear that it was not prepared to implement the program, citing a lack of resources.[336]

Given the needs of unrepresented litigants in the Boston Housing Court, a sophisticated information kiosk alone cannot provide the type of assistance unrepresented litigants require to safeguard their rights in court. Absent counsel, or substantial assistance for every unrepresented litigant in every case, the burden will fall on the court to revise the roles of the judges, mediators, and clerks to provide the necessary assistance. Yet, the Court's own words to advocates as part of its vigorous defense of the Housing Court's operation speak volumes: "I hope that your disappointment in not having the Program implemented immediately is ameliorated by my commitment and efforts to initiate the program as soon as I can, without jeopardizing the vitality and success of the Court."[337] As long as the "vitality and success" of the court are measured by how well the docket moves, the concerns of unrepresented litigants will remain secondary and their rights and claims will continue to be trampled.

2. The New York City Housing Courts

The New York City Housing Courts are similar to the Boston Housing Court, although much larger in scale. The courts handle a crushing volume of cases in decrepit and overcrowded facilities.[338] Most

Chief Justice Daher did not identify the rules to which he was referring. The court sought a response to its concerns "to protect the integrity and impartiality of the judiciary." *Id.* at 2.

336. Letter from E. George Daher, Chief Justice, Commonwealth of Massachusetts, Housing Court Department, City of Boston, to Jeanne Charn, Esq., Legal Services Center 2 (Apr. 9, 1997) (on file with author). "The Supreme Court has given me a broad grant as to when and whether I want to initiate such a program—at this time I have not done so." *Id.* Along the way, the Chief Justice of the Housing Court had (1) accused legal services lawyers of a variety of unethical behavior, including soliciting clients and interfering with the mediation process, *see id.*; (2) vigorously defended the court's current practices in terms of the extent to which mediation was utilized, the level of explanation of mediation provided and the extent of court oversight of resulting agreements by the Clerk/Magistrate, *see* Daher Mar. 13, 1997 Letter, *supra* note 313, at 1-3; and (3) even made gratuitous comments critical of legal services in his decisions. *See, e.g.*, Arcadian Management v. King, No. 97-00257 (Mass. Housing Ct. Mar. 14, 1997) (unpublished opinion, on file with the *Fordham Law Review*) (blaming Legal Services for making receivership impossible, thereby jeopardizing tenancies in affordable housing). In response to a motion by the Legal Services Center to permit a tenant to raise a section 8A defense in an eviction proceeding brought by a receiver, the court *sua sponte* terminated the receivership, ending its order as follows: "Greater Boston Legal Services has constantly argued to the Court that they wish to protect affordable housing for the poor—now they have an opportunity to come up with a solution." *Id.* at 2. The Legal Services Center—not Greater Boston Legal Services—was involved in the case. Both offices were involved in the effort to implement the program in court.

337. *See* Daher Mar. 13, 1997 Letter, *supra* note 313, at 4.

338. Nearly 400,000 eviction cases are filed each year. *See* 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956, 960 (N.Y. Civ. Ct. 1992). "Overcrowded, dirty, poorly

cases handled by the court are eviction proceedings, typically pitting an unrepresented tenant against a represented landlord.[339] Unrepresented litigants disproportionately are poor women of color, often with a limited understanding of English.[340] Landlord-tenant disputes are hotly contested, and the governing law is complex.[341] Most cases settle as the product of pressured, unmonitored hallway settlements between the landlord's lawyer and the unrepresented tenant.[342] The negotiations are rife with unethical behavior by the landlord's attorney, while the resulting agreements are routinely approved by the court despite minimal oversight.[343]

In theory, the courts were designed to provide some assistance to unrepresented litigants.[344] In reality, long lines of litigants routinely await the help of clerks, who remain prohibited from giving legal advice.[345] In most boroughs, a "pro se" attorney works in the clerk's office, providing legal advice to a handful of litigants.[346] The bewilderment of the unrepresented litigants is exacerbated by complicated proceedings and incomprehensible pleadings. Various organizations

ventilated, inadequate seating" are among the physical problems cited by one report. 5 Minute Justice, *supra* note 110, at 20.

339. While landlords are represented in approximately 90% of the cases, tenants are unrepresented in over 90% of the cases. *See Lacrete*, 585 N.Y.S.2d at 958; 5 Minute Justice, *supra* note 110, at 28 (quoting a housing court judge outraged that "95 percent of the landlords [were] represented by attorneys, and only 5 percent of the tenants [were]" (alteration in original)). "About 90 percent of the 321,000 cases filed in Housing Court [in 1992] concerned overdue rent." Anthony M. DeStefano, *In Housing Court, Justice in a Jam*, N.Y. Newsday, June 1, 1993, at 7 (quoting Ernesto Belzaguy, chief clerk of the court).

340. *See, e.g.*, Community Training and Resource Ctr. & City-Wide Task Force on Housing Court, Inc., Housing Court, Evictions and Homelessness: The Costs and Benefits of Establishing a Right to Counsel at iii (1993) [hereinafter Housing Court, Evictions and Homelessness] (providing statistical profile of housing court litigants); Jan Hoffman, *New York's Court Interpreters: Overworked Link*, N.Y. Times, Dec. 24, 1993, at A1 (describing high demand for interpreters in New York housing court).

341. New York's housing laws are so complex that the New York Court of Appeals has referred to them as an "impenetrable thicket, confusing not only to laymen but to lawyers." 89 Christopher Inc. v. Joy, 318 N.E.2d 776, 780 (N.Y. 1974).

342. *See, e.g.*, *Lacrete*, 585 N.Y.S.2d at 960 ("[S]tipulations are generally signed [by tenants] without knowledge of possible defenses and out of fear of eviction or the sense that there is no alternative."); Catherine T. Brody, *In Housing Court: Not a Clue*, N.Y. Times, Sept. 25, 1994, at B21 (noting that settlements occur "away from the courtroom in the hurly-burly of the hallway").

343. *See* Engler, *supra* note 43, at 108-15.

344. *See* N.Y. City Civ. Ct. Act § 110(o) (McKinney 1989) ("There shall be a sufficient number of pro se clerks of the housing part to assist persons without counsel. Such assistance shall include, but need not be limited to providing information concerning court procedure, helping to file court papers, and, where appropriate, advising persons to seek administrative relief."). "Housing Court" is the common name for the "Housing Part of the New York City Civil Court."

345. *See* Judith S. Kaye & Jonathan Lippman, Breaking New Ground 2 (1997).

346. *See Id.* The inadequacy of the staffing is underscored by the Housing Court Program's planned expansion of the number of pro se attorneys "to ensure that self-represented litigants have access . . . ." *Id.* at 16.

SMALL GROUP DISCUSSION PROBLEMS

1. On a motions calendar requiring documents to be submitted three days in advance, a *pro se* litigant arrives without any paperwork. The lawyer for the other side objects to presentation of arguments without the required paperwork. What do you do?

2. In a trial in which one party is *pro se* and trying to cross examine a witness, the other party's attorney continues to make objections, valid under the rules of evidence, but which leave the *pro se* party totally confused.

3. A *pro se* litigant on the motions calendar submits handwritten materials. Court policy or local rules require materials to be typed. What should the judge do?

4. In a trial involving one represented litigant and one unrepresented litigant, the attorney continually asks objectionable questions on direct and cross examination. The *pro se* litigant is clearly unaware of the impropriety of the questions. Should the judge interfere?

5. In a trial involving a represented litigant and an unrepresented litigant, the *pro se* litigant is harming his/her case with answers given in response to questions he/she does not understand, due to the complexity of the words and sentences used by the attorney. Should the judge interfere?

6. In a trial with unrepresented litigants, the parties do not understand trial procedures or evidence rules. As a result the trial is taking substantially longer than a trial would normally take, backing up other previously scheduled trials. What should the judge do?

7. In a divorce trial involving two *pro se* litigants, the parties in their testimony appear to be only focusing on their animosity to each other, rather than the necessary testimony to present their case. They are not only wasting time but necessary evidence is not being provided. What can the judge do?

8. An Hispanic woman appears in a small rural county court *pro se* as a defendant in an unlawful detainer action. Her landlord is represented by counsel. She speaks very little English and, despite the presence of an interpreter, is unable to articulate what appears on paper to be valid defenses for non-payment of rent. She was unable to secure *pro bono* counsel through the local *pro bono* program. A paralegal assisted her in preparing her answer. Can the judge do anything to assist her in presenting her defense?

9. The plaintiff in a suit for breach of contract against a vocational institution has presented a properly drafted complaint. However, the plaintiff is in a wheel chair, has a serious speech impediment and appears confused by the proceedings. He is eligible for free legal services, but there is no legal services program in his county. There is a small *pro bono* program in the county, but the attorneys only handle uncontested divorces. Plaintiff has a strong claim and will be disadvantaged without the advice of counsel. The vocational school is represented by counsel. Is there anything the judge can do to assist the plaintiff?

The pressured settings in which unrepresented tenants are expected to settle their cases seem to guarantee that the settlements will favor the represented party. Yet the judicial role is not designed to uncover and correct the problems. Where the judges approve the agreements, the level of inquiry fails to elicit the information needed to ensure that the agreements are fair and reasonable or that the unrepresented litigant's decisions are the product of informed consent, as opposed to misinformation, misunderstanding, and coercion.[327] Many agreements do not even reach a judge for approval, but rather go to the clerk/magistrate, who rubber-stamps the agreements.[328] In the few cases that reach trial, the judges often fail to develop a full and fair record, assist the unrepresented litigant on procedure and questions of law, or conduct the trial in a manner "best suited to discover the facts and do justice in the case."[329] The Boston Housing Court declines even to examine the files or inquire about claims and defenses in pro se pleadings.[330]

327. *See supra* Part II.A. Nor is it even clear that the Housing Court judges apply their limited colloquy to all cases. *Mercer*, the Boston Housing Court decision discussing the judge's role in settlement, involved an injunction proceeding brought pursuant to chapter 139, section 19 of the General Laws of Massachusetts. *See* Benchmark Apartment Management Corp. v. Mercer, No. 96-00949, at 8 n.8 (Boston Housing Ct. Jan. 3, 1997) (unpublished opinion, on file with the *Fordham Law Review*). Most cases on the summary process docket are nonpayment cases, with the balance of the remaining cases involving termination of tenancy proceedings, rather than cases seeking an injunction pursuant to chapter 139, section 19.

328. *See* Daher Mar. 13, 1997 Letter, supra note 311, at 1-2. In routinely approving the agreements, the Clerk/Magistrate asks even fewer questions than the court articulated in *Mercer*. The clerk asks the parties only "whether they entered into the Agreement voluntarily, and whether in the circumstances of the case, they are satisfied with the Agreement." *Id.* at 2. These questions provide even less of a basis to explore the fairness of the agreement by identifying the applicable facts, law, and waivers of rights than the minimal judicial inquiry discussed by the judge.

329. Mass. Unif. Sm. Cl. R. 7(c). The typical decision of the Chief Justice after trial involving unrepresented tenants begins as follows: "The parties stipulate to tenancy, occupancy, notice to quit, monthly rent of [dollar figure] and arrearage of [dollar figure]." Lawton v. Garwood, No. 98-01215, at 1 (Mass. Housing Ct. Apr. 6, 1998) (unpublished opinion, on file with the *Fordham Law Review*); Bromley Heath Tenant Management Corp. v. Day, No. 98-01188, at 1 (Mass. Housing Ct. Apr. 1, 1998) (unpublished opinion, on file with the *Fordham Law Review*). Both cases involved a represented landlord against an unrepresented tenant. The trials typically lasted a matter of minutes. The tenants in essence "waived" any defenses they may have had to the landlord's prima facie case, thereby stipulating to the landlord's entire case. Under these circumstances, serious doubts should exist as to whether the waivers are knowing, intelligent, and voluntary ones and are the product of anything resembling informed consent. *See supra* Part II.A.3.

330. *See, e.g.*, Wisdom v. Brunache, No. 96-05297 (Boston Housing Ct. Mar. 6, 1997) (unpublished opinion, on file with the *Fordham Law Review*) (refusing to reconsider a pro se litigant's inability to communicate in English when the argument was not raised at trial). The standard legal services clinic, providing assistance in completing pro se pleadings and motions, is of limited efficacy if judges fail to read the papers.

The goal of protecting and assisting unrepresented litigants yields at every turn to the goal of docket control.[331] The court's emphasis on speed best explains its response to efforts by legal services advocates to advise and counsel unrepresented families in Boston Housing Court.[332] Rather than embrace the proposal as a means of assisting unrepresented litigants, the court raised concerns about whether the proposal would involve the impermissible solicitation of business by lawyers,[333] the inappropriate use of "public space and facilities for private use,"[334] and the appropriateness of providing limited assistance in mediation.[335] Despite explicit endorsement of the proposal by the

331. For example, if unrepresented parties were told the mediator would not help or protect them, fewer cases might settle at mediation, again causing more work for the judges. Similarly, if the court limited or monitored hallway settlements, either fewer cases would settle or more resources would be dedicated to settlement. If judges provided a detailed inquiry truly designed to assess the fairness of the agreements, more judicial resources would be required and many of the proposed settlements might be rejected. If judges actually had to assist unrepresented litigants at trial, by developing facts and claims, the trials would take longer. Indeed, the judge in *Wisdom* explicitly referred to docket control pressures in explaining his decision: "There are hundreds of cases on the summary process docket on any given Thursday." *Id.* at 2.

332. Advocates proposed not only to speak with litigants in court, as in a traditional LFD program, but to assist families in mediation as well. For cases that did not settle, advocates proposed to conduct an intake the following day and refer the case for full representation to lawyers from a panel of pro bono attorneys. The advocates asked the court's cooperation in allowing the families access to the advisors in court, allowing the litigants to file amended answers with discovery, and re-scheduling the cases that did not settle to a "date certain," to accommodate the schedules of the volunteer lawyers and enable them to develop the case. Letter from Barbara Sard, Senior Managing Attorney, Greater Boston Legal Services, & Paul R. Collier, Esq., Hale & Dorr Legal Services Center, to E. George Daher, Chief Justice, Commonwealth of Massachusetts, Housing Court Department, City of Boston 2 (Mar. 22, 1996) (on file with the author).

333. Letter from E. George Daher, Chief Justice, Commonwealth of Massachusetts, Housing Court Department, Housing Unit, City of Boston, to Barbara Sard, Esq., Senior Managing Attorney, Greater Boston Legal Services, & Paul R. Collier, Esq., Senior Clinical Instructor, Hale and Dorr Legal Services Center 1 (May 6, 1996) [hereinafter Daher May 6, 1996 Letter] (on file with the author). The proponents of the plan subsequently responded to this concern by explaining that no tenant would be "solicit(ed) for a fee" in violation of D.R. 2-103(C) and (D) and noting that the disciplinary rules governing solicitation "do not limit the offering of legal services in any manner where the representation is 'not for a fee.' D.R. 2-103(B)(1)." Collier May 23, 1996 Letter, *supra* note 315, at 5-6. Although the Code of Professional Responsibility has since been superseded in Massachusetts by the Rules of Professional Conduct, the analysis would remain unchanged. *See* Massachusetts Rules of Professional Conduct Rule 7.3 & cmt. 1 (1998).

334. Daher May 6, 1996 Letter, *supra* note 333, at 2. Advocates responded that "the provision and use of courthouse areas to permit counsel to meet with and consult clients is a fairly traditional one." Collier May 23, 1996 Letter, *supra* note 315, at 6.

335. *See* Letter of E. George Daher, Chief Justice, Commonwealth of Massachusetts, Housing Court Department, City of Boston, to Paul R. Collier, Esq., Senior Clinical Instructor, Hale and Dorr Legal Services Center 1 (June 19, 1996) (on file with the author). "[T]he Supreme Judicial Court would have to amend the rules by which a lawyer could advise and represent a pro se litigants [sic] at mediation, without being compelled to file an appearance, should the case proceed to trial." *Id.* at 1.

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Section B Story

Are Courts Encouraging *Pro Se* Litigants?

By Diana Digges

Before long, most litigants will be pro se, largely because lawyers are pricing themselves out of the market for most individual consumers, says Arizona Chief Justice Thomas Zlaket.

Increasingly, courts are providing pro se litigants with forms, software and other help - a trend that some believe could have an impact on small-firm practices.

This trend has prompted a backlash among some lawyers, who argue that self-represented litigants are ill-prepared and at an automatic disadvantage in a system designed for lawyers. They get into major trouble in the courtroom, hurt their own causes, overburden court clerks and place judges in an ethical twilight zone.

Zlaket is a staunch proponent of making the legal system more user-friendly - and more affordable. Zlaket, who spent 27 years in small-firm private practice, argues that, with proper support services from the courts, people are quite capable of handling bread-and-butter legal issues on their own. And even if they're not, they're doing it anyway - so the legal system had better help them be more effective, he says. Lawyers are quickly becoming "catastrophically irrelevant," he says, by pricing themselves beyond the reach of ordinary people and by losing public trust.

Ed Ryan, president of the Massachusetts Bar Association, argues that the courts are wrong to support self-representation. He compares the pro se movement to a fast food diet, with few long-term benefits. He claims that support by the courts for pro se hurts the system, hurts the self-represented litigants and demeans the contributions that lawyers have made to society. He criticizes Zlaket in particular for encouraging the pro se movement.

Lawyers Weekly USA spoke with Ryan and Zlaket in separate interviews, encouraging them to respond to the major points in each other's arguments.

Chief Justice Zlaket led off the discussion by asserting that pro se litigation is on the rise because many people cannot afford legal representation or believe they can do the same job

When measured by the traditional standards articulated in case law involving unrepresented litigants, the Boston Housing Court decisions reflect a judicial role well within the mainstream, and possibly moving toward the "liberal" end of the spectrum. The context of the court, however, reveals the inadequacy of the judicial role and the drastic consequences for unrepresented litigants. Most cases pit a represented landlord against an unrepresented tenant.[315] The unrepresented tenants typically are poor, female, and people of color.[316] The court handles a huge volume of cases, particularly on Thursday, known as "Summary Process Day," when the eviction cases first appear on the court's docket.[317] Housing law in Massachusetts is complex, and the cases routinely are quite adversarial.[318]

The court, nonetheless, provides minimal assistance to unrepresented litigants outside the courtroom.[319] While individual clerks may

"(1) whether a federally subsidized tenancy is involved; (2) if yes, whether the landlord has served the tenant with a legally sufficient termination notice prior to the commencement of the legal action." *Id.* at 8 n.8.

315. Various studies have indicated that landlords are represented in approximately 75% of the cases in Boston Housing Court, while tenants are represented in approximately 10% of the cases. *See* Letter from Paul R. Collier, Esq., Senior Clinical Instructor, Greater Boston Legal Services, et al., to the Honorable Paul J. Liacos, Chief Justice, Supreme Judicial Court of the Commonwealth of Massachusetts 2 (May 23, 1996) [hereinafter Collier May 23, 1996 Letter] (on file with author); Russell Engler & Craig S. Bloomgarden, Summary Process Actions in Boston Housing Court: An Empirical Study and Recommendations for Reform 5 (May 20, 1983) (unpublished manuscript, on file with the author); Neil Steiner, An Analysis of the Effectiveness of a Limited Assistance Outreach Project to Low-Income Tenants Facing Eviction 2 (Oct. 14, 1997) (unpublished manuscript, on file with author); *see also* Fox, *supra* note 23, *passim* (exploring the role of "self-agency" in negotiations between landlords and tenants); Kurtzberg & Henikoff, *supra* note 95, at 60-61 (arguing that poorer, unfamiliar tenants are at a legal disadvantage against wealthier, knowledgeable landlords).

316. *See, e.g.*, Bezdek, *supra* note 23, at 557 (noting that rent court "is a theater of class conflict in which businesses and their hirelings constitute a class of professional claimants exercising significant advantages over the individual defendants whom they bring before the court, who are poor and poorly situated with respect to the attributes that garner respectful hearing in court rooms"); Fox, *supra* note 23, at 92-93 ("Groups in the hallway [of the Boston Housing Court] are stratified by socio-economic class and authority with the court. In addition to visible discrepancies such as style of dress and color of skin, other palpable distinctions exist between those with more and less privilege.").

317. *See* Fox, *supra* note 23, at 91-92; Steiner, *supra* note 315, at 2.

318. *See, e.g.*, Kurtzberg & Henikoff, *supra* note 95, at 63-70 (noting that the complexities of Massachusetts housing law present obstacles to tenants in defending their rights). In the words of a Boston Housing Court Judge, "[t]he laws regulating landlords and tenants in Massachusetts are technical and complex and often traps for the unwary." Engler, *supra* note 43, at 117 n.166 (quoting Associate Justice Jeffrey Winik, Remarks from the Bench (Nov. 30, 1995)). With respect to the adversarial nature, the frequent battles in the legislature and the courts between landlords' interests and tenants' interests are one indicator of the conflict. The court cases reflect conflicting policies of protecting a tenant's home and a landlord's property (and home as well, in the owner-occupied context).

319. *See, e.g.*, Fox, *supra* note 23, at 92 ("No information was available regarding the rights and responsibilities of landlords or tenants. Similarly, no one was available

be helpful, they are prohibited from giving legal advice. The court has not designated anyone to explain possible claims and defenses or to help unrepresented litigants make informed choices. Not surprisingly, unrepresented litigants interviewed "were often intimidated and frightened by the process of appearing in the Boston Housing Court."[320]

The difficulties facing unrepresented litigants are compounded, rather than ameliorated, by the roles played by the mediators and judges. Most cases result in settlements in which tenants routinely forfeit their rights.[321] Many cases are funneled through "voluntary" mediation,[322] although, as one observer noted, "[t]he court officials gave no explanation of mediation, nor did they mention its voluntary nature."[323] Mediators are expected to resolve cases;[324] they are prohibited from giving legal advice or assistance to the unrepresented party.[325] Most cases not resolved in mediation are settled in the hallways, a result achieved through unmonitored negotiations between a lawyer and an unrepresented tenant and which often involve attorney misconduct.[326]

to answer questions."); *see also* BBA Report, *supra* note 175, at 20 ("There are not sufficient signs to direct people to the correct floor and no information desk or other means for litigants to know where to go or what to do.").

320. BBA Report, *supra* note 175, at 20.

321. *See, e.g.*, Fox, *supra* note 23, at 92-93, 98 (citing examples of tenants' unwillingness to assert valid defenses); Kurtzberg & Henikoff, *supra* note 95, at 71 ("Without the benefit of legal counsel, tenants frequently forfeited their formal legal protections . . . ."); Collier May 23, 1996 Letter, *supra* note 315, at 2-3 ("The tenant families were evicted in approximately 80% of these cases.") (citing Massachusetts Law Reform Inst., Survey of 1993 and 1994 Summary Process Cases in the Housing Courts and District Courts in Massachusetts (1995)).

322. *See, e.g.*, Fox, *supra* note 23, at 85 (stating that the majority of housing court cases in Boston are sent to mediation).

323. *Id.* at 91-92. The mediation office is called the office of the housing specialists, and the mediators are referred to as "housing specialists." *Id.* at 91.

324. *See, e.g.*, *id.* ("In an effort to manage the hundreds of cases docketed for a single day, the housing court instituted mediation with housing specialists.").

325. *See, e.g.*, Kurtzberg & Henikoff, *supra* note 95, at 90 (referring to the Harvard Mediation Program's "policy which prohibits mediators from providing parties with 'the law' during mediation"). Not surprisingly, unrepresented tenants fare worse when they settle cases in mediation than when they appear before a judge. *See* BBA Report, *supra* note 175, at 21; Engler & Bloomgarden, *supra* note 315, at 5-6; Steiner, *supra* note 315, at 28.

326. *See generally* Engler, *supra* note 43 (arguing for the regulation of lawyers' negotiations with the unrepresented poor). Whether unrepresented tenants fare worse in the hallways or before the mediators is a matter of dispute. *Compare* Steiner, *supra* note 315, at 28 (stating that tenants who choose mediation fare worse), *with* Kurtzberg & Henikoff, *supra* note 95, at 73-74, 108 (stating that tenants who negotiate in the hallways fare worse). The disparity may be due in part to the fact that Kurtzberg & Henikoff did not limit their study of mediation in housing cases to mediation conducted by the specialists in Boston Housing Court; they examined other jurisdictions in Massachusetts and other mediation mechanisms. *See* Kurtzberg & Henikoff, *supra* note 95, at 73-74. Neither report, however, questions the fundamental conclusion that unrepresented tenants generally fare poorly both in the hallway and in mediation.

themselves for a fraction of the cost.

Ryan: It's true we have a growing number of people in courts without an attorney. Some people simply don't have the means; I believe we have to take care of those people. The legal profession should find a way. What I really object to is the courts encouraging people to do it themselves and providing them with fill-in-the-blank forms, a less than complete explanation of their rights and a less than complete explanation of the consequences of their actions.

Zlaket: We are not encouraging [*pro se*]; we're responding to it. This is not an affirmative effort to encourage self-representation. It is instead a recognition of the simple fact that more and more people are choosing to represent themselves. About 80 percent of the parties in domestic relations cases are not represented by a lawyer. We have to figure out a way to deliver legal services to those people.

In Arizona, we have self-service centers with forms that are drafted by lawyers. [Those forms] are correct and conform completely to Arizona law. The court operates a roster of private lawyers who advise and counsel self-represented litigants on a fee-for-service basis. This is more cost-effective for some litigants than full representation

Compare this to the old days when people went to a stationery store and bought a power of attorney or will or deed off the shelf, mass-produced out of state. At least what we're giving them now meets the law and gets them to first base. We're not all the way home, because we're still confronted with the requirements of the courtroom. They're still in a deep pool and in danger of going over their heads.

Ryan: If a form is being reviewed by a lawyer, that's better than [if it were reviewed] by someone who is untrained. But I wouldn't want to be the lawyer reviewing the form - you can't get the information needed to make a quality decision in a matter of minutes. In the hands of a professional, in the ordinary give and take of consultation, an individual can ask questions, and more importantly, be counseled. A computerized program is not a satisfactory way of doing that.

Zlaket: Who can afford a lawyer? Like it or not, lawyers are increasingly pricing themselves out of the reach of most Americans. When I was state bar president a decade or more ago, we used to spend a lot of time talking about how to provide legal services to the poor. Now the focus has changed, because when it comes to hiring a lawyer, most of us are poor. Unless you're wealthy or a major corporation, you simply cannot afford to pay $300 an hour. When I give this speech in Butte, Montana, a lot of the lawyers look at me and say, 'Well, we're not charging that here.' But it's very difficult in big cities to find a lawyer who is within reach of the average citizen.

Ryan: Lawyers *are* sufficiently affordable. What we need to do is make sure people are well aware of that. The bar associations

sion of the proper role of the mediator.[311] Seemingly fundamental issues are thus left to individual resolution, without guidance or corresponding consistency.[312]

B. *A Tale of Two Housing Courts*

1. Boston Housing Court

The judges in Boston's Housing Court describe their role in presiding over trials involving an unrepresented litigant as follows:

> A judge cannot act as the lawyer for either party appearing before the Court.... A judge cannot be expected to scour the case file for evidence that might be relevant and admissible on some issue in the case. The parties must present the facts of their cases at the time of trial. I listen carefully to what the litigants and their witnesses have to tell me, and attempt to give each person the opportunity to tell me whatever it is they want to say about their case. I endeavor to be patient and courteous to all persons who come before me. If I perceive during the trial that one of the parties is attempting to raise an issue or claim, albeit imperfectly, or says something that needs clarification, I will ask follow up questions.[313]

Greacen, *supra* note 24 (arguing that the phrase "no legal advice from court personnel" has no inherent meaning and has negative consequences in the courts' ability to serve the public).

311. *See, e.g.*, *Bankruptcy Excerpt*, *supra* note 300, at 38 (noting the equalizing effect of mediation in litigation between pro se parties and represented parties); Barry Russell, *U.S. Bankruptcy Court Initiates Innovative Mediation Program with Success*, Resolutions, Winter 1997, at 4, 4 (measuring "success" of mediation program by a settlement rate of 62%).

312. As one commentator has noted:

> Judges disagree as to the level and type of assistance they or other members of the court staff can provide to pro se parties without creating a perception of, or actually, favoring unrepresented parties, engaging in the inappropriate "practice of law" in the cases before the court, and compromising the court's impartiality. *These materials are not intended to provide support for any position on these issues, but rather to provide suggestions for consideration by judges in light of their individual views.*

Bankruptcy Excerpt, *supra* note 300, at 37 (emphasis added). Moreover, the recommendations remain such until and unless they are adopted by the courts themselves, or the proposals receive the full support of the courts. *See id.* ("[T]he Case Management Manual for United States Bankruptcy Judges['] ... suggestions reflect the varied experiences of both bankruptcy and district court judges, *but not any official position or recommendation of the Judicial Conference, the Administrative Office [of the U.S. Courts], or the [Federal Judicial] Center.*"(emphasis added)).

313. Wisdom v. Brunache, No. 96-05297, at 2-3 (Boston Housing Ct. Mar. 6, 1997) (unpublished opinion, on file with the *Fordham Law Review*). The other justice, Chief Justice E. George Daher, stated that the court's decision "accurately reflects my own views." Letter from E. George Daher, Chief Justice, Commonwealth of Massachusetts, Housing Court Department, City of Boston, to Barbara Sard, Senior Managing Attorney, Greater Boston Legal Services 1 (Mar. 13, 1997) [hereinafter Daher Mar. 13, 1997 Letter] (on file with the author). In *Wisdom*, the defendant received assistance from Greater Boston Legal Services in completing her answer and filing discovery. *Wisdom*, No. 96-05297, at 2 n.2. Despite the presence of claims relating to a violation of Massachusetts' Security Deposit Statute and a breach of the implied

With respect to the judge's role at settlement, one judge articulated his view of his role as follows:

> It would be prudent, especially in cases where the tenant is not represented by counsel, for a judge to conduct a colloquy with the parties before deciding whether to approve an agreement . . . [that includes] (3) whether the tenant understands that she has a right to a hearing on the merits where the landlord would have the burden of [proving] by a preponderance of the evidence . . . ; (4) whether the tenant understands that by entering into the agreement she is waiving her right to such a hearing; (5) whether she understands the terms of the agreement; (6) whether she signed the agreement voluntarily; and (7) whether she has any questions for the Court regarding any aspect of the Court proceeding or the agreement. If the judge is dissatisfied with any of the responses he or she has the option of: (1) rejecting the agreement and conducting a hearing on the merits; or (2) suggesting modifications to the agreement adequate to address the judge's concerns.[314]

warranty of habitability, no evidence relating to these claims was elicited at trial. *See id.* at 2. As the court further explained:

> There are hundreds of cases on the summary process docket on any given Thursday. The answer form filed by the defendant was apparently provided to the her [sic] by Legal Services. The defendant checked off boxes, filled in a few blanks and signed her name. These form pleadings are filled out and filed by tenants in thousands of summary process actions. Sometimes the tenant presents evidence in support of a claim check off on the form. Often they do not. The parties (both represented and pro se) file numerous papers with the Court prior to trial (including discovery) that are never introduced in evidence. The defendant now points to information about a security deposit in the plaintiff's answer to an interrogatory which was not mentioned during the trial.... I am obligated to decide cases based upon the evidence and testimony presented at trial.

Id. at 2-3.

314. Benchmark Apartment Management Corp. v. Mercer, No. 96-00949, at 8-9 n.8 (Boston Housing Ct. Jan. 3, 1997) (unpublished opinion, on file with the *Fordham Law Review*). The *Mercer* decision arose in the limited context of a motion to vacate a consent judgment involving a federal subsidized tenancy. At issue was a proceeding brought under Massachusetts General Laws chapter 139, section 19 to annul and void the tenancy based on alleged illegal acts, in this instance involving an altercation between the tenant and her neighbor. *See id.* at 1. Despite the fact that the tenancy was a section 8 tenancy, the landlord did not provide termination notice, as required by federal law, believing that the federal law did not apply in a Massachusetts General Laws chapter 139, section 19 proceeding. *See id.* at 9. On the court date, the case was referred to mediation where the tenant entered into an agreement to vacate her apartment. *See id.* at 4. The tenant thereafter retained counsel, who filed a motion to vacate the consent judgment on a variety of grounds, including a lack of subject matter jurisdiction based on the failure to serve a termination notice. *See id.* at 1. Finding that federal law did not conflict with state law; that federal law required service of the termination notice; that the failure to serve the termination notice deprived the court of jurisdiction; and that the lack of jurisdiction could not be waived by the tenant by entering into a consent judgment, the court allowed Defendant's Motion to Vacate the Agreement and dismissed plaintiff's complaint. *See id.* at 12.

The court's proposed colloquy included the following additional questions specifically relating to the federal subsidy reached in a case brought under Massachusetts General Laws chapter 139, section 19. At a minimum the judge should determine:

are going to stand ready to identify lawyers willing to take on these cases on terms on which the lawyer and the litigant can agree. The bottom line is that some of the *pro se* movement is being driven not by people who want to do it on their own, but by the courts. The more courts encourage people to represent themselves, the more people may take a stab at it.

Clearly, in domestic relations, a number of people are going into court without lawyers. The question is, why? Are we deluding them by suggesting as a court system that they can do these things? If that's the case, why train [people] in the law? Why give them a rigorous exam to demonstrate their proficiency in the law?

People need to understand that they can give up substantial rights by filling in the blanks on some form. If they buy a home without an attorney, there will be a problem when it comes time to sell their house or enlarge their property. People who enter into contracts, form businesses, do any number of things can run into trouble later on.

Often the mistake is not discovered for years. [The *pro se* movement] just gives people the illusion of justice. It's the equivalent of walking into an emergency room and asking for the equipment to perform a procedure on yourself. Down the road, lawyers are going to be required to untangle the mess that's been created.

Zlaket: Of course lawyers will report, anecdotally, that these people are hurting themselves and they don't get the results they would if they were represented. Lawyers may be correct in that. To my knowledge, there is no study that would shed light on what happens to *pro se* litigants later on. But these people either cannot afford a lawyer or for one reason or another have chosen not to have a lawyer and the Constitution says they are entitled to represent themselves if they choose to do so. So the question becomes, how do we make the process more responsive to these people?

Ryan: If somebody voluntarily wants to go into a courtroom, I don't object. But simply because one has a right doesn't mean that the courtroom has to stand on its head to accommodate them. Unrepresented litigants don't know the rules of procedure, they come in unprepared, with documents that don't cover what they need. The judge bends over backwards to accommodate the person who doesn't know the rules. Lawyers on the other side of that kind of case are often caught in the crossfire and their client ends up the loser.

Zlaket: Yes, most judges will tell you that it's much more difficult to manage a courtroom or case where there are no lawyers. But we're not supposed to be devising a system for the convenience of judges and lawyers. We're supposed to be devising a system for citizens to have their rights and liabilities adjudicated.

Ryan: Many judges say that since [*pro se* litigants] seem to be

The consequences of the lack of counsel often are devastating: the "[a]bsence of counsel undermines the likelihood that an individual debtor will obtain a 'fresh start' from bankruptcy."[299] Commentators, therefore, have proposed a variety of mechanisms to provide assistance to unrepresented litigants, beginning with increased pro bono resources.[300] With Chapter 7 debtors, the resources might be directed "at limited technical assistance," possibly involving a "pro se clinic" to provide advice.[301] In contrast, since "attorney help with a Chapter 13 is crucial," pro bono help in the nature of representation is critical in that context.[302] Since "[n]o amount of pro bono resources will eliminate pro se cases entirely,"[303] additional recommendations include: (1) upgrading the available non-attorney counseling;[304] (2) designating a pro se clerk to provide formal assistance to pro se debtors;[305] (3)

> Through experimentation with various debt and asset measures of relative case complexity, we found that consumers' use of self-help bankruptcy was best explained by the dollar amount of total debt involved in each bankruptcy case .... As total debt increases, use of self-help declines. The relationship between consumer income and the incidence of self-help bankruptcy, on the other hand, is a quadratic one. As income increases from very low levels to lower middle income levels, the incidence of self-help bankruptcy falls; but, between $20,000 and $50,000 of annual income, the incidence of self-help bankruptcy increases slightly.

Cox & Dwyer, *supra* note 48, at 27 (footnote omitted).

299. Block-Lieb, *supra* note 285, at 37; *see* Klein & Spade, *supra* note 285, at 18-27. Bankruptcy judges in Massachusetts have expressed concerns about unrepresented litigants, including "the loss of valuable rights by litigants who do not understand the process." BBA Report, *supra* note 175, at 38.

300. *See, e.g.*, Block-Lieb, *supra* note 285, at 42-45 (describing existing programs for *pro bono* representation of individual debtors); *Pro Se Debtors & Creditors in Bankruptcy Cases: An Excerpt from the Case Management Manual for U.S. Bankruptcy Judges*, FJC Directions, June 1996, at 37, 39 [hereinafter *Bankruptcy Excerpt*] (offering suggestions regarding development of district-wide programs to address the needs of pro se parties); Klein & Spade, *supra* note 285, at 37 (proposing a "pro se clinic" model for unrepresented Chapter 7 debtors).

301. Klein & Spade, *supra* note 285, at 37. Klein and Spade caution that the clinic would be designed to provide "advice to those who feel comfortable proceeding without an attorney, *as long as pro bono help is provided to qualified debtors who need it.*" *Id.* (emphasis added). Klein and Spade envision that the help would be available on an ongoing basis, "for example, if a motion for relief or adversary proceeding is filed." *Id.*

302. *Id.*

303. *Id.*

304. This proposal involves "[a]ggressive enforcement work" under 11 U.S.C. § 110 to put "the bad actors out of business" and the elimination of publications known to be out of date. *Id.* at 38. Elsewhere, the authors assert that "[t]he bar should encourage rather than discourage responsible non-attorney participation in that process, through bankruptcy kits and petition preparation services." *Id.* at 36; *see also Bankruptcy Excerpt*, *supra* note 300, at 39 (identifying the need to control "improper filings by 'bankruptcy mills'" as a key component to a strategy to assist pro se parties in bankruptcy court).

305. *See Bankruptcy Excerpt*, *supra* note 300, at 37 (describing the possible use of clerks to provide early review of pro se filings to allow for prompt curing of technical defects); Klein & Spade, *supra* note 285, at 38 ("The number of pro se cases has

promulgating special rules for litigation involving pro se debtors;[306] and (4) creating official forms with user-friendly instructions.[307]

The recommendations of the various reports, if implemented, would undoubtedly benefit unrepresented litigants in the bankruptcy courts. Yet, as with the reports discussing unrepresented litigants in family law cases, the recommendations fail to address the fundamental issues relating to the proper roles of the judges, clerks, and mediators in dealing with unrepresented litigants. Judges are mentioned only to the extent that the prevalence of unrepresented litigants makes their jobs more difficult[308] and that an active judicial role creates traditional problems of impartiality.[309] Bankruptcy clerks are portrayed often as helpful to unrepresented litigants, at times as antagonistic to unrepresented litigants, and frequently without guidance as to the permissible scope of assistance.[310] The use of mediation is touted without discus-

increased to the point in many jurisdictions where it makes sense to designate clerk's office personnel for special training and assistance to pro se debtors.").

306. Examples include regulation of reaffirmation agreements and uniform protections for motions and other litigation filed against pro se debtors. *See* Klein & Spade, *supra* note 285, at 39 (footnote omitted); *see also Bankruptcy Excerpt*, *supra* note 300, at 37-39 (discussing generally management techniques for individual cases and proceedings involving pro se litigants).

307. *See Bankruptcy Excerpt*, *supra* note 300, at 39 (discussing sample forms and instructional materials as components to a districtwide program to assist pro se parties); Klein & Spade, *supra* note 285, at 39.

308. Klein & Spade state that:

> [J]udges . . . frequently devote significant court time to explaining the intricacies of the bankruptcy system to confused *pro se* debtors, providing information about bankruptcy which is normally conveyed by an attorney in the course of paid representation. Judicial proceedings involving *pro se* debtors may be time consuming and frustrating for all concerned.

Klein & Spade, *supra* note 285, at 2. The authors attribute the relative scarcity of motions for stays by creditors in cases involving unrepresented debtors in part to "creditor awareness of judicial protectiveness of *pro se* debtors." *Id.* at 23 (footnote omitted).

309. "Since judges regularly engage in substantial efforts to assist *pro se* debtors because of a perception that they are at a disadvantage, it is not uncommon for parties opposing *pro se* litigants to feel unjustly treated." *Id.* at 2. "Taking such precautions [of sample instruction sheets] can alleviate the need for judges to serve as *ad hoc* protectors of the interests of pro se debtors together with the appearance of partiality which that creates." *Id.* at 39. "Discussions with other members of the bar about this study suggest that many perceive the judges in Massachusetts to bend over backward to protect the rights of unrepresented debtors. There was little objection to this practice." *Id.* at 23 n.48; *see also* Cox & Dwyer, *supra* note 48, at 51 (noting that one problem created by self-helpers in both bankruptcy and divorce cases is that "courts are forced to take an active role in their cases in order to protect individuals' rights, thus jeopardizing judicial impartiality").

310. *See* Greacen, *supra* note 24, at 12 (observing that the phrase "I am not allowed to give legal advice" is an easy way to "get rid of" an unrepresented litigant seeking assistance); Cox & Dwyer, *supra* note 48, at 50 ("Some judicial personnel even display a marked degree of antagonism for the self-helper."); Klein & Spade, *supra* note 285, at 32 ("The clerk's office in Massachusetts will almost always accept filings unless they are so deficient as to be incomprehensible .... Although personnel seek to avoid providing legal advice, it is not completely clear where the line lies."). *See generally*

coming in greater numbers, we have to do something to make it easier for them and therefore easier for us and move these cases along. That's the wrong approach. The approach should be one that is an effort to make people aware of significant rights they could be missing in the rush to represent themselves.

Zlaket: We have to accept the fact that we are in a do-it-yourself era. The society is becoming more self-reliant; there's an independent streak and why shouldn't it carry over into lawyering? That mentality, coupled with the public mistrust of lawyers makes for a perfect recipe for self-representation.

Ryan: The judge has taken a number of issues and run them together when they're really non-sequiturs. He [links] *pro se* litigation to the notion that lawyers are becoming irrelevant because they've priced themselves out of the economy, are arrogant and won't hear what the public is saying. They don't necessarily follow one from the other. And he's given speeches where he stands up and gives a litany of things lawyers lie about. Any judge who calls lawyers liars is out of sync.

Zlaket: Mr. Ryan has misunderstood me. I love lawyers, but dammit this profession is apparently willing to ignore the reality that more and more people cannot afford to take advantage of its skills and services. One of my concerns is that public esteem for lawyers has been declining over the years. This is why Mr. Ryan has taken me to task, but he really misunderstands what I am saying.

There is no doubt that the public has a perception of lawyers that is not flattering One of the things the public sees about lawyers is a lack of trustworthiness, a lack of truth-telling. Why else is Jim Carrey, in [the hit movie] "Liar, Liar" funny? He's funny only because he's a lawyer. You know the old joke about how you know when a lawyer's lying - when his lips are moving. If Carrey had been an accountant or an architect, nobody would have laughed. Why is it that those attempts at humor garner such a response? Clearly, it is because underlying it all is the perception that lawyers don't tell the truth. People believe that lawyers will do and say anything to win.

Ryan: There is absolutely no empirical data to support the connection between the do-it-yourself movement and the public perception of attorneys. The do-it-yourself movement has existed for 30 years. This is not new. The courts, because of greater numbers of cases, just want to make things easier. Case flow management is one of the most significant driving elements in this court-orientated do-it-yourself self-service center. I think we should stop it. Our courts represent the third branch of government.

Zlaket: We have fallen down on the job of public education - I did not say public relations. To that extent, Mr. Ryan and I agree. My remarks are addressed to the justice system, not to lawyers. I'm a lawyer and damn proud to be one. I'd rather hang out with them. But what does that have to do with the justice system? I'm responsible administratively for 183 courts, for

not have done so had they received proper advice.[288] Bankruptcy cases have been a fertile ground for the increased use of self-help kits and non-lawyer assistance, creating concerns regarding the unauthorized practice of law in this area.[289]

The factors identified in the previous section indicate a need for substantial assistance to unrepresented litigants. The prevalence of unrepresented litigants creates strains on the system.[290] Unrepresented litigants routinely face lawyers in these proceedings, since "bankruptcy cases generally involve lawyers representing adverse parties, including creditors and the trustee."[291] The economic imbalance inherent in the creditor-debtor context is exacerbated by the fact that unrepresented debtors are poorer than represented ones; many unrepresented litigants are low-income.[292]

The remaining factor—the complexity of the proceeding—suggests not simply that unrepresented litigants may need assistance, but that the type of assistance required may turn on the type of case.

288. *See* Klein & Spade, *supra* note 285, at 29 ("Most lawyers advise [judgment proof] debtors not to bother with the bankruptcy process, because they have little to gain from filing which they cannot achieve by ignoring their creditors.").

289. "[P]etition preparation services and their advertising as well as 'self help' bankruptcy kits, played a significant but unquantifiable role in the *pro se* filings we studied. The data in this study strongly suggests that a high percentage of debtors obtained assistance in some way, large or small, from non-attorneys." Klein & Spade, *supra* note 285, at 34-35; *see also* Rhode, *supra* note 77, at 227 (noting that in response to a recommendation by the California State Bar Commission on Legal Technicians for limited reforms in the area of unauthorized practice of law, "[a]dvisory groups in bankruptcy, family law, and landlord-tenant stressed the significant risk of injuries from lay practice . . . ."). For cases involving the alleged unauthorized practice of law in the bankruptcy context, see, for example, *In re* Buchmann, 113 B.R. 769 (Bankr. S.D. Fla. 1990); *In re* Anderson, 79 B.R. 482 (Bankr. S.D. Cal. 1987); O'Connell v. David, 35 B.R. 141 (Bankr. E.D. Pa. 1983).

290. *See* Klein & Spade, *supra* note 285, at 2. Nonetheless, the prevalence of unrepresented litigants and volume of cases might vary significantly from jurisdiction to jurisdiction, calling for different responses. *See id.* at 40 ("Pro se filing rates appear to have substantial local impetus. For example, in California there are huge and unmanageable numbers of pro se cases. In other jurisdictions, such as Vermont, there are almost none."). Klein and Spade identify the additional strains on clerks in terms of dealing with paperwork that is improperly prepared and the need to address frequent requests for significant information. *See id.* at 2. Judges and other courtroom personnel similarly "devote significant court time to explaining the intricacies of the bankruptcy system to confused pro se debtors," and hearings "in pro se cases frequently fray the nerves of not just the participants," but others in the courtroom as well. *Id.*

291. *Id.* at 5. Due primarily to this factor, the Bar Association in Minneapolis provides pro bono counsel for "adversary proceedings." *Id.* at 39.

292. "Nearly half the pro se debtors were low-income, while only 19% of the control group fell in this bracket. By comparison, nearly 40% of the represented debtors had incomes recorded at the highest range, above $24,000 annually, while only 17% of pro se debtors had similar income." *Id.* at 12. "The majority of the telephone interviewees, 66% . . . indicated their reason[ ] for filing *pro se* was that they were unable to afford an attorney for the case." *Id.* at 17. Cox and Dwyer similarly found that income for pro se debtors was generally lower than for represented debtors. *See* Cox & Dwyer, *supra* note 48, at 44. "Payment of attorneys fees is . . . out of the reach of many individuals in bankruptcy." Block-Lieb, *supra* note 285, at 39.

Although bankruptcy cases tend to be "extremely technical in nature,"[293] "*pro se* debtors can generally manage successful results in Chapter 7, but not in Chapter 13."[294] The complexity of the Chapter 13 proceeding requires more complicated forms, including the need to file a feasible reorganization plan.[295] One study found that most dismissed cases were dismissed due to incomplete or missing forms or reorganization plans or to unpaid fees.[296] The complexity of the Chapter 13 proceeding leads to higher attorney fees, in turn increasing the likelihood that the unrepresented debtor will appear without counsel.[297] This likelihood, however, is tempered by the fact that lower income debtors tend to have fewer assets and, therefore, less complicated bankruptcy cases.[298]

293. Klein & Spade, *supra* note 285, at 4. Cox and Dwyer previously identified the complexity of bankruptcy cases as a major reason consumers' use of self-help was greater in divorce ("the less complex field") than bankruptcy. Cox & Dwyer, *supra* note 48, at 2. Cox and Dwyer assumed that legal complexity was important to consumers' choice of legal representation, and therefore compared "consumers' use of self-help divorce (a relatively simple legal procedure) to that of self-help bankruptcy (a more complex legal action)." *Id.* "Our empirical findings are consistent with our hypothesis that consumers' use of self-help varies inversely with legal and factual complexity." *Id.* at 30.

294. Klein & Spade, *supra* note 285, at 20. While both Chapter 7 and Chapter 13 bankruptcies are options for an individual debtor, Chapter 7 involves a simpler process, often resulting in discharge of debts but typically involving liquidations of the debtor's assets. *See id.* at 27-28. Chapter 13 "has substantial procedural and substantive complications," including a reorganization plan and the need for ongoing payments; the stakes are higher, since the successful debtor can "protect and keep nonexempt property, take advantage of the broader discharge, and . . . make installment payments on the arrears of a secured debt after default." *Id.* at 28.

Klein and Spade measured success primarily by the extent to which the debtors' debts were discharged, the goal of most bankruptcy cases. Since a discharge releases the debtor from the legal obligation to repay discharged debts, "[d]ischarge is . . . a good outcome." *Id.* at 18. In contrast, case dismissal is "generally a bad outcome," since the debtor is turned away without relief. *Id.* "In Chapter 7 [cases], 97.5% of represented debtors and 93.5% of unrepresented debtors obtained discharges." *Id.* at 19. In contrast, in only 2% of the Chapter 13 bankruptcies (possibly rising at most to 12%, since not all cases were completed at the time of the study) were the debts of the unrepresented debtors discharged. *See id.* at 19-20. Comparatively, 27.3% of the represented debtors already had received a discharge by the end of the data collection (possibly rising as high as 82%, given the pendency of additional cases). *See id.* Cox and Dwyer earlier had found that self-helpers tended to reaffirm too many debts. *See* Cox & Dwyer, *supra* note 48, at 49. Klein and Spade, however, found that this concern, which requires the debtor to remain legally bound to pay a debt which would otherwise be eliminated, was not born out by their study. *See* Klein & Spade, *supra* note 285, at 21.

295. *See* Klein & Spade, *supra* note 285, at 20.

296. *See id.* "*Pro se* debtors had more problems filling out the bankruptcy forms than debtors represented by an attorney." *Id.* at 24.

297. *See id.* at 28-29. Pro se "debtors are priced out of [Chapter 13] bankruptcy unless they can afford the $800-1500 attorney fee for such cases—in addition to the amounts necessary to cure their defaults and propose a feasible plan." *Id.* (footnotes omitted).

298. *See id.* at 12 ("Represented debtors . . . tended to have more assets than *pro se* debtors."). For Cox and Dwyer, however, the clearer correlation was with debt:

7,000 employees and for a justice system that is supposed to deliver open access to a court system for the citizens of this state - reasonably priced, reasonably speedy justice, a level ground, neutral playing field, with no prejudice or favoritism.

One of the things that irks Ed Ryan most is Chief Justice Zlaket's frequent public criticisms of lawyers. In speech after speech, the chief justice pulls out statistics documenting the public distrust of the profession and warns lawyers to "clean up their act."

Ryan: His remarks demean the contributions lawyers have made to this society. It is lawyers - not regulatory agencies or government bodies - that have secured to the average citizen the rights they now take for granted. You're safe in what you say because the Constitution says you have a right to say it and lawyers in courtrooms have secured it for you in the face of legislation that has tried to curtail it. If you have children, your children's toys are safe because of lawyers. The clothes you wear, the fabrics on your furniture, the rugs in your houses, the paint on your walls - all these safety standards have been the product of lawyers' efforts. Justice Zlaket refers to the "catastrophic irrelevance" of lawyers. He's lost touch. He's out of sync. He's not thinking about what lawyers do across this country every single day. He's wrong.

Zlaket: Please. I don't want to hear about how good we are. I have my lawyer heroes, too. I don't need to hear lectures from people who are personal injury lawyers charging contingent fees. By the way, that's what I was for many years. Of *course*, lawyers do good work. I don't trivialize what lawyers contribute to this democracy at all. Having said that, it's time to move on and quit patting ourselves on the back and engaging in public relations and respond in a positive and efficient way to those criticisms of the system that have merit.

In many ways, the public has got us right on. I intend to make lawyers mad when I discuss the *pro se* movement. I say, "Look, we're in a bind here. I'm a chief justice. There are 50 of us. Don't you think that the judges are going to have to go back to the drawing board and design a system that's tailored to *pro se* litigants? They are going to be the majority. All the statistics indicate that the trend is moving in that direction in other areas. We're missing the boat. Our justice system is tied to tradition. It needs to be modernized, more accessible."

Do we have to change the rules of procedure, the rules of evidence to accommodate *pro se* litigants? I don't know the answer to that. I throw it out to be provocative, to get lawyers thinking. The reaction I get back is anger and hostility. The problem really strikes at solos and small firms. They're the ones who will have to help us. Most lawyers don't believe it will ever happen - that the majority of litigants will be *pro se*. Most lawyers think it's limited to domestic relations and most lawyers don't like those anyway. But the trend is clear - for anyone who's got his eyes open.

Questions or comments can be directed to the writer at:

call for the abolition of such a prohibition.[278] The discussions about mediation focus primarily on whether mediation is appropriate at all where issues of domestic violence are involved.[279] The proposals fail to confront the harm caused to unrepresented litigants in mediation conducted by a mediator who is not responsible for the substantive terms of the mediated agreements and who is barred from providing help if that help constitutes legal advice.

The support for assistance programs is increasingly accompanied by a backlash against unrepresented litigants in the form of fear that, far from being disadvantaged, unrepresented litigants use their status to gain advantage in the proceedings.[280] The backlash includes a disturbing trend calling for the adoption of rules designed to curb "pro se abuses."[281] Nowhere do the proposals talk about the need to curb attorney misconduct in cases pitting a lawyer against an unrepresented party.[282]

278. *See* Responding to the Needs, *supra* note 25, at 24-26; Changing the Culture, *supra* note 58, at 29 ("Significant numbers of *pro se* litigants seek to use court personnel as a source of legal advice."); Yegge, *supra* note 74, at 11 ("While court clerks may not practice law, they must not hide behind that prohibition. Clerks must be trained to give clear and correct *procedural* directions . . . ." (emphasis added)); Long & Lee, *supra* note 62, at 5. While observing that court staff are "appropriately reluctant to give information that could be construed as legal advice," the Minnesota Conference of Judges has proposed following the advice of John Greacen. Minn. Conference Report, *supra* note 40, at 14; *see* Nord Memorandum, *supra* note 276, app. F; *see also supra* Part II.B.3 (stating that the role of court personnel should be expanded beyond the barrier of "no legal advice").

279. *See, e.g.*, Committee for Gender Equality of the Mass. Supreme Jud. Ct., Achieving Equity: Recommendations for Dispute Intervention Practice in the Probate & Family Court 10-11 (1995) [hereinafter Achieving Equity] (redefining mediation as "dispute intervention" in the family setting); Mass. Gender Bias Study, *supra* note 49, at 23-27 (arguing that mediation, as it is currently practiced in the probate court, disadvantages women because if their generally unequal bargaining power); Grillo, *supra* note 225, at 1548-50 (challenging the view that mediation is preferred over the adversarial system for women in custody disputes).

280. *See, e.g.*, Changing the Culture, *supra* note 58, at 28-29 ("*Pro se* litigants often raise frivolous claims or legally meritorious claims in frivolous ways . . . . *Pro se* litigants are rarely penalized for failure to follow the rules."); Sales et al., *supra* note 53, at 558 ("An issue . . . is whether judicial assistance to self-represented litigants in any way biases the outcome in their favor when the opposing parties are represented by attorneys."); Daniszewski, *supra* note 187, at 47 (describing one school of thought that proposes that "judges [may be] more prone to relax the enforcement of the rules when they are dealing with pro se litigants.").

281. *See* Daniszewski, *supra* note 187, at 46; Charles P. Kindregan et al., *Emerging Changes in Domestic Relations Procedure*, 26 Mass. Law. Wkly. 1241, 1262 (1998).

282. *See generally* Engler, *supra* note 43, at 122-30 (providing examples suggesting that such misconduct is commonplace). Even where ethical issues are mentioned, they are mentioned in terms of problems created for the lawyer by the unrepresented litigant, rather than as lawyer misconduct that must be curbed. *See, e.g.*, Changing the Culture, *supra* note 58, at 28 ("Lawyers who represent a party against a pro se opponent are often placed in an ethical bind because the lawyer must deal directly with the unrepresented opponent."); Long & Lee, *supra* note 62, at 5 (noting that one party's lack of representation creates difficulties for the adversary).

By failing to resolve the underlying tensions created by the application of the traditional rules to a context with a high volume of unrepresented litigants, the reports and proposals miss a crucial component of efforts to assist unrepresented litigants. Some unrepresented litigants with amicable family law cases involving less complicated legal issues, little power imbalance between the parties, and an unrepresented party on the other side may find sufficient assistance from the typical proposals. With complicated or adversarial cases involving significant power imbalances, particularly those pitting unrepresented litigants against represented ones, the limited assistance models alone are insufficient.[283]

B. *Bankruptcy Court*

A 1985 ABA study from Maricopa County, Arizona, found that self-help was utilized much less in bankruptcies than in divorces.[284] Self-representation by debtors in bankruptcy court nonetheless increased dramatically in the early 1990s.[285] The numbers understate the incidence of self-representation, because in many cases a lawyer may commence the action on behalf of the debtor, but not appear in subsequent negotiations or contested hearings.[286] The numbers further understate the need for assistance, because some debtors bewildered by the process may refrain from filing at all.[287] In addition, some judgment proof debtors who file for bankruptcy pro se would

283. Even the source of the proposals underscores current limitations. The proposals come from individual lawyers and groups of lawyers, and remain as proposals. Until and unless the proposals gain the backing of court administrators, the effectiveness of the proposals will be limited. Rather than simply providing courthouse space and cooperation, court administrators need to promulgate rules redefining the proper role of the judges, lawyers, mediators and clerks consistent with the principals discussed in this Article. *See supra* Part II.C.

284. *See* Cox & Dwyer, *supra* note 48, at 2.

285. *See* Gary Klein & Maggie Spade, National Consumer Law Ctr., Self Representation in the Bankruptcy Court: The Massachusetts Experience 1 (1996) (unpublished manuscript, on file with the author). The total number of pro se cases filed in Massachusetts increased from 580 to 813 between 1990 and 1991. *See id.* Data from New Hampshire, Rhode Island and Vermont reflected a similar pattern. *See id.* at 1 n.4. Pro se filings in bankruptcies varied from 10% to 34% in certain California counties by the late 1980s. *See* Rhode, *supra* note 77, at 214-215. "The Administrative Offices of the United States Courts estimate that 12.7 percent of Chapter 7 cases were filed pro se in 1992, or approximately 84,000 pro se petitions." Susan Block-Lieb, *A Comparison of Pro Bono Representation Programs for Consumer Debtors*, 2 Am. Bankr. Inst. L. Rev. 37, 55 (1994).

286. *See* Block-Lieb, *supra* note 285, at 41.

287. "In addition to those who file pro se because they can't afford an attorney, there is also undoubtedly a pool of people who would like to file bankruptcy but can't afford the legal fees and don't feel confident to file pro se." Klein & Spade, *supra* note 285, at 36 (citing Jason DeParle, *Poor Find Going Broke is Too Costly*, N.Y. Times, Dec. 11, 1991, at A24). Bankruptcy court, of course, provided the context for the famous due process challenge of the debtor too poor to afford the filing fee for bankruptcy. *See* United States v. Kras, 409 U.S. 434, 450 (1973) (upholding a state filing fee requirement conditioning access to judicial discharge in bankruptcy).

POINT OF VIEW

Diana Richmond, Esq.

A Court That Works, and Anticipating Y2K

We are all accustomed to complaints about the courts. This judge is callous; that one does not know the law. This judge would not listen to what the client felt he had to say. It takes six weeks to process an uncontested judgment, and just as long to schedule a short-cause hearing. No one cares about the people whose lives are being judged and whose strained finances are being further challenged by unlivable "net spendable incomes." So inured to frustration are we by these perceptions or actual experiences that when we visit a court that really works, we feel refreshed, in fact, inspired. We remember what impelled us to practice family law in the first place.

A Court That Works. Consider this courtroom. It is devoted to the District Attorney family support calendar, hardly the most elevated or glamorous of the courtroom scene. For the judicial officer, it is not at the top of the judicial pecking order. It is not a courtroom one expects to be blessed by financial resources.

Even before the commissioner enters the courtroom, the court personnel are busy. The room is filled to capacity, but only a few parties appear with counsel. Most of the participants look like people who could not afford counsel or would not know how to find counsel. Those who appear to be here for the first time clutch their papers with anxiety. The clerk explains politely how parties should check in. The assistant district attorney confers in turn with several men who seem to know him already; they show him paycheck stubs and explain their circumstances. He speaks to them respectfully, as if to colleagues, not a trace of disdain in his manner. The court facilitator answers questions from parties, alternating comfortably from speaking in Spanish with one to English with another. She remembers someone who has been here before, even recalls her circumstances, and makes a suggestion the party appreciates and thanks her for. She smiles warmly, then turns to the next party with questions.

When the commissioner takes the bench, the room quiets without effort. Physically, she is neither tall nor commanding. But her open demeanor, respect for the participants, and ready humor visibly lower the anxiety of the participants. She introduces the DA, his investigators who run the computer guideline calculations, and the facilitator. She explains the process of calculating child support according to California statewide guidelines and how the laws limit what she can do. She explains what the criteria are and what they are not. She encourages people to try to come to agreement on support amounts because in doing so the participants have more flexibility in setting an amount than she does. She even gives a good-humored quiz on what criteria are and are not relevant. "If you ask me to lower your child support obligation because of the amount of your car payment, can I do it?" A few people from the audience venture an audible and tentative "no." As she asks other questions, the answers become a sort of chorus from the audience. They have caught on. She has not only broken the ice, but has also given them information to help them understand and participate in the process. She encourages them to sit with the DA investigator and facilitator to figure out their probable support obligations. Then she recesses for half an hour to give the participants a chance to resolve the issues themselves. Many of them do. There is not a trace of antagonism in the room, whether the judge is present or not. When she rules, she is clear and certain, and the parties accept what she says.

Obviously, this commissioner has instilled the quality of respect into everyone who works here. Just as disdain foments disdain, respect breeds respect; and it permeates the atmosphere for everyone here. The culture of respectful participation did not happen here by accident. It makes everyone who works here feel valued; feel as if they have been heard and understood.

This is not a fabricated story or imaginary courtroom, and the characters are not invented. They not only resemble real people; they are real people who deserve to be recognized for the quality of the work that they do. The department is room 416 in San Francisco; the commissioner is Marjorie Slabach. The Assistant District Attorney is Paul Eyerly. The

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for resorting to "unfair and unscrupulous practices" in divorce litigation.[269]

The surging numbers of unrepresented litigants have caused judges and lawyers to identify pro se litigation as a major problem affecting courts that handle family law cases. The family law context has received widespread attention in bar committee reports[270] and articles[271] in an effort to respond to the problem. The proposals include: (1) a simplification of procedures, combined with utilization of court forms; (2) an increase in educational and explanatory materials, often involving self-service centers with information kiosks; (3) increased "technical" or "procedural" assistance, with some capacity to provide substantive assistance; (4) and an increase in the pool of pro bono lawyers to take cases for free or at a reduced rate.[272]

Despite their impressive breadth, the proposals fail to discuss systemically the proper roles of the key actors in the system. For example, the reports routinely discuss the important rights that unrepresented litigants forfeit during the course of their cases due to their lack of representation.[273] Yet these discussions do not arise as

York Court of Appeals); *see* Grillo, *supra* note 225, at 1572 ("[F]amily conflicts . . . often involve a combination of emotional and legal complaints . . . .").

269. *See, e.g.*, Richard E. Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behavior in Divorce Litigation*, 20 Fam. L.Q. 413, 415-34 (1986) (describing unethical tactics used in divorce litigation). *But cf.* McEwen et al., *supra* note 93, at 1364-65 (describing the results of a study in Maine, including reports from lawyers that they typically try to reduce, rather than exacerbate, conflict).

270. *See, e.g.*, District of Columbia Bar Task Force on Family Law Representation, Access to Family Law Representation in the District of Columbia: A Report of the D.C. Bar Public Service Activities Corporation 12 (1992) (demonstrating that the majority of low income families and children in the District of Columbia are not receiving the legal assistance they need in family law matters); Changing the Culture, *supra* note 58, at 26 (discussing the large number of unrepresented litigants appearing in family courts); Minn. Conference Report, *supra* note 40, at 14 (recommending measures to address the needs of pro se litigants); Long & Lee, *supra* note 62, at 1-2 (discussing the pro per problem in California family law cases).

271. *See generally* Millemann et al., *supra* note 57, *passim* (describing an experimental project in which law students provided legal information and advice to otherwise unrepresented parties in family law cases); Murphy, *supra* note 80, at 123-24 (discussing the lack of access to the courts to resolve family law disputes and recommending alternatives to adversarial proceedings); Sales et al., *supra* note 53, at 560 (discussing self representation as an alternative to attorney representation in divorce cases).

272. *See* Responding to the Needs, *supra* note 25, at 12-13; Changing the Culture, *supra* note 58, at 29-34; Murphy, *supra* note 80, at 142; Yegge, *supra* note 74, at 10-12; Long & Lee, *supra* note 62, at 13-42. Some include reference to the concept of "unbundled legal services." *See* Responding to the Needs, *supra* note 25, at 37-38; Minn. Conference Report, *supra* note 40, at 16; Wisconsin Comm. on the Delivery of Legal Services, State Bar of Wisc., Final Report and Recommendations 29 (1996); Changing the Culture, *supra* note 58, at 33; Millemann et al., *supra* note 57, at 1188-89; Long & Lee, *supra* note 62, at 40-42.

273. *See, e.g.*, Caroline Kearney, *Pedagogy in a Poor People's Court: The First Year of a Child Support Clinic*, 19 N.M. L. Rev. 175, 176 (1989) ("One of the frequently

concerns about the impartiality of the system and the need to revise the roles of the players accordingly. Instead, impartiality is cited as a limitation on the extent to which judges can assist unrepresented litigants: providing too much help is seen as compromising the judge's position.[274] Moreover, where the judges' role is discussed, the need to ensure a fair settlement is ignored, despite the fact that most family law cases settle, with minimal judicial oversight.[275] The focus of the reports remains on the few cases that do not settle and the judges' burden in dealing with unrepresented litigants.[276]

Similar gaps appear in the discussions of clerks and mediators. Unrepresented litigants are viewed as problems, unduly burdening the clerks.[277] The reports note the difficulties in providing help without running afoul of the prohibition against giving legal advice, but do not

cited barriers to the establishment and collection of support orders is the inability of large numbers of women to afford counsel." (citations omitted)); Golden, *supra* note 58, at 1 (reporting that, according to judges and other legal observers of the Massachusetts Probate and Family Courts, "[w]ithout attorneys, [unrepresented female litigants] run more risk of losing their children, paying excessive support, being pressured into an unfair settlement—or even making themselves vulnerable to batterers . . . ."); Yegge, *supra* note 74, at 10 ("Research indicates that pro se litigants frequently proceed without the benefit of critical information such as pretrial relief, allocation of insurance, pension benefits, and tax consequences."); Long & Lee, *supra* note 62, at 9 ("Pro pers appear to have a greater probability of experiencing an unjust result"). *See generally* Bryan, *supra* note 153, at 931 (discussing the different background conditions that women face in divorce proceedings).

274. *See* Changing the Culture, *supra* note 58, at 29 (arguing that judges' practice of using "valuable court time to explain rules and procedures or to ask questions of witnesses in an attempt to be fair or to further discovery of critical information" may be unfair to represented adversaries "since it creates the appearance that the court favors the unrepresented party"); Cox & Dwyer, *supra* note 48, at 51 (noting a potential problem in divorce cases, where "courts are forced to take an active role in their cases in order to protect [unrepresented] individuals' rights, thus jeopardizing judicial impartiality"); Long & Lee, *supra* note 62, at 7-8.

275. *See* Bohmer & Ray, *supra* note 97, at 40; Bryan, *supra* note 153, at 937; McEwen et al., *supra* note 93, at 1345-46; Mnookin & Kornhauser, *supra* note 158, at 956; Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 Yale L. & Pol'y Rev. 168, 173 n.11 (1984).

276. *See supra* notes 274-76; *see also* Memorandum from Judith C. Nord, Staff Attorney, Minnesota Judicial Center, to All Pro Se Subcommittee Members app. G (May 2, 1997) [hereinafter Nord Memorandum] (on file with author) (recommending a protocol to be used by the court during proceedings with pro se litigants); Long & Lee, *supra* note 62, at 5-7 ("Pro pers demand . . . more attention from judges. . . . [Some] judges feel that unrepresented parties place them in a compromising position.").

277. *See* Daniszewski, *supra* note 187, at 49 ("According to one superior court clerk's informal estimate, 75 percent of the staff time at the clerk's office counter is spent dealing with inquiries by *pro se* litigants. *Pro se* litigants also consume 60 to 70 percent of staff telephone time."); Cox & Dwyer, *supra* note 48, at 54 ("[T]he majority of court personnel indicated that self-help cases require more court time and resources on a per case basis than do attorney-handled cases."); Long & Lee, *supra* note 62, at 5.

courtroom facilitator is Cristina Llop. The clerk is Jennifer Ngo-Chan. The atmosphere they have created is refreshing, but I do not imply that they are alone in their accomplishment. They are an example of what we can make of the resources we have, and they should inspire us with the possibility of improving the manner in which we dispense justice throughout our court system.

A Unique Y2K Issue. On a completely different subject, it occurs to me that we may have a "Y2K" problem in our court system that no one may have fully anticipated, and it has nothing to do with computers. About November of each year, some clients come to the recognition that they want their dissolutions over by the end of the year. It is a predictably recurring phenomenon: a blinding insight that inspires many clients who have not earlier felt any urgency to resolve their situation that it must be over by year-end. The idea of starting off a new year fresh, unencumbered by the prior year's impediments, motivates many of us. Think of how much more powerful is the impetus to complete a task before the end of the century. Recently, one of my clients said she certainly wanted her dissolution concluded before the Millennium—and a light went on in my head that she was going to be echoed by many more before the year is out. I think there is going to be a millennial stampede for judgments to be finalized in December 1999. We ought to start early in finalizing those judgments that can be entered this year, and our courts would be well advised to arrange for extra help in processing judgments.

ADOPTION

Hearing After Investigative Report

Court's Refusal to Hold Evidentiary Hearing on Independent Adoption Petition Violated Family Code

Adoption of Baby Girl B.
(Civ. No. E022283; Ct. App., 4th Dist., Div. 2. 8/10/99)
—Cal. App. 4th—, —Cal. Rptr. 2d—
By Richli, J. (Hollenhorst, Acting P.J., Ward, J., concurring)

The court of appeal held that a trial court violated a prospective adoptive parent's statutory right to a hearing by refusing to hold an evidentiary hearing on an independent adoption petition after a county social services agency filed an adverse adoption report.

Facts and Procedure. In October 1996, a mother with a history of drug abuse gave birth; her infant daughter (Baby B.) was released to a prospective adoptive parent (Cyndie). In April 1997, Cyndie filed an adoption petition, acting in propria persona.

In October 1997, a county social services agency (the Department) filed an adoption report stating that Cyndie (1) had failed to respond to requests for information, including requests for documentary proof of marriages, proof of insurance, and personal references; (2) was unemployed, (3) had a criminal record, including convictions in 1981 for welfare fraud, in 1982 for writing bad checks, and in 1996 for possession of a controlled substance, (4) was living with an ex-husband who had a criminal record, including arrests in 1986 for grand theft, in 1995 for public drunkenness, and in 1994-1995 for spousal abuse; (5) was living off and on with an alcoholic adult son who had a criminal record, including arrests for battery and burglary, and (6) would not provide a suitable home for Baby B. The report recommended that the adoption petition be denied, and that Baby B. be removed from Cyndie's custody.

On December 10, at a hearing on the adoption petition, Cyndie appeared in *pro per* and requested a contested hearing. However, an attorney for the Department argued that Cyndie "had more than enough opportunity to be cooperative with [the caseworker]," that Baby B. was "in danger the longer she stays in [Cyndie's] household," and that a contested hearing would result in "just delaying a

come complicated and contested, more help is needed. Cases with the potential to be adversarial and complicated, with litigants of unequal power facing one another, and with one side typically represented by counsel, will require extensive assistance for unrepresented litigants if the assistance is to be any help at all. The details of the revised roles of the judges, mediators, and clerks in a particular setting must be determined by the needs of the unrepresented litigants in that setting.[262]

Part III examines particular courts involving large numbers of unrepresented litigants. The factors identified in part II.C provide the framework for analyzing the features of the different settings. The analysis reveals the need for revised roles of the judges, mediators, and clerks, the need for guidelines defining the revised roles, the need for increased assistance to the unrepresented poor, and the need to tailor changes to fit the varying contexts.

III. Help for Unrepresented Litigants—Examples from Context

A. *Family Court*

The numbers of unrepresented litigants in family law cases have surged nationwide, with some reports indicating that eighty percent or more of family law cases involve at least one pro se litigant.[263] The

262. As discussed above, the goal remains one of providing fairness and justice for those without lawyers as well as those with lawyers. *See supra* Part II.A.1. As urged throughout this Article, for that goal to have meaning, at a minimum, litigants should not forfeit important rights due to the absence of counsel. Outcomes of cases should relate to the merits of the claims, rather than the presence or absence of counsel. *See supra* note 17. While similar questions of fairness arise when both parties have counsel of differing levels of skill or the parties have unequal resources, those questions are beyond the scope of this Article. The profession could choose to place the burden on the court personnel to correct imbalances, increase its regulation of lawyers, or allow the imbalance to operate unchecked. None of the choices obviates the need to solve the problem of assisting the unrepresented poor.

263. *See, e.g.*, Changing the Culture, *supra* note 58, at 26 (reporting the impressions of court personnel that "in approximately 80% of cases in the [Massachusetts] Probate and Family Court, at least one party is not represented by counsel"); Erin M. Moore, *The Cost of Divorce: Pro Se Litigants Flood Family Law Courts*, De Novo, May 1995, at 1 (reporting that 77% of all family cases in Washington State involve at least one unrepresented litigant); Sales et al., *supra* note 53, at 571 n.82 (noting that "in 88.2% of the divorce cases filed in Maricopa County [Arizona] in 1990, at least one of the litigants was self-represented"); McKnight, supra note 126, at 1 (revealing that 89% of the family law cases in Oregon involve at least one pro se party). The numbers have been surging at least since the 1980s. *See, e.g.*, Rhode, *supra* note 77, at 214-15 (noting that the proportion of pro se filings in surveyed California counties grew from 39% to 62% of family law cases during the 1980s); Cox & Dwyer, *supra* note 48, at 2 (reporting that pro se filings for a sample of divorce cases in Arizona increased from 24% to 47% between 1980 and 1985); *see also* BBA Report, *supra* note 175, at 5 ("Although some growth in pro se litigation is reported in all categories of civil litigation, the most drastic and consistent increase appears to be in domestic litigation."); Meeting the Challenge, *supra* note 1, at 49 ("The area of law and court

factors identified in part II.C suggest the need for a range of mechanisms for assisting unrepresented litigants. The high percentage of unrepresented litigants, combined with the huge volume of the court's cases, compels the need for a sweeping institutional response rather than an *ad hoc* reaction to isolated litigants; the more the numbers suggest that attorneys are becoming the exception rather than the rule, the greater the need to operate the court in a manner that reflects that reality. Early reports identified the relative lack of complexity of family law as a factor explaining the increase in numbers of unrepresented litigants;[264] where cases lack legal and factual complexity, increased information and technical assistance may be a sufficient response. At the same time, depending on factors such as the type of family law case, the assets involved, or the extent of conflict between the parties, cases may become quite complex, suggesting that assistance programs will need to have the capacity to go beyond increased information and technical assistance.[265]

The remaining factors suggest that unrepresented family law litigants often may not only need assistance, but also protection. While in many cases both sides appear without counsel, at least a third, and often more, of the cases pit an unrepresented party against a lawyer.[266] Since unrepresented litigants typically are poorer than represented ones and unrepresented litigants disproportionately are women, unrepresented women may therefore be facing their batterers in the proceeding and may be dealing with tactics such as "custody blackmail."[267] While some family law proceedings are amicable, others are quite adversarial: "matrimonial matters . . . 'are unequaled in stress and emotion,'"[268] and family law lawyers have a reputation

operations that is feeling the brunt of the increase in the volume of pro se cases is domestic relations.").

264. *See, e.g.*, Cox & Dwyer, *supra* note 48, at 30 (concluding that after testing theories as to why more litigants self-represent in divorce cases than in bankruptcy cases, "[o]ur empirical findings are consistent with our hypothesis that consumers' use of self-help varies inversely with legal and factual complexity").

265. *See, e.g.*, Sales et al., *supra* note 53, at 561-66 (identifying factors such as the income of the parties, the presence of any children, the amount of property, and the length of the marriage as affecting the complexity of the proceeding).

266. *See, e.g.*, Sales et al., *supra* note 53, at 571 n.82 (reporting that in over 35% of the divorce cases filed in Maricopa County, Arizona, in 1990, one side was pro se, while the other was represented by an attorney); McKnight, *supra* note 263, at 1 (reporting that 44% of the family law filings in Oregon involved only one represented party).

267. *See* Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 Md. L. Rev. 497, 503 (1988) (describing "custody blackmail," in which "divorcing husbands routinely and successfully use the threat of a custody fight to reduce or eliminate alimony and child support obligations"). *But cf.* Eleanor E. MacCoby & Robert H. Mnookin, Dividing the Child 154-59 (1992) (questioning the extent of the practice of "custody blackmail" based on a California study).

268. Jan Hoffman, *New York's Chief Judge Imposes Strict Rules for Divorce Lawyers*, N.Y. Times, Aug. 17, 1993, at A1 (quoting Chief Judge Judith S. Kaye of the New

A Report and Guidebook for Judges and Court Managers

Jona Goldschmidt

Barry Mahoney

Harvey E. Solomon

Joan Green

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3. *The complexity of the proceeding.* The simpler the substantive law and the procedure, the less likely the need for comprehensive legal advice and assistance, and the greater the likelihood that the development of forms and information systems might overcome many of the problems facing unrepresented litigants.[255] The more complicated the substantive law, procedures and forms, the more help the unrepresented litigant will need.[256]

4. *The adversarial or contested nature of the proceeding.* The more a type of case has the potential for being contested, the greater the level of assistance that will be necessary to build into the system. Although not all name changes are simple and not all custody battles bitterly contested, name change cases typically are less adversarial than custody cases.[257]

5. *The extent to which cases regularly pit an unrepresented party against a party represented by a lawyer.* Cases involving a lawyer and an unrepresented party are the most difficult challenge, requiring the greatest level of intervention. Where both parties are without counsel, both litigants are likely to need assistance. The court system at least is not generally faced with helping an unrepresented litigant survive and overcome the efforts of an adversary schooled in using, and often manipulating, the legal system.

255. This is not to suggest that simplifying the procedures will inevitably benefit indigent litigants, the most common unrepresented litigants. Scholars have vigorously debated advantages of formal versus informal procedures in considering changes that might benefit poor people. *See, e.g.*, Richard Abel, *Informalism: A Tactical Equivalent to Law?*, 19 Clearinghouse Rev. 375, 379-83 (1985) (arguing that formal procedures protect the pro se litigant); Galanter, *supra* note 253, at 149 (suggesting that substantive rule change alone is not likely to "be determinative of . . . outcomes"); William H. Simon, *Legal Informality and Redistributive Politics*, 19 Clearinghouse Rev. 384, 385-88 (1985) (analyzing the strategic advantages of the anti-informalist argument). Viewed only from the perspective of simplicity, difficulties facing unrepresented litigants in prosecuting breach of warranty of habitability might be equally met by making the proof of the defense easier for the tenant on the one hand, or eliminating the defense on the other. Both changes would "simplify" the procedure, but with very different substantive results.

256. Notwithstanding the importance of a generalized assessment of complexity by subject matter, assistance models must also plan for varying degrees of complexity in individual cases. *See, e.g.*, Cox & Dwyer, *supra* note 48, at 19 ("[J]ust as legal fields vary in complexity, so do individual cases. Some cases present simple fact situations, and others present complex situations. An otherwise simple divorce case, for example, may be made complex by the presence of marital children or substantial marital property.").

257. In making this assessment it is critical that the inquiry not turn on settlement rate of the cases; as has been seen, the pressure on unrepresented litigants to settle is immense, and the fact of their capitulating with great regularity is more a comment on the difficulties they encounter in court than on the contested nature of the action. A more instructive test might be to measure the contested nature of the action where both parties have lawyers. If the type of case is one that typically may be easily resolved, the case may be viewed as one that is not tremendously adversarial. One's view as to whether the presence of lawyers exacerbates or facilitates the dispute resolution process will affect one's view as to the appropriateness of such a test.

6. *The extent to which a power imbalance exists between the parties.* Cases involving a lawyer against an unrepresented party are but one example of power imbalance. Other examples include consumer cases generally pitting creditors against debtors,[258] landlord-tenant cases pitting institutional landlords against poor tenants, who often may be women of color,[259] and family law cases, particularly those involving domestic abuse or disparity in the economic situation of the husband and wife.

For consideration along with the factors listed above are the various mechanisms for assisting unrepresented litigants. Many of the mechanisms may be organized on a spectrum ranging from those that provide the least intervention to those providing the most.[260] Informational kiosks and hand-outs, instructional forms, simplified procedures, and the implementation of user-friendly court forms might require the fewest changes in a court's current operation. Expanded roles for clerks, or the development of programs using nonlawyers limited by the type of advice they may give, might be next along the spectrum. "Lawyers-for-the-day" programs, and clinic programs using law students and lay advocates trained and permitted to dispense legal advice and help litigants complete their forms, might be next. Providing "lawyers-for-the-day" or lay advocates who assist the litigant throughout the proceeding, including in negotiation, in mediation and before the judge, might be next. Finally, at the far edge of the spectrum would be the appointment of counsel to represent the litigant.[261]

In designing programs to assist unrepresented litigants, the features of the particular courts at issue must determine the required level of assistance. The simpler and less contested the cases are, the more that information kiosks and court forms may be sufficient. As cases be-

258. *See, e.g.*, Caplovitz, *supra* note 158, *passim* (considering the serious problem of debt disentanglement); Sterling & Schrag, *supra* note 158, at 360 (suggesting that procedural reforms to protect unrepresented debtors may be warranted).

259. *See infra* Part III.C.

260. Notwithstanding imperfections in any effort to place programs along such a scale, the exercise nonetheless may provide assistance to those choosing among programs.

261. While no jurisdiction has recognized a right to counsel in most civil cases, judges in civil cases retain the discretion to appoint counsel where appropriate. *See, e.g.*, UBO Realty Corp. v. Fulton, No. 98761/91 (N.Y. Civ. Ct. Dec. 9, 1991) (unpublished opinion, on file with the *Fordham Law Review*) (assigning counsel to indigent defendant where complex legal issues were at stake); Gardenia Realty v. McMillan, No. 77216/87 (N.Y. Civ. Ct. Aug. 3, 1987) (unpublished opinion, on file with the *Fordham Law Review*) (assigning counsel to indigent defendant where risk of grave harm existed). "Many states have poor persons statutes that authorize the appointment of counsel in civil matters for people who cannot afford the costs of prosecuting or defending a proceeding." Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv. C.R.-C.L. L. Rev. 557, 585 (1988); *see also* Rubin, *supra* note 60, at 1008-09 (discussing court appointed representation for indigent litigants).

The legal and judicial ethics issues surrounding any form of judicial assistance to a self-represented litigant, or even a represented party, are numerous, intertwined, and implicate competing values.

Judicial ethics principles have obvious relevancy to the thorny dilemma confronting the trial judge: balancing the duty of impartiality in appearance and in fact with the duty to provide a fair and meaningful hearing. The judge who provides any form of assistance to a self-represented litigant whose adversary is represented risks being accused of unfairness by the opposing attorney. Yet, by maintaining complete passivity when a self-represented litigant makes errors jeopardizing the claim or defense sought to be made, some would argue that the judge runs afoul of the meaningful hearing requirement of the due process clause and the rights of access to the court, self-representation, and an open court. These and other legal and judicial ethics issues are discussed below.

GENERAL RULES REGARDING TREATMENT OF PRO SE LITIGANTS

The Supreme Court in *Haines v. Kerner.*[69] held that a self-represented litigant's complaint must be held to "less stringent standards than formal pleadings drafted by lawyers." "Pleadings" is defined by *Black's Law Dictionary* (5th ed. 1979) as: "The formal allegations by the parties of their respective claims and defenses." It is not clear whether "pleadings" includes letters, motions, or other written submissions to the court. Moreover, whether *Haines* applies to pleadings in state courts, or is limited to an interpretation of the federal pleading rule (Rule 4, F. R. Civ. P.) is an open question.

What if the court determines that pleadings filed by a pro se litigant were in fact drafted for a fee by an undisclosed nonattorney? Should the court deny the filing of the petition or impose other sanctions against the litigant? A Tennessee attorney general opinion on this point states:

> Preventing the filing of such pleadings or documents or expunging them once filed, when they are signed and filed by a litigant proceeding pro se, could be construed as depriving that litigant of the state and federal constitutional right of access to the courts.... [I]t is the opinion of this office that a trial court would exceed its powers and proper role by rejecting the filing of a document because of such circumstances. Such action by the court could well cause a litigant, at no fault of his own, to forever forfeit valuable rights, such as when a filing is necessary to prevent the running of the statute of limitations on a claim, or to comply with other mandatory requirements of statute or court rules. Such a rejection would also raise serious questions of denial of the litigant's constitutional right of access to the courts. While unauthorized practice is obviously a serious concern, the remedy of striking a document for that reason would be a drastic one, and would have repercussions on the litigant rather than the real wrongdoer.[70]

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69. 404 U.S. 519, 520, 92 S.Ct. 594 595 (1972).

70. Opinion 94-101, 1994 WL 509446 (September 9, 1994). The opinion cites the following case law: *John L. v. Adams*, 969 F.2d 228, 231 (6th Cir. 1992) (noting that on numerous occasions the Supreme Court has recognized the existence of a federal constitutional right of access to the courts); *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 137 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172, 106 S.Ct. 2896 (in federal courts, while there is no constitutional right to self-representation in civil cases, there is a statutory right of long standing to such self-representation); *Whishant v. Byrd*, 525 S.W.2d 152, 153 (Tenn. 1975) (recognizing that an individual has a state constitutional right to institute and prosecute a civil action seeking redress for injury or damage to

forcing attorneys to appear in court or refrain from assisting at all, courts should be building on the limited assistance.[249] Courts concerned mainly with docket control might find meddlesome and annoying the increased use of lay advocates and limited assistance. Courts dedicated to providing fairness to unrepresented litigants should welcome the increase in assistance from outside the court.

C. *Developing Guidelines and Considering Context*

An analysis of necessary change in a particular context will depend on the identification of the barriers facing unrepresented litigants not on a piece-meal basis, but systemically. The features of a particular context are important in determining the extent to which the traditional roles must be revised. While the details of revised roles may vary from context to context, it does not follow that judges, mediators, and clerks should be left without guidance as to how to handle cases involving unrepresented litigants. As with the development of rules of procedure, the supreme courts or equivalent rule-making bodies in particular jurisdictions should develop general standards, which then should be tailored to particular courts by the administrators of those courts. Individual variation between judges and clerks would occur within the context of specific guidelines and rules. The development of rules in the small claims context regarding the role of the judge attests to the feasibility of such an approach.[250]

Judges, mediators, and clerks currently receive little or no guidance as to how to handle cases involving unrepresented litigants.[251] Yet solutions to the problems described in this Article require the promulgation of guidelines consistent with the underlying principles and re-

249. See part I.B.2 for a discussion of the judiciary's and the profession's reaction to the provision of limited assistance by attorneys. Appropriate inquiries by judges and mediators would help identify the advice received by the unrepresented litigant and provide a measure of oversight. *See supra* Part II.B.1–2. Once attorneys are persuaded that the provision of limited assistance is welcomed, they may become more willing to provide the assistance. Rules requiring disclosure in pleadings might then become appropriate safeguards, rather than a device for chilling the practice.

250. *See supra* Part I.D.

251. Ninety-one percent of judges in one recent survey reported "that their courts had no general policy addressing the manner in which pro se litigants should be handled in the courtroom or in the litigation process generally." Goldschmidt, *supra* note 3, at 16; *see* Meeting the Challenge, *supra* note 1, at 54, 117. Forty-eight percent of court administrators in the same study reported that their court had no established rules, policies, or instructions to guide court staff in responding to pro se-related questions; of those responding that their courts had such policies, only 38% said the policies were in writing. *See* Meeting the Challenge, *supra* note 1, at 50, 123; Goldschmidt, *supra* note 3, at 21. For a discussion of the lack of guidance for mediators, see *supra* notes 217-25 and accompanying text. *See also* BBA Report, *supra* note 175, at 18 ("there is no systemic approach to unrepresented litigants in the [Massachusetts] District Court[s]"); *id.* at 3, 66 (recommending the adoption of guidelines to assist judges).

vised roles discussed in the preceding sections.[252] The rules need to distinguish between cases involving only unrepresented litigants and cases pitting unrepresented litigants against represented ones, since the scenarios present different issues for the court system. While rule changes alone are unlikely to eliminate the problems facing the unrepresented poor,[253] the continued absence of appropriate guidelines tailored to context is a gaping hole that must be filled if the courts are serious in their efforts to provide unrepresented litigants meaningful access to the courts.[254]

Context is important not only in assessing the extent to which the traditional roles must be revised, but also the extent to which the revision of the roles must be supplemented by assistance programs, and the type of assistance programs that should be considered. The following factors may be useful as a starting point for the analysis.

1. *The prevalence of unrepresented litigants.* The higher the percentage of unrepresented litigants, the more the court's rules in general must be geared toward meeting the needs of unrepresented litigants.

2. *The volume of cases.* The higher the volume of overall cases, particularly of those involving unrepresented litigants, the greater will be the need to develop assistance programs. An isolated unrepresented litigant in a low-volume court might be accommodated simply by revising the roles of the existing players, whereas a large number of unrepresented litigants in a high volume court may render the development of additional programs imperative.

252. Policy recommendations include: "Courts, in conjunction with the bar, should establish policies to guide court staff in assisting self-represented litigants" and "[e]ach state should establish judicial protocols to guide judges assisting self-represented litigants." Meeting the Challenge, *supra* note 1, at 109, 111. The policy recommendations also call for the education of judges and clerks. *See id.*

253. As Professor Galanter warned 25 years ago in his classic study explaining why the "haves" come out ahead of the "have nots":

> Rule change is in itself likely to have little effect because the system is so constructed that changes in the rules can be filtered out unless accompanied by changes at other levels. . . . The system has the capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice or distribution of tangible advantages.

Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95, 149 (1974) (footnote omitted) (describing relative success of repeat players versus one-shot players in court).

254. In promulgating rules, it will be important to ensure that rules or guidelines protect unrepresented litigants, rather than self-interested lawyers and judges. As a number of commentators observed, the process of adopting the Model Rules of Professional Conduct produced rules favoring lawyers at every turn, providing a basis for the concern that self-interest might prevail in rule-making. *See, e.g.*, Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 Ohio St. L.J. 243, 245, 268 (1985) (noting the tendency of the American legal profession to adopt self-serving rules); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 Tex. L. Rev. 689, 691 (1981) (discussing potential conflicts of interest among members of the bar in adopting rules).

The Committee on Standards of Conduct Governing Judges in the Sixth Judicial Circuit of Florida answered a similar question.[71] There, a judge inquired whether he would violate the Canons of Ethics by presiding over a case which he knew or had reason to know was "the product of unlicensed practice of law, in that the pro se litigants are receiving legal advice and services from nonlawyers." The committee saw "no ethical impropriety in a judge presiding over a case where a pro se party may have received advice from a nonlawyer or an attorney not admitted to practice in Florida. If appropriate, at the conclusion of the matter, the judge may refer such cases to the Florida Bar...."

GHOSTWRITING

"Ghostwriting" is the term used by several courts to describe the act of an undisclosed attorney who assists a self-represented litigant by drafting his or her pleadings as part of "unbundled" or limited legal services. The practice has been criticized by some courts as violative of various court rules and ethics principles. For example, in *Johnson v. Bd. of County Commissioners*,[72] the court held that the self-represented defendant's pleadings,

> seemingly filed pro se but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The pro se litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party.

The court also found ghostwriting a violation of Rule 11, F. R. Civ. P., which requires that "every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's name, or, if the party is not represented by an attorney, shall be signed by the party." The court found that a "deliberate evasion of the responsibilities imposed on counsel" by this rule occurred in that case.[73]

The court in *Johnson* cited Informal Opinion 1414 (1978) of the ABA Standing Committee on Ethics and Professional Responsibility in support of its ruling. That opinion found that undisclosed counsel who renders extensive assistance to a self-represented litigant engages in misrepresentation contrary to the former Model Code of Professional Responsibility provision DR1-102(A)(4), which provides: "A lawyer shall not:..(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The court further found that "Having a litigant appear to be pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous [sic] to say the least; it is far below the level of candor which must be met by members of the bar."[74] See also, *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*,[75] in which a federal district court found that ghostwriting was a violation of a local rule that requires counsel to obtain leave of court before terminating their representation of a party. No cases have been found upholding the practice of ghostwriting.

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his personal property, or for the vindication of any other legal right); *Irvin v. City of Clarksville*, 767 S.W.2d 649, 651-652 (Tenn. Ct. App. 1988) (discussing generally the right of a litigant to proceed pro se).

71. Opinion 94-96 (December 16, 1994), http://www.co.pinellas.fl.us/sixth/ocscgj/ninet4/94-46.html.

72. 868 F.Supp. 1226, 1231 (D.Colo. 1994), citing *Ellis v. Maine*, 448 F.2d 1325 (1st Cir. 1971); *Klein v. H.N. Whitney, Goadby & Co.*, 341 F.Supp. 699 (S.D.N.Y. 1971); and *Klein v. Spear, Leeds & Kellogg*, 309 F.Supp. 341 (S.D.N.Y. 1970).

73. *Johnson v. Bd. Of County Commissioners*, 868 F.Supp. at 1231.

74. *Id.* at 1232.

75. 968 F.Supp. 1075, 1079 (E.D.Va. 1997).

reasons the clerks should not be so restricted. The giving of legal advice by a nonlawyer should not constitute the unauthorized practice of law since no fee is charged and the advice is under the auspices of the court.[241] As with the clerks, the danger that lay advocates will give poor legal advice should be addressed by training and oversight, not a prohibition against giving the advice. For lawyers staffing the assistance programs, the biggest theoretical danger is litigation, either by dissatisfied unrepresented litigants or their adversaries.[242] At a minimum, staff at the court-based programs should have malpractice coverage provided for them and, in some circumstances, be immune from civil suit.[243]

Outside the courthouse, commentators have promoted policy arguments supporting a relaxation of the unauthorized practice of law with respect to lay advocacy.[244] As prohibition gives way to permission,

241. *See, e.g.*, Wis. Stat. Ann. § 757.30(2) (West 1981) ("Every person who . . . for compensation or pecuniary reward gives professional legal advice not incidental to his or her usual or ordinary business . . . shall be deemed to be practicing law within the meaning of this section."). For a narrower formulation, see Fla. Sup. Ct. Rule 10-2.1(a) ("it shall not constitute the unlicensed practice of law for nonlawyers to engage in limited oral communications to assist individuals in the completion of blanks on a legal form approved by the Supreme Court of Florida."). For a similar recommendation relating to court staff, see Meeting the Challenge, *supra* note 1, at 112. *See also* Letter from William Griffin, Chief Assistant Attorney General, State of Vermont Office of the Attorney General, to Jan Rickless Paul, Esq., Paul & Paul (Aug. 8, 1994) (on file with author) (writing in response complaint regarding the unauthorized practice of law by a Family Court Case Manager).

> It is my opinion . . . that the activities of a case manager in conformance with the job description does not constitute the practice of law. Even if they did, since the activities are authorized by the Court and performed on its behalf, the Attorney General would be hard pressed to argue that they are unauthorized (albeit unlicensed). . . . There may be a policy argument against allowing court personnel to help litigants complete forms and understand their right [sic] and the legal process, but I do not know what that argument might be.

Id. at 2.

242. *See, e.g.*, Changing the Culture, *supra* note 58, at 34-35 (describing how a lawsuit against a volunteer attorney jeopardized future LFD programs).

243. *See, e.g.*, Mosten, *supra* note 48, at 430-35 (discussing malpractice exposure and civil immunity in the context of limited representation). With court-sponsored limited assistance programs, it is difficult to envision sound policy reasons to permit litigation. The appropriate focus should be court oversight and training. Litigants receiving harmful advice should have their remedy in the litigation itself in the form of relief from adverse decisions. The closer the assistance provided comes to full representation, the weaker the argument for civil immunity will be. For a similar recommendation relating to court staff, see Meeting the Challenge, *supra* note 1, at 113.

244. *See* Nonlawyer Practice, *supra* note 77, at 1-12, 73-157; Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 Fordham L. Rev. 2581, *passim* (1999); Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 Fordham L. Rev. 2241, *passim* (1999); Rhode, *supra* note 77, *passim* (surveying developments in the unauthorized practice of law). As Gary Bellow and Jeanne Kettleson observed twenty years ago, "[m]uch more effective lay . . . representation would be a necessary component of any significant expansion of access . . . ." Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. Rev. 337, 386 n.193 (1978). The increased use of lay advocates, however, would not necessarily benefit indigent litigants. As Barbara Bezdek's study of Baltimore's Rent Court revealed, the lion's share of non-attorney assistance is used against, rather than for, the indigent litigant. *See* Bezdek, *supra* note 23, at 562-63. Professor Bezdek's study confirmed the earlier predictions of Professor Abel: if advantaged parties were prohibited from using lawyers, they "could retain representatives who were not formally qualified as lawyers but possessed all of the lawyer's competence." Richard L. Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 L. & Pol'y Q., 5, 20 (1979).

new rules authorizing and regulating lay advocacy need to replace the current restrictions.[245] Finally, changes to the ethical rules and malpractice standards are necessary to encourage discrete task representation consistent with the notion of "unbundled legal services."[246]

A relaxation of the rules must be accompanied by a change in attitude by judges and other court personnel regarding the presence of lay advocates in court and the provision of limited assistance by attorneys. This Article has identified the extensive assistance judges, mediators, and clerks must provide unrepresented litigants to ensure that important rights of those litigants are not forfeited due the absence of counsel.[247] The more that unrepresented litigants receive competent assistance before and during their court appearance, the lighter the burden on the court personnel will be.

Rather than resisting the presence of lay advocates in court or in mediation, the courts should be assisting the efforts to expand, upgrade, and oversee available non-attorney counseling.[248] Rather than

245. *See* Murphy, *supra* note 80, at 138-39; Rhode, *supra* note 77, at 221.

246. *See, e.g.*, Responding to the Needs, *supra* note 25, at 37-38 (discussing the problems the non-traditional attorney-client relationship raises for malpractice insurance coverage); Millemann et al., *supra* note 57, at 1188-89 (discussing the need for reform in order to provide better legal services for unrepresented litigants); Mosten, *supra* note 48, at 430-34 (purporting that clear communication and a positive personal relationship between lawyer and client is mandatory until immunity or limitation on malpractice exposure are enacted for discrete task representation); Long & Lee, *supra* note 62, at 40-41 (exploring the possibility of providing incentives for the private bar to service those now unrepresented in family law matters); *see also* Meeting the Challenge, *supra* note 1, at 112 (recommending enhancement of unbundled legal services in pro bono cases). Recognizing a standard of care consistent with the limited representation, rather than measuring the provider of discrete task representation by the standards of full representation, and embedding the sliding standing into analysis under the ethics and malpractice rules, seems to be the most sensible approach. Requiring the attorney to set clear limits, particularly through a retainer, as to the scope of the representation is consistent with this approach. Mosten's call for civil immunity, however, seems unnecessary and goes too far. *See* Mosten, *supra* note 48, at 433-34. Even Mosten seems to recognize this: "I do not suggest complete immunity for unbundled lawyering malfeasance. Rather, I propose that liability should attach according to the contracted scope of lawyer engagement." *Id.* at 434. For a thoughtful set of recommendations designed to balance the need to protect vulnerable clients while expanding the use of discrete-task representation see McNeal, *supra* note 86, at 335-38.

247. *See supra* Part II.B.1-3.

248. *See, e.g.*, *infra* Part III.B (discussing lay advocates in the context of bankruptcy cases).

PROCEDURAL COMPLIANCE

In the context of a criminal case, the Supreme Court in *McKaskle v. Wiggins* held that "A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course."[76] It has been suggested that this also applies to civil cases.[77]

Assuming judges need not "take over chores" for a self-represented litigant, how should judges treat them? Many courts have an unstated policy of leniency regarding the construction of pro se pleadings, and failures to adhere to technical rules of procedure are largely ignored to ensure that claims made are given "fair and meaningful consideration."[78] As Judge Posner once stated, "It is unfair to deny a litigant a lawyer and then trip him up on technicalities."[79] One court observed that "[c]ourts will go to particular pains to protect pro se litigants against the consequences of technical errors if injustice would otherwise result."[80]

However, it has been held that "The trial court is under no obligation to become an 'advocate' for or to assist and guide the pro se layman through the trial thicket."[81] The judge who "unduly" aids the pro se litigant in his defense is, it is argued, wrongfully acting as an advocate for one side of the dispute.

DUTY OF IMPARTIALITY

The general rule regarding a judge's duty to remain impartial was captured in the following statement of the Illinois Appellate Court. The opinion is from a case in which the plaintiff was represented at trial and the defendant physician appeared pro se. The plaintiff, appealing an adverse judgment, argued among other things that he was denied a fair trial because the judge "attempted to assist the defendant in presenting his case."[82] The court, rejecting the claim, stated:

> 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 practices is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on

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76. 465 U.S. 168, 183-84, 104 S.Ct. 944, 954, reh. denied, 104 S.Ct. 1620 (1984).

77. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. Chi. L. Rev. 659 (1988). Bradlow goes further and proposes using the test for determining what process is due under the due process clause announced in *Mathews v. Eldridge*, 424 U.S. 319, S.Ct. (1976) "to determine the procedural leniency due a pro se civil litigant" beyond the liberal interpretation of pro se pleadings required under *Haines v. Kerner*, 404 U.S. 519, S.Ct. (1972). Although she suggests using the *Mathews* balancing test (i.e., identifying the litigant's "protected interest," and then weighing the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards, followed by a consideration of the government's interest that the additional or substitute procedural requirement would entail), she provides no example of its possible application. Nevertheless she concludes that "some litigants will require very great procedural protections; others will require no protection; and the vast majority will receive an amount of protection somewhere in between." *Id.* at 676.

78. *Matzker v. Herr*, 748 F.2d 1142, 1146 (7th Cir. 1984).

79. *Merritt v. Faulkner*, 697 F.2d 761 (7th Cir. 1983) (Posner, concurring and dissenting).

80. *United States v. Sanchez*, 88 F.3d 1243 (D.C. Cir 1996).

81. *U.S. v. Pinkey*, 548 F.2d 305, 311 (10th Cir. 1977).

82. *Oko v. Rogers*, 466 N.E.2d 658 (Ill. 1984).

in the cases discussing the judge's role in interacting with unrepresented parties;[234] judges remain without appropriate guidance as to their role in such cases.[235] The provision of limited assistance by lawyers serves as a reminder that settling on a universal understanding of "the lawyer's role" is an impossible task;[236] defining the clerk's role by contrasting it to the lawyer's role is equally impossible. As with the barrier of "no legal advice," a guideline of not acting in a manner that a lawyer for the litigant might act would prove to be both unworkable and harmful to unrepresented litigants. Much of the help that lawyers often provide is precisely the help that unrepresented litigants need.

With respect to the problem of clerks not being capable of providing accurate advice, one solution is to provide sufficient numbers of appropriately trained lawyers, law students, or lay advocates to provide the needed assistance. In those contexts, limiting the clerk's role is not only acceptable, but may be advisable. Where limited assistance programs are inadequate to meet the demand, court personnel must provide the needed assistance. Training of the clerks and oversight of the advice they give is imperative. The solution to bad advice-giving should be to improve the quality of the advice, rather than eliminate the advice-giving.[237]

Where an unrepresented litigant relies on erroneous advice to her detriment, or misunderstands accurate statements by a clerk, judges should consider the reliance in determining whether to grant relief. A number of courts have found "good cause" to exist within the meaning of Federal Rule of Civil Procedure 4(j) when the failure to effect service was attributable to the advice or actions of someone in the clerk's office.[238] If an unrepresented litigant defaults based on erroneous advice from a clerk, the misunderstanding might rise to the level of excusable default, providing part of the basis for vacatur of the de-

234. *See supra* notes 123-28 and accompanying text.

235. *See supra* Parts I.D, II.B.1.

236. *See supra* Part I.B.

237. *See* Increasing Access to Justice, *supra* note 33, at 10; Meeting the Challenge, *supra* note 1, at 109 ("State Court Systems and Local Courts Should Train Court Staff on How to Assist Self-Represented Litigants."). Clerks may need to preface their assistance with clear disclosures about their role, including their status as non-lawyers, where appropriate, and the fact that they might be called upon to help the other side. Given the realities facing the unrepresented poor, it is hard to imagine that the disclosures will deter many litigants from accepting whatever assistance the clerks can provide. A discussion of the court's role where clerks give poor advice to a represented party is beyond the scope of this Article.

238. *See* Poulakis v. Amtrak, 139 F.R.D. 107 (N.D. Ill. 1991); Patterson v. Brady, 131 F.R.D. 679 (S.D. Ind. 1990) (holding that where a pro se litigant's failure to comply with service requirements was attributed in part to the clerk's office, the pro se plaintiff satisfied the good cause requirement under Fed. R. Civ. P. 4(j)), *aff'd mem. sub nom.* Patterson v. Rubin, 89 F.3d 838 (7th Cir. 1996); *see also Patterson*, 131 F.R.D. at 684 n.7 (citing cases where courts found good cause in a pro se litigant's reliance on the clerk's advice).

fault.[239] Similarly, if an unrepresented litigant waives important rights in settlement due to misinformation or misunderstanding, from a clerk or otherwise, the misunderstanding might lead the court to vacate the agreement, particularly where the failure to do so would constitute a miscarriage of justice.[240]

This scenario is less troubling than it seems. As discussed in the previous section, a critical role for the judge is to identify the advice and information on which the unrepresented litigant is relying. This precaution would not only reveal any reliance on erroneous advice from clerks, but from others as well, including family friends and opposing counsel. If the judge is conducting an appropriate inquiry, before the court accepts the unrepresented litigant's choices, many of the problems can be uncovered before they cause harm. Where the problems do not arise until after the litigant has acted, such as in a situation of default, the improper advice can and should provide a basis for relief.

This discussion illustrates the inevitable connection between the role of the clerks or other court personnel and the role of the judge. The less help the nonjudicial court personnel provide, either because they refuse to do so, are prohibited from doing so, or are providing incorrect "help," the greater the burden on the judge, either in providing the help in the first place, or undoing the effects of incorrect advice. The more that clerks provide extensive, competent assistance, the less the burden on the judge.

4. Beyond the Judges, Mediators, and Clerks

The ability of people beyond judges, mediators, and clerks to assist unrepresented litigants will be enhanced to the extent that rules that act as barriers to assistance can be modified or eliminated. Inside the courthouse, programs staffed by nonlawyers should not be restricted by the traditional prohibition against giving legal advice for the same

239. *See, e.g.*, Fed. R. Civ. P. 60(b); Mass. R. Civ. P. 60(b).

240. *See, e.g.*, *supra* notes 152-55 and accompanying text. Greacen refers to the consequences of misunderstood advice as an "extraneous" issue of "estoppel." Greacen, *supra* note 24, at 12. Greacen cites a series of cases that he contends stand for the proposition that reliance on erroneous advice from clerks does not "absolve[ ]" procedural responsibilities, constitute "excusable neglect" or permit "rel[iance] thereon for the purpose of estoppel." *Id.* at 12-14 (citing Brown v. Quinn, 550 N.E.2d 134, 136, 137 (Mass. 1990); Krupp v. Gulf Oil Corp., 557 N.E.2d 769, 771 (Mass. 1990); and Wyoming *ex rel.* Wyo. Workers' Compensation Div. v. Halstead, 795 P.2d 760, 775 (Wyo. 1990), *superseded by statute as stated in* Neal v. Caballo Rojo, Inc., 899 P.2d 56 (Wyo. 1995)). The cases cited by Greacen do not stand for the proposition that when an unrepresented litigant relies on incorrect advice from a clerk, such reliance does not constitute estoppel. The two Massachusetts cases, as well as the cases cited in those two cases, do not involve unrepresented litigants. *See Brown*, 550 N.E.2d at 135; *Krupp*, 557 N.E.2d at 770-71. In the third case, which does appear to involve an unrepresented litigant, the Supreme Court of Wyoming granted relief on other grounds, "negat[ing] the need to discuss the issue of estoppel." *Halstead*, 795 P.2d at 762.

> the trial judge. The buck stops there. There is no law that requires a litigant to have a lawyer. The lawyer on 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 explanations 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 [the trial judge] faced up to that high responsibility in this case.[83]

Several judicial ethics requirements are relevant to judges' treatment of pro se litigants. Canon 2 of the American Bar Association's *Model Code of Judicial Conduct* (1990) (hereafter "Code") requires that judges "avoid impropriety and the appearance of impropriety" in all judicial activities; this includes acting "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[84] "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[85] Thus, impartiality is a fundamental precept of the adversary process.

As any judge who has had a case with a self-represented litigant knows, the impartiality admonition is problematic because of the frequent need to assist the litigant in the presentation of the case. Judges must balance their duty of impartiality to all parties with their duty to provide the required "meaningful opportunity to be heard" to which all litigants are constitutionally entitled.

Judges also have a duty under Canon 3 of the Code to "be patient, dignified and courteous to litigants...."[86] However, the Code explains that "The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate."[87]

Further, judges "shall accord to every person who has a legal interest in a proceeding...the right to be heard according to law."[88] In addition, judges also "must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay.[89]

Finally, judges have a duty to assure that court officials "refrain from manifesting bias or prejudice in the performance of their official duties."[90] The latter provision suggests a duty upon judges generally, and especially administrative judges, to assure their court staff provide assistance in an impartial manner. Judges have inquired of judicial ethics committees as to "the degree of legal assistance a judge should give pro se litigants." They have been informed "that although judges may advise pro se litigants regarding procedures, judges cannot provide legal advice."[91]

83. *Id.* at 661.

84. *Code* (1990), Canon 2, Sec. A.

85. *Id.* at Sec. A, Commentary.

86. *Id.* at Canon 3, Sec. B4

87. *Id.* at Canon 3, Sec. B4, Commentary.

88. *Id.* at Canon 3, Sec. B7. "Law" includes court rules, statutes, constitutional provisions and decisional law. *Id.* at Terminology.

89. *Id.* at Canon 3, Sec. B8, Commentary.

90. *Id.* at Canon 3, Sec. C2.

91. Committee on Standards of Conduct Governing Judges in the Sixth Judicial Circuit of Florida, *supra* note 71.

Greacen recommends that court staff keep in mind the following five principles when providing advice and information to court users:

> 1. Court staff have an obligation to explain court processes and procedures to litigants, the media, and other interested citizens. . . .
> 2. Court staff have an obligation to inform litigants, and potential litigants, how to bring their problems before the court for resolution. . . .
> 3. Court staff cannot advise litigants whether to bring their problems before the court, or what remedies to seek. . . .
> 4. Court staff must always remember the absolute duty of impartiality. They must never give advice or information for the purpose of giving one party an advantage over another. They must never give advice or information to one party that they would not give to an opponent. . . .
> 5. Court staff should be mindful of the basic principle that counsel may not communicate with the judge *ex parte*. Court staff should not let themselves be used to circumvent that principle, or fail to respect it, in acting on matters delegated to them for decision.[230]

The Greacen principles are an excellent start. The first two, which require the clerk to provide information about the processes and procedures are important guidelines; the fifth, which cautions against facilitating ex parte communications is an important safeguard as well. The fourth principle, regarding impartiality, may need to be modified to conform to the revised notion of impartiality discussed above.[231] As the first and third sentences of the fourth principle urge, court staff must indeed remain impartial and must not give information or advice to one party that they would not give to an opponent. To the extent the purpose of the second sentence of the fourth principle simply is to prohibit clerks from choosing sides and trying to help one side gain an advantage when the clerks would not provide equivalent help to the other side,[232] the sentence is redundant: the prohibition against favoring one side is included in the last sentence. The sentence may be eliminated or replaced with: "They must never favor one party over another." The sentence must not be read to prohibit clerks from providing any such assistance that might be viewed as giving one party an advantage over another. In an adversarial system, it is inevitable that much, if not all, information that helps one side could be viewed as giving one party an advantage over another. As long as the last sentence remains, and the clerks are as willing to help one side as the other, concerns about impartiality are overcome.

230. Greacen, *supra* note 24, at 14. Greacen also develops a description of the "Sample Staff Guidelines for Providing Information." *See id.* at 15. For a critique of the guidelines, see Meeting the Challenge, *supra* note 1, at 42-43. In Michigan, a group of court managers and support staff announced a description of guidelines. *See id.* at 43-44.

231. *See supra* Part II.A.2.

232. According to Mr. Greacen, this is the reading he intended. *See* Letter from John M. Greacen, Director of the Administrative Office of the Courts, Supreme Court of New Mexico, to Russell Engler, Clinical Director & Professor of Law, New England School of Law 4 (July 29, 1998) (on file with the author).

The third principle, prohibiting court staff from advising litigants whether to bring their problems before the court, or what remedies to seek, is troubling and ill-advised as a rule of universal application. Unrepresented litigants must have access to competent advice to help them decide whether they should bring their problems before the court, and, if so, what remedies they should seek. Without an examination of a particular context, it is not clear in the abstract who will best be situated to provide the necessary advice. In some settings, court clinics, lay advocates, and "lawyers-for-the-day" may relieve the clerks from the need to provide the assistance. If the help is nonexistent or inadequate, the clerks must be trained and permitted to provide the needed assistance. Otherwise, the litigant either is deprived of the needed assistance, or the judge is required to provide it.[233]

The details of how much assistance clerks should provide must be tailored to particular courts. In some courts, compliance with procedural rules may be a major hurdle facing unrepresented litigants. In other courts, discovering and understanding possible claims and defenses may be critical. Litigants may need help completing forms, articulating their stories, or correlating their stories to cognizable claims. They may need guidance as to the importance of witnesses or documents. Nothing in the description of a clerk's job should bar this type of assistance unless a given court has provided someone else to do so.

Providing such a broad license to clerks and other court personnel may be ill-advised. The role of the clerk may feel uncomfortably close to the role of the lawyer. Clerks may not be equipped to provide the necessary advice and may give bad advice. The courts may increasingly be faced with litigants having relied to their detriment on poor advice from clerks, or on a misunderstanding of a clerk's accurate statements.

As troubling as these issues are, they do not call for blanket rules discouraging or barring clerks from providing assistance. Adding a guideline that clerks must not act as a lawyer for the unrepresented party provides little guidance for the clerks. A similar "rule" appears

233. As with my reservations about the fourth Greacen principle, my discomfort with the third principle may be one of semantics, rather than substance. As proponents of a "client-centered" approach to counseling might contend, even lawyers arguably should not be *telling* litigants whether to bring their claims to court; the lawyers should be helping clients choose by advising clients of their options and the advantages and disadvantages of the options. *See generally* Binder et al., *supra* note 45, at 258-86 (discussing the proper and desirable ways lawyers can offer advice and guidance). To the extent the third Greacen principle only prohibits the *telling*, it is less objectionable, but it also provides clerks with less guidance. To the extent it is intended to bar clerks in all contexts from providing the type of information that might help unrepresented litigants make informed choices, my objections remain.

The data collected in this study show that the most serious concern of trial judges is their perceived inability to assist a pro se litigant due to their duty to maintain impartiality. Can there ever be a situation when a judge appropriately lends proactive assistance to a self-represented litigant without jeopardizing his or her impartiality? An answer to this question was recently provided by the Indiana Commission on Judicial Qualifications.

The 1997 opinion begins: "At issue are a judge's duties under the Code of Judicial Conduct with regard to pro se litigants in nonadversarial cases."[92] The opinion states that

> from time to time judges who have before them pro se litigants whose pleadings or presentations are deficient in some minor way, sometimes take an unnecessarily strict approach to those deficiencies, turn the litigants away on those grounds, and, in the name of strict neutrality, violate other sections of the Code of Judicial Conduct.
>
> Fairness, courtesy, and efficiency also are hallmarks of an honorable judicial system.... The Commission members believe that in presiding in a case with a pro se litigant in a nonadversarial setting, where the litigant has failed in some minor or technical way, or on an uncontroverted or easily established issue, to submit every point technically required or which would be required from any attorney, the judge violates the Code by refusing to make any effort to help that litigant along, instead choosing to deny the litigant's request or relief.
>
> For example, if a pro se litigant seeking a name change pays the required fees, submits proof of publication, establishes the basis for the request, but inadvertently or for lack of experience does not state an element which the judge requires, such as that the name change is not sought for a fraudulent purpose, the judge should make that simple inquiry during the litigant's presentation to the court rather than simply deny the petition on that basis alone. Neither the interests of the court nor of the litigant are served by rejecting the petition on the basis of this type of deficiency. Similarly, for example, a married couple seeking a divorce, each acting pro se, with no contest or issues in dispute, might knowingly omit from their pleadings their county of residence. A judge should make inquiry of the parties to establish this element of their petition, and proceed appropriately, rather than deny the petition and excuse the parties from the courtroom on the basis of their omission.

The opinion concludes: "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 foregoing opinion is the only one found that directly addresses the issue of proactive judicial assistance to self-represented litigants and its relationship to other ethical obligations, and establishes a judicial *duty* to remedy minor errors by such litigants.

In contrast to the latter Indiana ethics opinion are two 1993 opinions from Florida and New Mexico that reflect the traditional "hands off" policy of many judges with respect to judicial assistance. In the Florida case, the Committee on Standards of Conduct Governing Judges addressed the question of whether a judge may distribute a brochure entitled "Family Law Division, Pro Se Pointers."[93] The purpose of the brochure is to assist pro se litigants in uncontested dissolution of marriage cases. It contains a checklist of documents, explanations of forms and procedures necessary to obtain a

92. Advisory Opinion 1-97 (undated).

93. Committee on Standards of Conduct for Governing Judges, Opinion 93-8 (February 4, 1993).

and voluntariness in deciding to settle on particular terms.[222] The decision to mediate cannot be truly voluntary unless consent is informed: "[i]nformed consent includes both the parties' agreement to participate in the mediation process and their acceptance of any ultimate substantive agreement."[223] The fundamental clash between the need to achieve voluntary and informed choices by disempowered and legally unsophisticated litigants without providing sufficient advice or assistance to make the choices truly informed remains a major, unresolved dilemma in the context of court-connected mediation.[224]

Something must give. One cannot cling to a classic vision of mediation while urging widespread use of mediation in settings involving unrepresented parties. Either the role of the mediator must be adapted to fit a given context, or mediation must be deemed inappropriate for certain contexts.[225] With the latter determination, the burden of adjudicating these cases may be returned to the judges, raising issues affecting judicial resources and docket control. Alternatively, someone other than a judge must be designated to facilitate settlement along the guidelines set forth above. If such a role offends the concept of "mediator," then it must be called something else. If the court is prepared to authorize existing court personnel, such as law clerks, to play the extensive and protective role in settlement, then these personnel may need to handle the cases that would have been sent to mediation. If none of the existing personnel is authorized and trained to perform the necessary role in the negotiations, then a new role must be created. Regardless of the title, the role must be performed in a manner designed to produce fair and just agreements where unrepresented litigants are involved. Otherwise, the allocation of resources is a poor one.

sented parties); Nolan-Haley, *supra* note 92, at 92-99 (discussing mediator's role with unrepresented parties in court).

222. *See, e.g.*, John D. Feerick et al., American Arbitration Assoc. et al., Model Standards of Conduct for Mediators Standard I (n.d.) ("Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time."), *available in* <http://www.adr.org/standard.html>; Henikoff & Moffitt, *supra* note 95, at 102-03 ("[T]he parties must fully understand that the process is voluntary and that they have the right to create, propose, evaluate, accept, or reject any possible solutions."); Nolan-Haley, *supra* note 92, at 90 ("The controlling principle of mediation is self-determination."); Stark, *supra* note 95, at 792 ("[A]n agreement is not truly voluntary if it is based on a factual misunderstanding (including a misunderstanding about governing law) that the mediator had an opportunity to correct but did not." (quoting James B. Boskey, *The Proper Role of the Mediator: Rational Assessment, Not Pressure*, 10 Negotiation J. 367, 370 (1994))).

223. Henikoff & Moffitt, *supra* note 95, at 103. Kurtzberg and Henikoff illustrate the tension by discussing competing visions of the meaning of the term "informed consent." *See* Kurtzberg & Henikoff, *supra* note 95, at 86. The issue of whether the "informed consent" should be informed simply with respect to the nature of the mediation process, or with respect to the terms of any agreement, parallels the procedural versus substantive fairness debate. *See supra* note 97.

224. *See, e.g.*, Henikoff & Moffitt, *supra* note 95, at 102-04 (considering principles of self-determination and informed consent); Kurtzberg & Henikoff, *supra* note 95, at 84-87 (same); Stark, *supra* note 95, at 775-79 (discussing arguments and counter-arguments regarding mediator evaluation and informed consent); Nolan-Haley, *supra* note 92, at 79-83 (discussing the debate over the propriety of mediators giving legal assistance).

225. Some scholars already argue that mediation is inappropriate in certain contexts—such as cases involving domestic violence—where a power imbalance exists and the mediation process may be utilized by the stronger party to further the domination of the weaker party. *See, e.g.*, Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 Buff. L. Rev. 441, 522 (1992) ("The insidious nature of mediation for divorcing women, though, remains hidden beneath its carefully crafted marketing rhetoric."); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1605-07 (1991) ("Women who have been through mandatory mediation often describe it as an experience of sexual domination, comparing mandatory mediation to rape." (citation omitted)); Henikoff & Moffitt, *supra* note 95, at 92-93 (criticizing mediations involving power imbalances between the sexes); Kurtzberg & Henikoff, *supra* note 95, at 55-60 (considering why critics find mediation to be harmful to the poor and disempowered). Similar arguments led to the exemption of unrepresented litigants from mediation in the Family Division in the Maryland Circuit Court. *See, e.g.*, Letter from Judith Moran, Esq., Family Division Case Coordinator, Circuit Court of Baltimore City, to Sandra F. Haines, Esq. (Aug. 8, 1997) (on file with author) (critiquing the rule, labeled as Rule 9-205(b)(1)(A)).

3. Court Personnel

The role of court personnel, particularly clerks, must be expanded beyond the barrier of "no legal advice."[226] Greacen's article demonstrates that the rules and practices governing clerks must be loosened for them to be able to provide effective help.[227] Another commentator goes further, urging courts to "unleash court clerks."[228] Some states have begun to recognize the need to expand the role of clerks as part of their efforts to assist unrepresented litigants.[229]

226. *See supra* Part I.A. The discussion in this section focuses on the role of clerks in the clerk's offices. A discussion of the possible role of law clerks in the settlement process is included in the discussion of the role of the judge. *See supra* Part II.B.1.

227. *See* Greacen, *supra* note 24, *passim*. While Greacen recognizes that simplified procedures, easy-to-understand-and use forms, guidebooks, and volunteer bar efforts all are helpful, "even these efforts will not succeed unless court staff are capable of providing extensive information to litigants without lawyers, and [are] willing to do so." *Id.* at 12.

228. Elias, *supra* note 47, at 5. Elias argues that "[c]lerks should be able to provide the same information to the self-represented as they do to lawyers and their staffs," that the boundary be pushed back as to what is considered legal advice, and that court clerks should be required "to facilitate equal access regardless of whether a party is represented by counsel." *Id.*; *see also* Goldschmidt, *supra* note 3, at 25 ("Assistance to the *pro se* litigant should also be proactively provided by court staff.").

229. *See, e.g.*, Minn. Conference Report, *supra* note 40, at 14; Greacen, *supra* note 24, at 12 (citing The Task Force on the Future of California's Courts, Justice in the Balance 2020 (1993)). Modifying the rules regarding the unauthorized practice of law might be necessary to provide comfort to clerks providing expanded assistance. *See, e.g.*, Meeting the Challenge, *supra* note 1, at 41-45 (discussing recent proposals to guide court staff).

final judgment, and a place for the signature of the pro se litigant. The litigants are requested to sign the brochure (presumably acknowledging they have read and understood it), and return it to the court's judicial assistant.

The committee split six to five on the issue. The majority found "that particularly in urban courts there is an increasingly large number of pro se litigants seeking uncontested dissolutions of marriage. Judges in these urban family courts need to provide informational assistance to pro se litigants so that the judges can promptly dispense the business of the court.... The brochure is an activity that improves the administration of justice." It is also of a generic nature and not directed toward specific litigants or cases.

The other five committee members believed the production of such a brochure "may be the practice of law" prohibited by the judicial code, and that the judge should inquire of the Florida Bar's Committee on Unauthorized Practice of Law for an opinion on the matter. They believe "the brochure may be legal or quasilegal work that is potentially the subject of litigation.... [I]f a judge answers a question of a litigant who has not properly followed the brochure instructions, the judge's answer may be the practice of law."

The New Mexico Advisory Committee on the Code of Judicial Conduct was asked whether a judge may develop court forms for use by litigants in his court.[94] The committee found that "the preparation and distribution of such forms would be inappropriate for several reasons." The reasons given were: (1) the preparation of forms with instructions to litigants constitutes the practice of law, which is prohibited for judges; and, (2) "A judge's act in providing pleading forms may also give rise to a perception of partiality." On the latter point, the committee explained: "For instance, in a contested action where the sufficiency of the pleadings are placed in issue, both the contestant and respondent may infer that the court would reject challenges to the pleadings." Thus, the committee concluded, preparation of forms is an act that serves to undermine the public confidence in the impartiality and independence of the judiciary.

It is not clear whether the more recent Indiana opinion signals a new direction in judicial ethics interpretations sparked by the rise in interest in enhancing access to the court for self-represented litigants. (See pages 65-66, describing the emphasis on access to courts in the *Trial Court Performance Standards*.)

MOTIONS FOR SUMMARY JUDGMENT

It has been held that the court has no duty to inform a self-represented plaintiff of the need to respond to a motion for summary judgment.[95] However, failure to respond "does not in and of itself make the granting of summary judgment 'appropriate.' "[96] Courts must accord "special attention" to self-represented litigants faced with summary judgment motions.[97] At the very least, litigants are entitled to be warned that when they are confronted by a summary judgment motion, they must obtain counter-affidavits or other evidentiary material to avoid the entry of judgment against them.[98]

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94. Judicial Advisory Opinion 93-3 (June 8, 1993).

95. *Jacobson v. Smith*, 790 F.2d 1362, 1365-66 (9th Cir. 1986)

96. *Northern Contracting Co. v. Allis-Chalmers Corp.*, 573 P.2d 64, 68 (1977).

97. *Ham v. Smith*, 653 F.2d 628 (D.C.Cir. 1981).

98. *Rosenboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975) (summary judgment held inappropriate in prisoner civil right action absent advisement that he had right to file counter-affidavits or other responsive material); *Madyun v. Thompson*, 657 F.2d 868 (7th Cir. 1981) (holding that in resolving pro se prisoners' cases on defense motions for summary judgment, central consideration should be whether claims of prisoners have had a fair and meaningful consideration); *Hudson v. Hardy*, 412 F.2d 1091 (D.C.Cir. 1968) (finding requirements of summary judgment rule may not fairly be applied with strictness to prisoner unrepresented by counsel and subject to handicaps that detention necessarily imposes).

tially less if the mediator has conducted the necessary inquiries during mediation. Second, if the mediators fail to consider the fairness and reasonableness of agreements, then the court presumably would need to reject an unfair agreement. At that point, the judge either must oversee additional negotiations or send the case back to mediation. The inefficient cycle continues.[212]

The third choice is to change the role of the mediator.[213] For mediation to provide a useful component for courts dealing with large numbers of unrepresented litigants, the mediators must ensure that the mediation process does not provide a forum for the represented party to gain an unfair advantage over the unrepresented party. Providing justice, rather than clearing the court's docket, must remain the primary goal of the mediation process.[214]

The mediator's role must be defined to achieve that goal. The mediator must ensure that the claims and concerns of the unrepresented party are addressed in the mediation and resulting agreements, and where one party is represented by counsel, that the agreement does not result from the advice, threats, or promises of the attorney to the unrepresented party.[215] Courts referring cases to mediators must clarify to the unrepresented litigant whether the mediation is voluntary or mandatory, and, in either case, the mediator must avoid leaving the unrepresented party with the belief that the mediation *must* result in

212. This efficiency is illustrated by *Wright v. Brockett*, 571 N.Y.S.2d 660 (Sup. Ct. 1991). The *Wright* court declined to enforce a court mediated agreement because it was not "a provident decision by the [unrepresented] tenant, free of coercion . . . ." *Id.* at 665. For a discussion of the *Wright* decision, see Nolan-Haley, *supra* note 92, at 87-88.

Moreover, to ensure that litigants are making informed choices to mediate, mediators should be advising all litigants that it is not their job to ensure that agreements are fair, and that they cannot provide assistance at all. Otherwise, the unrepresented litigant might be choosing mediation based on a misunderstanding of the mediation process.

213. As discussed above, the term mediation as used here is intended to cover all forms of court-connected ADR in which the unrepresented poor participate. *See supra* note 92. The focus must become the role played by the person conducting the settlement session, not the person's title.

214. *See, e.g.*, Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv. L. Rev. 668, 671-72 (1986) (expressing concern that ADR may "result in an abandonment of our constitutional system in which the 'rule of law' is created and principally enforced by . . . government"); Fischer et al., *supra* note 93, at 2156 ("[O]ne can infer that a primary motivation in sending [domestic disputes] . . . to mediation is that it helps clear court dockets of troublesome cases . . . ."); Fiss, *supra* note 92, at 1075 (arguing that ADR "should be treated instead as a highly problematic technique for streamlining dockets"); Menkel-Meadow, *supra* note 92, at 13 ("As ADR becomes institutionalized within the court system, one can ask . . . what are the implications for justice?").

215. *Cf.* Stark, *supra* note 95, at 794 ("[M]ediators who undertake case evaluation ought to be obliged to provide the parties sufficient information about the law and its application to their case to enable them to make reasonably informed decisions." (citation omitted)).

an agreement.[216] The mediator must do what the previous section urged the judge to do.[217] Only in this manner can the mediator both preside over a fair and impartial process and save judicial resources.

Whether such a role is a proper or permissible one for a mediator is a matter of much dispute.[218] The role diverges from the traditional role of mediators developed in the context of mediation with represented parties.[219] Yet the traditional notions of the mediator's role fail to provide meaningful guidance for the mediator where a power imbalance exists between the parties.[220] The situation is difficult enough where the mediation involves only unrepresented litigants, and becomes most troublesome when only one party appears without counsel.[221] Mediation theory teaches that voluntariness is a cornerstone of successful mediation, both in terms of voluntary participation

216. *See id.* at 794-95.

> [I]ncluded within this duty [to inform] should be a responsibility to provide information fairly, objectively, and in good faith, without regard for its effect on the prospects for settlement . . . . Helping parties resolve their disputes and assisting in unclogging crowded court dockets are positive goals. But I am unaware of any mediator ethics code that considers them *ethical* goals.

Id. (citation omitted) (emphasis in original).

217. Mediators might be assisted in this immense undertaking by development of a checklist tailored to a particular context. The checklist might include important introductory statements to clarify the role of the mediator and the mediation process. The checklist might also include inquiries to elicit information related to claims that typically arise in the context; to provide the unrepresented party with an opportunity to raise concerns other than those related to the typical claims; and to uncover improper advice, pressure, or misperceptions that might hinder the unrepresented litigants from giving informed consent or that might result in an unfair agreement.

218. Scholars even debate whether it is proper for mediators to engage in evaluative mediation. *See, e.g.*, Moberly, *supra* note 95, at 670-75 (discussing differing approaches to mediator evaluation).

219. *See supra* Part II.A.1. To the extent that the impartiality requirement bars such a role, the revised notion of "impartiality" should overcome those objections for the same reason it did with the role of the judges. *See supra* Part II.A.2. For a suggestion that impartiality may not be essential for effective mediation, see Saadia Touval, *Multilateral Negotiation: An Analytic Approach*, 5 Negotiation J. 159, 167-69 (1989) (describing the effectiveness of Britain as a mediator in the dispute between China and France over Indochina at the 1954 Geneva Conference, despite the fact that Britain was not an impartial third party, but instead possessed leverage over the parties to perform an effective mediation). An exploration of that concept is beyond the scope of this Article, and unnecessary, since the revised notion of impartiality discussed in this Article should permit the mediator to maintain impartiality and protect unrepresented litigants.

220. *See, e.g.*, Henikoff & Moffitt, *supra* note 95, at 89 ("For most mediators, however, questions of when and how to inform ignorant parties of the law present an unusually difficult dilemma."); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & Soc'y Rev. 767, 794 (1996) ("In the name of neutrality, mediators may fail to deal with power imbalances in negotiations.").

221. *See* Stark, *supra* note 95, at 792 ("What should be done about the dangers of materially incomplete, misleading, and manipulative advice by evaluative mediators? The dangers are clearly most pronounced in cases . . . in which the parties are pro se."); *see also* Florida Mediator Qualifications Advisory Panel, MQAP 96-003 (1997) (stating that mediators should take additional steps to ensure fairness to unrepre-

In *Timms v. Frank*,[99] a self-represented litigant bringing a civil action against her former employer appealed a grant of summary judgment because she never received adequate notice as to the effect of her failure to support a response with affidavits or other documents. The court held that self-represented civil rights litigants are entitled to notice of the consequences of failing to respond to summary judgment motion, with notice including both the text of the Federal Rule of Civil Procedure governing summary judgment motions and a short and plain statement in ordinary English that any factual assertion in movant's affidavits would be taken as true by the district court unless the litigant contradicted the movant with counter-affidavits or other documentary evidence.[100] The court further stated "[c]ounsel should include [the summary judgment notice discussed above] with the summary judgment motion, but if they fail to do so this responsibility will fall on the district court."[101]

When inadequacies (i.e., procedural errors) arise which "threaten to impinge upon the substantive legal rights of others, whether committed by seasoned counsel or pro se litigants, the court is compelled to act to prevent injustice."[102] Regarding compliance with evidentiary rules, the New Hampshire Supreme Court commended a trial judge for his conduct in "relax[ing] the rules of evidence and mak[ing] a special effort to facilitate the [self-represented] plaintiff's presentation of his case."[103] The court followed a recommendation of an ABA committee in declining to set any firm parameters regarding how far a judge should go to assist a pro se litigant:

> The court is confronted by an especially difficult task when one of the litigants chooses to represent himself. The court's essential function to serve as an impartial referee comes into direct conflict with the concomitant necessity that the pro se litigant's case be fully and completely presented.
>
> The proper scope of the court's responsibility [to a pro se litigant] is necessarily an expression of careful exercise of judicial discretion and cannot be fully described by a specific formula.[104]

SANCTIONS FOR PROCEDURAL NONCOMPLIANCE

Case law has addressed the consequences of noncompliance with two additional federal procedural rules: Rules 37 and 41, F. R. Civ. P., which authorize dismissals of complaints upon various grounds. As to Rule 37, F. R. Civ. P., dismissals, the Supreme Court has held that "There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."[105]

Dismissal of a suit pursuant to Rule 41(b) for failure to comply with an order of court will not be disturbed absent a showing that dismissal was without logic or reason, or that it is clearly unable to be defended."[106] "There are of course a wide variety of other sanctions

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99. 953 F.2d 281 (7th Cir. 1992).

100. *Id.* at 284.

101. *Id.* at 285 (emphasis added). But see *Newsome v. Farer* (708 P.2d 327, 331 (N.M. 1985)), in which the New Mexico Supreme Court, takes a stricter view.

102. *Cassell v. Shellenberger*, 514 A.2d 163 (Pa. 1986) (dismissal proper where complaint lacks factual basis).

103. *Austin v. Ellis*, 119 N.H. 741, 743 (1979).

104. Citing *ABA Standards, Comm. On Standards of Judicial Administration*, Sec. 2.23, at 45-47 (1976).

105. *Societe Internationale v. Rogers*, 78 S.Ct. 1087, 1094 (1958). See also *A.G. Rancho Equip. v. Massey-Ferguson*, 598 P.2d 100 (1979); *Edgar v. Slaughter*, 548 F.2d 770 (8th Cir. 1977) and *Beverly v. Conquistadores*, 537 P.2d 1015, 1017 (NM Ct. App.), *cert. denied* 540 P.2d 248 (1975).

106. *Newsome v. Farer*, 708 P.2d 327, 331 (NM. 1985) (dismissal with prejudice for pro se litigant's failure

ality, since the court's current operation, particularly where only one party appears without counsel, favors one party for reasons unrelated to the merits of the claims.

The practical concerns are the most imposing, but also the most important to overcome. In one sense, the issue may be framed as a consumer protection issue. If the courts hold out the promise of fairness and justice, but claim for practical reasons to be unable to achieve such a result, the advertising is false. It is hypocritical to claim to provide fairness to everyone through a system that is not prepared to do so for those without lawyers. An unattractive, but at least more honest solution would be to change the advertising and remove the public promise that those without lawyers will get a fair shake in court. The only acceptable solution is to overcome the practical objections.[206]

A systemic approach provides the most important clue as to how to overcome the practical problems. The judges must correct for the problems that have arisen before the cases reach them. The more that others, including court personnel, adequately assist unrepresented litigants in advance of their appearance before a judge, the easier will be the role of the judge in each case. For example, if a mediator or a judge's law clerk is involved in settlement negotiations, and intercedes as necessary to protect the interests of the unrepresented litigants, the burden on the judge will be reduced. The extent to which it is appropriate for judges in a particular context to rely on their law clerks, mediators, or other non-judicial court personnel will depend on the roles of those non-judicial actors.[207] In courts that continue to restrict the roles of court personnel, fail to provide well-funded programs offering comprehensive advice and assistance, resist the use of trained lay advocates, and refuse to appoint counsel, the judicial role will, and should be, immense. The buck stops with the judge.

2. The Mediators

Even without the expanded role of the judge discussed in the previous section, courts increasingly are turning to mediation in an effort to maintain docket control. The more time judges must spend with cases involving unrepresented litigants, the greater the temptation will be to utilize court-connected mediation.[208] Reports of high settlement rates and litigant satisfaction with the process will provide justification for, and added momentum to, the call for more court-connected mediation.[209] Yet, the increased use of alternative dispute resolution will cause more problems than it solves for courts in their handling of unrepresented litigants if the role of the "mediator" is not similarly revised.

206. In one survey, "[s]everal judges pointed to the need for rules permitting judges to actively assist self-represented litigants." Meeting the Challenge, *supra* note 1, at 59.

207. For a description of one judge's extensive use of law clerks as part of a "Pro Se Assistance Program" see Halberstadter, *supra* note 54.

208. As stated previously, for purposes of this Article, I am using the term "mediation" broadly enough to include all forms of court-connected ADR. *See supra* note 92.

As described in part I.C, the current understanding of the mediator's role, as limited by the prohibition against giving legal advice and a narrow view of impartiality, leaves unrepresented litigants vulnerable to the waiver of important rights in mediation. The danger is particularly acute where mediation involves an unrepresented litigant against a represented party. Unless safeguards are in place to ensure that the unrepresented litigant is protected during mediation, the increased use of mediation is no solution at all.

There are three general choices in response to this dilemma. One choice is to make no changes at all. Under the guise of impartiality, the court system funnels a large number of unrepresented litigants through mediation, a forum that produces systematically unfavorable results to unrepresented litigants when measured in terms of outcome.[210] Far from providing an impartial forum yielding fair results, the process routinely favors the more powerful party, particularly where one party is represented by counsel. The result is a process that is both unfair and partial.

A second choice is to maintain the current role for the mediators and leave the burden on the judges to correct resulting problems. The previous section detailed the active role the judge must play in settlement to ensure that the resulting agreement is fair and reasonable.[211] The need for such extensive judicial intervention in mediated cases is inefficient in two respects. First, one goal of court-connected mediation is to diminish the amount of judicial resources necessary. If cases "settled" by mediators nonetheless require extensive judicial resources, then the wisdom of utilizing mediation in the first place is questionable. While the judge still must provide a detailed level of oversight even where the mediator has accepted the responsibility for producing a fair agreement, the resources involved would be substan-

209. *See, e.g.*, John C. Cratsley, *Mediation: A Device That Is "Here To Stay"*, 26 Mass. Law. Wkly. 2055, 2077 (1998) (reporting results of key findings of ADR Studies, including findings that "ADR produces high user satisfaction" and in "high settlement rates"). "When users of District Court programs—usually pro se litigants—are asked about the fairness of the mediation process, their satisfaction is overwhelming." *Id.* at 2055. These findings mainly relate to small claims cases, which may or may not apply to other contexts. Moreover, the perception of fairness is only one measure of fairness. *See, e.g.*, Cecilia Albin, *The Role of Fairness in Negotiation*, 9 Negotiation J. 223 *passim* (1993) (analyzing four classes of fairness issues affecting negotiators); Bohmer & Ray, *supra* note 97, at 39 (same). If the unrepresented poor, routinely and without their informed consent, are waiving significant rights in court-connected mediation, high settlement rates and high litigant satisfaction should not compel a conclusion that the procedures are appropriate or fair.

210. *See supra* Part I.C.

211. *See supra* Part II.B.1.

short of dismissal.... The [trial court], however, need not exhaust them all before finally dismissing a case. The exercise of his discretion to dismiss requires only that possible and meaningful alternatives be reasonably explored."[107]

RULE 11

The Supreme Court has held that Rule 11, F. R. Civ. P., "imposes on any party who signs a pleading, motion, or other paper—whether the party's signature is required by the rule or is provided voluntarily—an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and that the applicable standard is one of reasonableness under the circumstances."[108] Sanctions have been applied under the rule against self-represented litigants, including dismissal of claims with prejudice, award of monetary sanctions, and injunctions against future filings. Commentators note that:

> [W]hat is a reasonable inquiry for a pro se litigant may continue to be different from the reasonable inquiry an attorney would be obligated to make. Indeed the Committee Notes require the court to consider whether the object of a Rule 11 motion has been trained in law [citing cases holding that certain sanctions were "too strict," not warranted due to the litigant's pro se status, or that such pleadings should be given more leeway and should be sanctioned only when the litigant continues to file frivolous suits repeatedly raising the same claims].[109]

APPOINTMENT OF COUNSEL IN CIVIL CASES

The U.S. Supreme Court held that there is no right to counsel for indigent parties in civil cases in *Lassiter v. Dept. of Social Services of Durham County*, a case involving termination of parental rights.[110] (Such a right does exist under the Alaska Constitution.[111]) Nor is there a First Amendment right to be represented by an unlicensed layman.[112]

PRO SE LITIGANTS IN CRIMINAL CASES

In *Faretta v. California*, the Supreme Court held that, "although [a self-represented defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' "[113]

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to comply with discovery order, after being given five opportunities to explain why dismissal would be improper, held no abuse of discretion).

107. *Von Poppenheim v. Portland Boxing and Wrestling Comm.*, 442 F.2d 1047, 1053-54 (9th Cir. 1971), *cert. denied*, 92 S.Ct. 715 (1972), cited with approval in *Newsome v. Farer, supra* note 106. See also *Green v. Dorrell*, 969 F.2d 915 (19th Cir. 1992) (dismissal for noncompliance not appropriate where "the infringement of the local rule was a single, unintentional incident, making the sanction of dismissal inappropriately severe").

108. *Business Guides, Inc v. Chromatic Communications Enters, Inc.*, 498 U.S. 533, 551, 111 S.Ct. 922, 933 (1991).

109. *Solovy*, at al., SANCTIONS UNDER AMENDED FEDERAL RULES OF CIVIL PROCEDURE 335-336 (American Law Institute/American Bar Association, 1995).

110. 452 U.S. 18, 101 S.Ct. 2153 (1981).

111. *See In re K.L.J*, 813 P.2d 276 (Alaska 1991). In this case the court held that an indigent biological father was entitled, under the due process clause of state constitution, to court-appointed counsel during proceedings on an adoption petition wherein the father's parental rights were being terminated. The father's private interest in his child was considered of the highest magnitude, the state shared the father's interest in an accurate and just decision and had interest in the rights of indigent father, and the father was disadvantaged by not having attorney in that complex legal arguments existed and the father did not know to present important evidence or cross-examine witnesses.

112. *Turner v. American Bar Association*, 407 F.Supp. 451 (N.D.Tex. 1975) (Nor is there a right on the part of laymen to represent other litigants).

113. *Faretta v. State of California*, 422 U.S. 806, 95 S.Ct. 2525, 2541, citing Illinois v. Allen, 90 S.Ct. 1057, 1064 (Brennan, J., concurring).

The need to assist the unrepresented litigant in developing a full, factual record, and to help the litigant with matters of procedure and substantive law, extends to the judge's role in settlements. Rather than pressuring the unrepresented litigant to settle the case with minimal judicial intervention, the judge must take a far more active role. The judge must help the unrepresented litigant develop the relevant facts and identify potential claims and defenses.[200] The judge must examine the papers in the case and talk to the unrepresented parties to ensure that possible claims and defenses are being articulated. Only by first assessing the merits of the case can the judge gain perspective as to what, if any, claims are being compromised or waived, whether such waivers truly are knowing, intelligent, and voluntary, and whether the judge should place the court's imprimatur on the result.[201]

The judge must identify what advice the litigant received, to correct for misinformation. Where the opposing party is represented by counsel, the judge must inquire into the substance of the negotiations with the opposing counsel, to ensure that the unrepresented litigant's decisions are not based on improper advice, manipulation, or threats.[202] As tools to aid in this inquiry, judges might ask the unrepresented litigants why they are signing the agreement and whether they think the agreement is fair. While the answers elicited may not dictate a particular result, they may assist the judge in identifying whether the decisions result from misinformation or coercion.

To the extent the judge does not oversee the negotiations and is presented with an agreement reached elsewhere, the inquiries set forth above should be undertaken by the judge prior to approving the agreement and with an eye toward rejecting agreements that do not protect the rights of the unrepresented litigant. In other cases, the judge may be involved in the negotiation that produces an agreement. Assuming the judge's involvement ensures the substantive fairness of the agreement, the judicial efforts during the negotiations would obvi-

200. Where the opposing party is represented by counsel, the judicial inquiry could be aided by imposing a duty on the opposing counsel to "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse[,]" a requirement currently imposed by the Model Rules in *ex parte* proceedings. Model Rules of Professional Conduct Rule 3.3(d) (1998). Such a duty may be imposed by ethical rule or court rule. *See generally* Engler, *supra* note 43, at 139-40, 143 (discussing the need for courts to enact rules regulating unrepresented adversaries).

201. *See supra* Part II.A.3-5.

202. Judicial oversight, including inquiries into the substance of the negotiations between lawyers and unrepresented parties, is one of the most important steps for the legal system to take in its effort to curb attorney misconduct in such negotiations and to protect unrepresented litigants from the misconduct. *See* Engler, *supra* note 43, at 142-47.

ate the need for an extensive colloquy upon completion of the agreement.[203]

The active judicial role extends to each phase of the proceeding at which the unrepresented litigant makes decisions since the events occur under the judge's auspices. Whether a litigant decides to engage in negotiations with the opposing party, go to mediation, settle, or go to trial may be as important as the specific decisions made at trial or in settlement. These decisions, too, must be informed and knowing, and the judge must assist as necessary to ensure that they are.

Busy judges with crowded dockets, and supervising administrative judges, undoubtedly will contend that these proposals are impractical and that the court system would grind to a halt upon their implementation. Some judges, and many lawyers facing unrepresented litigants, will argue that even if it were practical for judges to take the recommended actions, doing so would compromise the impartiality of the system.[204] Where judicial intervention leads to the rejection of a proposed settlement, a further objection might be raised: that the judge is interfering with the parties' right to engage in a private contract.

Each of these objections fails to justify the continuation of limited judicial roles and the resulting harm suffered by unrepresented litigants. The concern about interference with private contract is wholly without merit. Parties are always free to engage in private contracts. If they wish, the parties could withdraw their respective claims and enter into a private contract outside the court. They do not do so because at least one party is seeking not merely a private contract, but a court order with the corresponding enforcement power. Before exercising its power, the court has not only the right, but the obligation, to ensure that the exercise of its power will further, rather than frustrate, the goal of providing justice.

The concerns about impartiality are resolved by reference to the revised understanding of the concept of impartiality.[205] As long as the court would be equally willing to help each party, as necessary, the active judicial role does not constitute partial behavior. To the contrary, the *failure* to accept such a role is more likely to constitute parti-

203. For a discussion of ethical issues raised by the participation of trial judges in the settlement process, see Goldschmidt & Milord, *supra* note 151, at 9-18. Note, however, that the discussion does not focus on cases involving unrepresented litigants or courts with a large number of unrepresented litigants.

204. *See, e.g.*, Changing the Culture, *supra* note 58, at 27 (reporting that lawyers find it unfair when judges assisted an unrepresented opponent); Meeting the Challenge, *supra* note 1, at 29 ("The data collected in this study show that the most serious concern of trial judges is their perceived inability to assist a pro se litigant due to their duty to maintain impartiality."); Daniszewski, *supra* note 187, at 48 ("When the court deviates from its neutral course to lend assistance to otherwise overmatched pro se litigants the adversarial system itself can suffer."); Sales et al., *supra* note 53, at 558 ("Courts cannot be expected to assume the awkward position, not to mention the imposition, of serving as both adjudicator and counsel for the pro se litigant.").

205. *See supra* Part II.A.2.

"The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"[114] But "forcing defendant to accept state-appointed counsel against his will deprive[s] him of his constitutional right to conduct his own defense."[115]

114. *Id.*

115. *Id.* at 2541.

5. Voluntariness in the Choice of Appearing Without Counsel

Particularly in the "poor people's courts," a litigant's appearance without counsel must be presumed to be coerced, rather than voluntary, due to the shortage of counsel. Although some litigants who could afford counsel refrain from doing so, the notion that most litigants choose to forego legal representation is fictitious in many contexts.[186] Despite this reality, many of the rules regarding the handling of unrepresented litigants, and much of the backlash from lawyers and judges, arise in response to the behavior of notorious, overly-litigious plaintiffs.[187] Most unrepresented litigants in eviction cases and debt collection cases are defendants, as are some in family law cases.[188] Unrepresented plaintiffs in family law cases and bankruptcy cases are unlikely to be repeat players.[189] The case law that has been developed in response to actions by individual plaintiffs filing multiple proceedings is inapposite to these scenarios. The litigant who is the exception, rather than the rule, should not dictate the court's response to unrepresented litigants in general.[190]

6. The Importance of Context

The roles of the players are inter-connected and should be shaped by context. Yet the rules governing clerks and judges are carried over from court to court, without regard to the specific needs of a given court. Whether clerks should be encouraged and trained to provide extensive assistance should depend on whether the other players in that context are giving advice, how their roles are defined, and the needs of the unrepresented litigants in that context. Similarly, the judge's role will depend, in part, on what is happening in the clerk's office and what other assistance programs are available to the unrepresented litigants.

186. *See* BBA Report, *supra* note 175, at 20 ("Most of the unrepresented litigants [in the Boston Housing Court] reported that they wanted an attorney but felt they could not afford one."); *infra* Part III.

187. *See supra* notes 127-29 and accompanying text; *see also* Meeting the Challenge, *supra* note 1, at 60 (noting that pro se litigants who pursue a political agenda in court are seen as pests by judges); Robert M. Daniszewski, *Coping with the Pro Se Litigant*, N.H. B.J., March 1995, at 46 (discussing the trend toward pro se litigation); Paul B. Zuydhoek, *Litigation Against a Pro Se Plaintiff*, Litigation, Summer 1989, at 13 (discussing the difficulties of litigating against pro se plaintiffs).

188. *See infra* Part III.

189. For a description of courts handling family law and bankruptcy cases involving unrepresented litigants, see *infra* part III.A–B.

190. Litigants exercising the right to self-representation should not face a bias favoring represented parties. The right to self-representation is well established. *See, e.g.*, Faretta v. California, 422 U.S. 806, 816-32 (1975) (discussing a litigant's right to self-representation). Many observers nonetheless perceive a pattern of bias against the unrepresented litigant. *See, e.g.*, Mosten, *supra* note 48, at 435 (commenting on negative perceptions of the pro se litigant); Elias, *supra* note 47, *passim* (discussing the bias in the court system against unrepresented litigants and proposing solutions).

B. *Revisiting the Roles*

1. The Judges

In light of the general principles outlined above, and the need to assess the individual roles from a systemic point of view, in context, it is essential to address the judge's role first. As the Illinois Court correctly observed in *Oko v. Rogers*,[191] "[t]he buck stops there."[192] While the *Oko* court was describing the judge's role at trial, the observation applies to each aspect of the judge's role. The judge bears the "heavy responsibility" for presiding over a "fair" proceeding,[193] which includes not only what occurs at trial itself, but outcomes produced by the more common result of settlement.[194]

Because the buck stops with the judge, she must be as active as necessary to ensure that the legal system's promise of fairness and substantial justice is not frustrated by the litigant's appearance without a lawyer. Far from offending notions of impartiality, the call for judges to provide vigorous assistance to unrepresented litigants is consistent with the need for impartiality.

The judge's role at trials involving unrepresented litigants should be modeled on precedent from the small claims courts and administrative agencies. Judges should conduct trials in the manner "best suited to discover the facts and do justice in the case."[195] "In an effort to . . . secur[e] substantial justice," the court must assist the unrepresented litigant on procedure to be followed, presentation of evidence, and questions of law.[196] Further, the court may call witnesses and conduct direct or cross-examinations.[197] The court has a "basic obligation to develop a full and fair record . . . ."[198] Each of these duties is not only wholly consistent with the notion of impartiality,[199] but also necessary for the system to maintain its impartiality.

191. 466 N.E.2d 658 (Ill. App. Ct. 1984).

192. *Id.* at 661.

193. *See id.*

194. Indeed, the same holds true for defaults as well. Judicial duties are not limited to ministerial acts. *Compare, e.g.*, Fed. R. Civ. P. 55(b)(1) (discussing when a default judgment *may* be entered by the clerk), *with* Fed. R. Civ. P. 55(b)(2) (discussing when a default judgement *must* be entered by the clerk). Where a party fails to appear, the court still must take appropriate steps to ensure that the appearing party is entitled to any relief it is seeking against the defaulting party. The high incidence of default among debtors in debt collection cases, for example, is a poignant reminder of the need for judicial oversight even where litigants default. *See, e.g.*, Caplovitz, *supra* note 158, at 221 (finding default judgement rate of three city cross-section at over ninety percent).

195. Mass. Unif. Sm. Cl. R. 7(c).

196. Fla. Ct. Sm. Cl. R. 7.140(e).

197. *See* Ill. Sup. Ct. R. 286(b).

198. Lashley v. Secretary of Health and Human Servs., 708 F.2d 1048, 1051 (6th Cir. 1983) (quoting McConnell v. Schweiker, 655 F.2d 604, 606 (5th Cir. 1981)).

199. *See supra* notes 147-50 and accompanying text.

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AND JUSTICE FOR ALL—INCLUDING THE UNREPRESENTED POOR: REVISITING THE ROLES OF THE JUDGES, MEDIATORS, AND CLERKS

*Russell Engler**

INTRODUCTION

UNREPRESENTED litigants are flooding the courts. In the "poor people's courts," civil cases involving at least one unrepresented litigant are far more common than cases in which both sides are represented by counsel.[1] This phenomenon is hardly surprising, given widespread reports that over eighty percent of the legal needs of the poor and working poor currently are unmet in the United States.[2] Judges, clerks, and lawyers bemoan the difficulties that unrepresented litigants cause for other participants in the legal system.[3]

An impressive variety of assistance programs, developed by bar associations, legal services offices, and the courts themselves, have sprung up in many settings in response to the "pro se crisis."[4] Individual judges and clerks worry publicly and privately about what they can and cannot do—or what they should and should not do—in handling cases involving unrepresented litigants.[5] Some lawyers and judges even express concern that unrepresented litigants are using their status to gain an unfair advantage over represented parties, who are trying to play by the rules.[6]

Missing from the discussion is a fundamental re-examination by the judiciary of the roles of judges, mediators, and clerks in cases involving unrepresented litigants. The roles of these players were developed in the context of an adversary system.[7] An underlying assumption this system is that both sides will be represented by an attorney. The unrepresented litigant, having "chosen" to appear without a lawyer, is an aberration. Despite the vast number of unrepresented litigants, and the significant impact on the courts in which the unrepresented litigant is the norm, the roles of the players remain largely those developed for an idealized world in which all litigants are represented by lawyers.

Part I of this Article examines the traditional rules governing clerks, mediators, and judges in their interactions with unrepresented litigants. The examination reveals that the legal system has erected barriers that hinder the ability of unrepresented litigants to obtain the assistance necessary to make informed choices about their cases. The rules primarily prohibit clerks, mediators, and other court players from giving legal advice to unrepresented litigants. In theory, the prohibition is intended to protect the unrepresented litigant from receiving legal advice from someone not qualified to give such advice.[8] In practice, however, the prohibition deprives the unrepresented litigant of the opportunity to obtain legal advice throughout the course of the proceeding. She is forced to make choices at every turn without understanding either the range of options available or the pros and cons of each option.

Despite being deprived of the opportunity to make informed choices, the unrepresented litigant is deemed to be an informed, rational actor. Most cases settle, usually under pressure from the court.[9] Where the unrepresented party faces a represented one, additional settlement pressure comes from the opposing lawyer.[10] Judges routinely make, at most, a minimal inquiry before rubber-stamping the agreements and rarely undo the agreements in the face of a subsequent challenge.[11] The judges are driven by docket control, which de-

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1. *See* Jona Goldschmidt et al., Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers 49 (1998) [hereinafter Meeting the Challenge] ("Court managers believe that the volume of cases involving self-represented litigants has increased substantially in recent years."); *infra* Part III.

2. *See, e.g.*, William P. Quigley, *The Unmet Civil Legal Needs of the Poor in Louisiana*, 19 S.U. L. Rev. 273, 273 (1992) ("Between 85% and 92% of the low income people in Louisiana who had civil legal needs in 1991 were not represented by an attorney."); Janet Reno, *Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School*, 63 Fordham L. Rev. 5, 8 (1994) ("Ladies and gentlemen, at least eighty percent of the poor and the working poor in the United States do not have access to legal services." (citing Talbot D'Alemberte, *Racial Injustice and American Justice*, A.B.A. J., Aug. 1992, at 58, 59)). *See generally* Roy W. Reese & Carolyn A. Eldred, Legal Needs Among Low-Income and Moderate-Income Households: Summary of Findings from the Comprehensive Legal Needs Study 42 (1994) (finding that 71% of low income people who face legal problems do not have access to the legal and judicial system).

3. *See infra* Parts I.A, I.D, II.B.1, II.B.3. *See generally* Meeting the Challenge, *supra* note 1, *passim* (discussing how self representation has increased greatly in recent years); Jona Goldschmidt, How Are Judges and Courts Coping with Pro Se Litigants?: Results from a Survey of Judges and Court Managers *passim* (May 1997) (unpublished manuscript, on file with the author) (considering the policy issues raised by the increase in pro se litigants).

4. *See infra* Part I.B.

5. *See infra* Parts I.A, I.D.

6. *See infra* notes 132, 134 and accompanying text.

7. *See infra* Part II.A.1.

8. *See infra* Part I.A.

9. *See infra* note 160 and accompanying text.

10. *See infra* Part I.B.3.

11. *See infra* note 158 and accompanying text.

arises from the fact that "[t]he average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision."[178]

Without minimizing the complexities involved in the doctrine of informed consent, or the perils of transferring doctrines from one context to another, the doctrine exposes the dangers in rubber-stamping as "knowing, intelligent and voluntary" decisions by unrepresented litigants. Just as patients have minimal knowledge of medical science, the average litigant has little or no understanding of the law. The duty to assist the litigant in making informed choices, after weighing the pros and cons of different options, rests on the lawyer.[179] Where the litigant appears unrepresented, the unrepresented litigant's decisions cannot be presumed to be informed unless someone else assumes that duty.

As in the medical context, the issue of how much information must be disclosed to ensure informed consent is an enormous one.[180] Yet, the central concept remains valid: for a decision to be informed, the litigant must have had the "opportunity to evaluate knowledgeably the options available and the risks attendant upon each."[181] The voluntariness of an unrepresented litigant's choices to settle or proceed to trial, to agree to particular terms of settlement, or to choose mediation in the first place, must be measured by the extent to which the litigant understands the risks of the alternatives, which in turn depends on the litigant's understanding of the applicable law and facts.[182] Unrepresented litigants cannot be presumed to have had the

the alternatives to the contemplated treatment"). For a listing of many of the landmark cases discussing informed consent, see *Harnish*, 439 N.E.2d at 242 n.3, 243 n.4.

178. *Canterbury*, 464 F.2d at 780 (footnote omitted).

179. *See supra* note 45 and accompanying text.

180. For example, the cases split over the issue of whether disclosure should be measured from the patient's point of view, *see Harnish*, 439 N.E.2d at 242 n.3, or in light of the standards of the medical profession, measured by the information as is customarily disclosed by physicians in similar circumstances. *See id.* at 243 n.4. Even when measured by the custom of the profession, the concept of putting the patient in a position to make informed choices about alternatives remains central. *See, e.g.*, Woolley v. Henderson, 418 A.2d 1123, 1128 (Me. 1980) (explaining the general principles behind the doctrine of informed consent).

181. *Canterbury*, 464 F.2d at 780 (footnote omitted). *Black's Law Dictionary* defines "informed consent" as: "A person's agreement to allow something to happen . . . that is based on a full disclosure of facts needed to make the decision intelligently; *i.e.*, knowledge of risks involved, alternatives, etc." Black's Law Dictionary 779 (6th ed. 1990) (describing the concept of informed consent as the necessary disclosures so that a patient "faced with a choice of undergoing the proposed treatment, or alternative treatment, or none at all, may intelligently exercise his judgment by reasonably balancing the probable risks against the probable benefits").

182. The doctrine of "informed consent" already appears in the mediation literature both as a standard for measuring a litigant's decision to mediate and as a standard for measuring a decision to accept an agreement. *See, e.g.*, Mass. Unif. R. on

benefit of competent advice enabling them to weigh the advantages and disadvantages of the choices they are making.[183]

4. Legal Advice

A third barrier is the widespread use of the prohibition against giving legal advice. In redefining the roles of court personnel and those staffing assistance programs, the prohibition against the giving of legal advice by some of the actors in the system must be abandoned. The distinction between help that constitutes legal advice and help that does not provides little guidance to those on the front lines. Moreover, most assistance needed by unrepresented litigants is likely to involve what would fall within an intellectually honest definition of legal advice.[184] While guidelines should be developed for what help a particular office or program may provide in a given context, the limits should not turn on what constitutes legal advice.[185]

Dispute Resolution 9(c) (describing rules for informed consent to ADR), *reprinted in* 26 Mass. Law. Wkly. 2129, 2131 (1998); Henikoff & Moffitt, *supra* note 95, at 103 (noting that "[i]nformed consent includes both the parties' agreement to participate in the mediation process and their acceptance of any ultimate substantive agreement"); Kurtzberg & Henikoff, *supra* note 95, at 86-87 (describing different views of the role of informed consent in the mediation process); *see also infra* Part II.B.2 (describing the mediator's role). For a discussion of the concept of "informed consent" in the context of the lawyer-client relationship, see Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. Pa. L. Rev. 41 (1979). For recent examples of efforts to import concepts and practices from the medical world to the legal world, see Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 Clinical L. Rev. 321 (1998); and Linda F. Smith, *Medical Paradigms for Counseling: Giving Clients Bad News*, 4 Clinical L. Rev. 391 (1998).

183. Rather than assuming that the unrepresented litigant has had access to help, the unrepresented litigant must be viewed at best as having received no legal advice at all. In reality, the unrepresented litigant has probably received some combination of information and misinformation, that may or may not be accurate or helpful, and that the litigant may or may not have understood. Particularly in the "poor people's courts," the litigant's appearance without counsel cannot be viewed as one of choice, but one forced on the litigant by necessity. *See infra* Part II.A.5.

184. *See supra* Part I.A.

185. This point necessarily follows from the need for a broad definition of what constitutes legal advice. Moreover, it is consistent with the view that far more interactions between lawyers and unrepresented adversaries involve impermissible advice-giving than generally is recognized. *See generally* Engler, *supra* note 43, *passim* (examining the issues surrounding lawyers' interactions with lay adversaries). That more actors should provide more help does not imply that opposing lawyers should be unleashed on their unrepresented adversaries. The increased assistance from the court and advocates and relaxation of the prohibition against giving legal advice in that context should be combined with *enforcing* the limitations on the interactions with opposing counsel. The lawyer has a vested interest in influencing the unrepresented party to adopt a course of action serving the goals not of the unrepresented party, but of her client.

pends on the court's ability to settle cases quickly and with minimal oversight. The need for docket control leaves judges with little incentive to expend precious judicial resources on educating and protecting unrepresented litigants. Even where cases proceed to trial, many judges are unwilling to provide more than token assistance to the unrepresented litigant.[12] Judges typically explain their reluctance to provide greater assistance as a necessary byproduct of impartiality. Some judges go further, declaring that the unrepresented litigant, having chosen to appear without counsel, must live with the consequences of her decision.[13]

These consequences are devastating for unrepresented litigants. Settlement agreements routinely involve the waiver of significant rights by unrepresented litigants.[14] Unrepresented litigants appearing before mediators suffer a similar fate, after being deemed to have made an informed choice to participate in mediation in the first place.[15] Where cases do not settle, unrepresented litigants also routinely forfeit important rights due to the absence of counsel.[16]

The forfeiture of rights flows from the barriers facing unrepresented litigants at each stage of the proceeding and each encounter with the various players in the system. As revealed in part I, the roles of the different players typically are discussed in isolation. In reality, however, the roles are inextricably intertwined. The difficulties at each stage are compounded, rather than corrected, as the case proceeds. Re-examination of the roles must therefore be part of a systemic response to the problems facing unrepresented litigants.

Part II revisits the roles of the actors in the system with an eye toward helping, rather than hindering, unrepresented litigants. To frame the discussion of the individual roles, part II.A first revisits central principles that must shape a re-examination of the individual roles. A fundamental goal of the adversary system is to provide fairness and justice.[17] Where the operation of the traditional rules frustrates that goal, the rules, rather than the goal, must be modified. A system in which represented parties routinely prevail over unrepresented parties—without regard to the merits of the case—cannot be viewed as fair or impartial; the notion of impartiality should compel judges and mediators to assist unrepresented parties, rather than prevent them from doing so. Most indigent litigants are forced to appear without counsel, and have access to limited advice; the unrepresented poor must not be viewed as appearing voluntarily without counsel, and their decisions must not be presumed to be those of rational, informed actors. Where any credible definition of "legal advice" includes much of the assistance unrepresented litigants desperately require, a prohibition against giving legal advice must not constrain those to whom the unrepresented litigant must turn.

The systemic approach requires that re-examination of the roles of the judges, mediators, and clerks be driven not only by the general principles, but also by a realization that the roles of the players are interconnected, and must be shaped by context.[18] What is necessary and appropriate for clerks in a particular context may depend on the role of mediators and judges and the existence of other assistance programs in that context; what is necessary and proper conduct for judges will depend, in part, on the roles of those with whom the unrepresented litigant has dealt prior to appearing before the judge. While the details of the roles will be shaped by context, general guidelines may be developed in light of the concepts discussed in part II.A. Part II.B therefore proposes revised roles for judges, mediators, and clerks in light of those general guidelines.

Given the importance of context, part II.C identifies factors to guide a context-based analysis regarding the extent to which the roles of the players must be revised, and the features of supplemental programs that must be developed. Using the factors as guidelines, part III examines three different contexts struggling with large numbers of unrepresented litigants: family, bankruptcy, and housing courts. Each setting presents somewhat different problems, requiring differences in the overall response. Family courts, which have received the greatest attention in terms of reports and articles focusing on the "pro se problem," have faced surging numbers of unrepresented litigants for years; many of the cases involve unrepresented parties facing one another, while others pit unrepresented parties against represented ones.[19] The numbers of unrepresented litigants in bankruptcy court, while far

12. *See infra* Part I.D.

13. *See infra* note 134 and accompanying text.

14. *See infra* notes 151-57 and accompanying text.

15. *See infra* Part I.C. As described in part I.C, court-connected mediation is mandatory in some settings. In most settings, the court-connected mediation is labeled voluntary. To many unrepresented litigants, however, pressure from the court to mediate makes the mediation feel mandatory.

16. *See infra* Part I.D.

17. *See infra* Part II.A. It is unnecessary and foolhardy to attempt to provide a comprehensive definition of "fairness and justice." It is unnecessary because the profession repeatedly invokes the goals of "fairness and justice" without having provided a universal definition of the terms. Achieving "fairness and justice" nonetheless remains a fundamental goal of our legal system. *See infra* note 169. It is foolhardy because an attempt to define these terms would distract from the urgent and immediate task of assisting the unrepresented poor.

Fairness and justice as used in this Article mean more than procedural fairness. The terms must require examination of the underlying rights of the unrepresented litigants. A system in which litigants forfeit important rights through ignorance or powerlessness cannot be viewed as fair; nor can a system in which the outcomes of cases are determined not according to their merits, but according to the status of a party's representation. If the concepts mean less than this, judges, mediators, and lawyers must—at a minimum—educate the public accordingly. For articles discussing the debate between substantive and procedural fairness in the context of mediation, see *infra* note 97.

18. *See infra* Part II.A.6.

19. *See infra* Part III.A.

ness and justice. Given a choice between clinging to the rules at the expense of the goal, or modifying the rules to further the goal, the rules must be modified. New rules, or new interpretations of the traditional rules, must govern scenarios that are here to stay. That the modifications may bring changes in our traditional expectations of some of the players in the system is inevitable, and should not prevent change. These changes must be designed to overcome the barriers facing unrepresented litigants and promote fairness and justice for them.

2. Impartiality

One important barrier is the narrow conception of impartiality that typically permeates the discussions of the various roles. The notion that a court cannot provide extensive assistance to one party without compromising its impartiality must be rejected.[170] To the contrary, a court may need to provide more help to one side than to the other to maintain the impartiality of the proceeding.[171] The absence of counsel has a dramatic effect on the outcome of the proceedings.[172] A system that routinely favors parties with lawyers over parties without, regardless of the merits of the cases, cannot be viewed as impartial.[173] As long as a court is prepared to provide extensive assistance to both parties if necessary, the court will maintain its impartiality.[174]

Cases involving a lawyer pitted against an unrepresented litigant therefore provide the greatest challenges to the impartiality of the

170. For the purposes of this discussion, the word "court" applies not only to the judge but to the overall court system, including any of the individual actors in that system who must maintain impartiality.

171. *See, e.g.*, Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 Ind. L.J. 301, 321 n.96 (1989) ("A judge can be impartial but very active in developing the case . . . . Impartiality is a requirement for fair adjudication, but judicial passivity is not.").

172. *See infra* Part III.

173. *Cf.* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. Rev. 95, 98-99 (1997) (distinguishing between structural and individual impartiality in arguing "that the Fourteenth Amendment's judicial impartiality mandate is violated by the persistent presence of an all-white bench in jurisdictions with significant minority populations" (footnote omitted)).

174. *See, e.g.*, Black's Law Dictionary 752 (6th ed. 1990) (listing, as the first three definitions of "impartial": "Favoring neither; disinterested; treating all alike . . . ."). This is not to minimize the problems created in terms of the *appearance* of impartiality where the court provides more help to one side than the other. Nor does it minimize the dangers that an arbiter might be moved by a "sympathetic identification" with a party that the arbiter begins to assist. *See* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160-61 (1958). Given the difficulties facing unrepresented litigants in the courts, a failure to assist unrepresented litigants is a greater threat to the impartiality of the court system than the dangers flowing from the provision of assistance.

court system.[175] Rather than refusing to provide the necessary help, the court instead may need to explain why the help is targeted to one side, and be prepared to help all parties as needed. That a given case calls for the court to provide more help to one side than the other does not merit a conclusion that the court is violating the principle of impartiality.

3. Voluntary Choices and Informed Consent

A second barrier is the courts' failure to measure the voluntariness of an unrepresented litigant's choices by the standards of informed consent. Unrepresented litigants routinely waive significant rights, despite having had limited, if any, opportunities for receiving independent advice. They may be acting on bad legal advice, poor explanations, or—where opposing counsel is involved—manipulation and threats. Yet, courts routinely, and swiftly, conclude that the waivers are knowing, intelligent, and voluntary.[176]

The voluntariness of an unrepresented litigant's choices must not be determined solely by whether the litigant appears to be acting by her own free will. The actions and decisions must be accepted as voluntary only if they result from informed choices. The assessment of informed choices should be analogous to the doctrine of informed consent, developed in the medical context. "True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each."[177] The need for the rule

175. *See, e.g.*, Boston Bar Ass'n, BBA Task Force on Unrepresented Litigants Report 26 (1998) [hereinafter BBA Report] ("[T]he judges . . . worry over potential unfairness to both sides in a case where one of the litigants is unrepresented."); Meeting the Challenge, *supra* note 1, at 52-53 (stating that judges found it difficult to maintain their impartiality where one litigant was unrepresented); Goldschmidt, *supra* note 3, at 13-14 ("Some judges indicate they [sic] under some agonizing moments during the course of trials where one party is represented and one is pro se . . . . Some of the judges' comments concerned problems arising from attorneys' actions in these situation [sic] of one party appearing pro se.").

176. As noted, courts expect most cases to settle, provide minimal supervision to the settlement, and rarely overturn the settlement agreement. *See supra* notes 158-62 and accompanying text. The agreements routinely involve the waiver of significant rights by the unrepresented litigants. *See id.* Some commentators therefore prefer the concept of "informed waiver" to that of "informed consent." *See, e.g.*, Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 Clinical L. Rev. 271, 298-99 (1998).

177. Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972) (footnote omitted). Other formulations of the doctrine, developed in the medical context, consistently include the elements of evaluating options based on an understanding of the risks and alternatives. *See, e.g.*, Harnish v. Children's Hosp. Med. Ctr., 439 N.E.2d 240, 242 (Mass. 1982) ("Knowing exercise of this right requires knowledge of the available options and the risks attendant on each."); Wilkinson v. Vesey, 295 A.2d 676, 685 (R.I. 1972) (describing the informed consent doctrine as standing for the proposition that "a patient's consent to a proposed course of treatment was valid only to the extent he had been informed by the physician as to what was to be done, the risk involved and

lower than those in family court, have recently surged; the problems are compounded by complex laws and procedures that keep some needy debtors out of the system while trapping others, who do not belong, in the system.[20] Housing courts present perhaps the ultimate breakdown of the adversary system, with the typical case pitting represented landlords against unrepresented tenants. Part III.C examines the different official responses to the problems in housing court in two settings: the Boston Housing Court and the New York City Housing Courts.

Despite the differences in context and the increased attention to the "pro se problem" in each setting, a common failure hinders the efforts to help unrepresented litigants. The judiciary has failed to provide any guidelines redefining the roles of the judges, mediators, and clerks. Absent revised rules that not only permit, but require, the players in the system to help unrepresented litigants, those litigants will continue to forfeit important rights due, not to the merits of their cases, but to the absence of counsel.[21] The continued absence of such rules provides a striking contrast to the plethora of rules designed to streamline dockets and foster speedy disposition of cases.[22]

The judiciary can respond to the flood of unrepresented litigants in one of three ways. First, it may revise the roles of the various players in the court system as outlined in this Article. This first route allows the judiciary to reclaim its promise of providing fairness and justice by authorizing court personnel, themselves, to protect the unrepresented poor from the forfeiture of important rights.

To the extent the judiciary is unwilling or unable to revise the roles of court personnel, or to the extent these revisions alone fail to protect the unrepresented poor, the judiciary must identify others who can do so. The judiciary must nurture and oversee the increased use of skilled lay advocates. Judges should exercise their discretion in civil cases to appoint counsel, particularly in cases pitting an unrepresented indigent litigant against a represented party. Rather than seeking resources from their legislatures to appoint more judges, mediators, or clerks—who also will be unwilling or unable to provide the necessary assistance—the judiciary must urge the targeting of available re-

20. *See infra* Part III.B.

21. Proposals to create "pro se divisions" or courts are therefore at most only partial responses. *See, e.g.*, Robert Gottsfield, *Let's Talk About It—A Superior Court Pro Se Division*, Ariz. Att'y, May 1992, at 49, 49 (describing a model of a pro se court in which the decision would not be binding unless both parties consent to it); William W Schwarzer, *Let's Try a Pro Se and Small-Stakes Civil Calendar in the Federal Courts*, FJC Directions, June 1996, at 14 (suggesting an expedited calendar for "fair and efficient disposition" of pro se litigation). The issue of the roles of the players remains critical regardless of whether the cases are segregated.

22. *See, e.g.*, Fed. R. Civ. P. 16 (outlining federal pretrial conference scheduling and management rules). The contrast unwittingly speaks volumes about the notion of justice in the courts: justice apparently is measured by case dispositions, not case outcomes.

sources to the provision of skilled advocates for the unrepresented poor.

The third choice is to maintain the status quo. This choice places band-aids on a crumbling system while giving lip service to the idea of fairness and justice for all. The dockets will continue to churn. Justice will continue to be measured by how swiftly the courts dispose of their cases, rather than by what happens in the cases and whether the rights of the unrepresented poor have been trampled in the process. Achieving justice will remain a goal reserved for those with lawyers.[23]

I. THE PLAYERS—RULES AND REALITY

A. *Court Personnel: Clerks*

Unrepresented litigants typically will encounter a variety of court personnel during the course of their cases, beginning with clerks in the clerk's office.[24] The primary restriction on the ability of the clerks to provide information is that clerks may not give legal advice.[25] In some

23. Throughout this Article, I consciously choose the term "unrepresented litigants" in most cases instead of "self-represented," "pro se," or "pro per." The prefix "un-" means "not," the "opposite of." Webster's Third International Dictionary of the English Language 2481 (1986). The literal definition therefore is "not represented," indicating a "lack of" representation. Because the focus of this Article is the unrepresented poor, the concept of "not represented" best captures the plight of indigent litigants who appear without lawyers and who, essentially, are not heard by the court. *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L. Rev. 533, 562-63 (1992) (stating that only 3.7% of tenants in observed cases were represented, mostly by non-attorneys); Erica L. Fox, *Alone In the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 Harv. Negotiation L. Rev. 85 (1996) (discussing the disadvantages of hallway settlements between the parties themselves). The concept of "self-representation" connotes the choice to forego counsel and probably some perceived ability to carry out the representation of oneself. *See, e.g.*, Faretta v. California, 422 U.S. 806, 816-18 (1975) (discussing criminal cases in which courts allowed defendants to waive the right to counsel). This does not describe the predicament of most of the unrepresented poor and should not form our operating assumptions in attempting to fashion solutions. *See generally infra* Part II.A.5 (discussing the notion that most unrepresented litigants are not voluntarily unrepresented). For similar reasons, and because I prefer English to Latin, I prefer the term "unrepresented litigants" to "pro se" ("for himself") and "pro per" (the abbreviation for "*in propria persona*," California's version of "pro se," meaning "in one's own proper person").

24. As the proceeding progresses, unrepresented litigants may seek additional help from the clerks and may also encounter other court personnel, such as court officers and clerks, in the courtrooms. Although the focus of this section is on the clerks, the restrictions apply to the range of nonjudicial court personnel. *See, e.g.*, John M. Greacen, *"No Legal Advice from Court Personnel" What Does that Mean?*, Judges' J., Winter 1995, at 10, 10 (discussing the types of advice court staff may and may not give).

25. *See, e.g.*, *In re* Amendments to the Fla. Small Claims Rules, 601 So. 2d 1201, 1216 (Fla. 1992) ("The clerk is not authorized to practice law and therefore cannot give you legal advice on how to prove your case."); State v. Walters, 411 S.E.2d 688, 691 (W. Va. 1991) (stating that no magistrate clerk may act as an attorney for any party); Standing Comm. on the Delivery of Legal Servs., American Bar Ass'n, Responding to the Needs of the Self-Represented Divorce Litigant 24-25 (1994) [hercin-

counsel.[164] Where the case has not settled, and the judge is forced either to act on pleadings or motions, and even conduct a trial, the level of assistance the unrepresented litigant will receive may depend on a variety of factors. To the extent the court feels that the litigant is choosing to appear without counsel, is making a poor decision not to settle, or is otherwise acting in a way of which the court does not approve, the litigant should expect very little help. The judge will remind the parties that the same rules apply to unrepresented litigants as to represented ones, that the judge must remain impartial, and that the judge cannot act as advocate for the unrepresented litigant. Though a sympathetic judge may provide some assistance to the unrepresented litigant, the notions of impartiality and need to avoid playing the role of advocate remain.

The picture of the typical judicial behavior may ignore the practices of some judges who deal regularly with unrepresented litigants. Judicial treatment of unrepresented litigants varies widely.[165] The practices of some judges may vary from the principles described in this section. That reality does not eliminate the need to revisit rules for judges developed in contexts in which the unrepresented litigant is the exception. Absent explicit rules to the contrary, the level of assistance provided by judges typically will fall short of that provided in small claims courts and administrative agencies.

II. Revisiting the Roles of the Players in the System

Part I explored the rules and realities governing the roles of the various players in the court system in their interactions with unrepresented litigants. The discussion identified barriers that prevent various players from providing unrepresented litigants with the help they need to enable them to participate meaningfully in the legal system. This part re-examines the roles of the judges, court personnel, and other players to demonstrate how they can and should provide the necessary assistance. Because the roles must be reshaped as part of a systemic response to the problems facing unrepresented litigants, the next part begins with a discussion of underlying principles that must guide both the development of the systemic response and the reshaping of the individual roles.

164. "The survey of judges makes it clear that many judges experience great difficulty when dealing with pro se litigants in the courtroom." Meeting the Challenge, *supra* note 1, at 68 (referring to a non-randomly administered study).

165. For a description of varying judicial attitudes and strategies in dealing with unrepresented litigants, see *id.* at 52-61.

A. *Revisiting the Underlying Principles*

1. The Adversarial System

The traditional notions of who should be giving legal advice, and what it means to be impartial, were developed within the framework of the adversarial system. The adversarial system presumes that both sides will be represented by counsel, and that cases involving unrepresented litigants are the exception, rather than the rule.[166] Yet, with the dramatic increase in the numbers of unrepresented litigants, cases involving unrepresented litigants can no longer be viewed as the exception.[167] When both sides appear without counsel, the traditional configuration of the adversarial system has been altered; when one side is represented and the other is not, it has broken down.[168]

The challenge to the adversary system, however, should not lead to an abandonment of its goals. The adversarial system purports to promote fairness and justice.[169] Yet, the rules currently operate as barriers preventing unrepresented litigants from participating meaningfully in the legal system and thereby frustrate the goal of dispensing fair-

166. *See, e.g.*, Model Code of Professional Responsibility EC 7-18 (1982) (stating that lawyers should not undertake to give advice to a person who is attempting to represent himself except to advise him to obtain a lawyer). The ethical rules give little direct attention to cases involving unrepresented litigants. In the Model Rules, only Rule 4.3 speaks directly to a lawyer's dealings with an unrepresented party. *See* Model Rules of Professional Conduct Rule 4.3 (1998). In the Model Code, only a single subsection of one disciplinary rule focuses on this scenario. *See* Model Code of Professional Responsibility DR 7-104(A)(2) (1982).

167. In many contexts, particularly the "poor people's courts" that handle civil cases, it is the case involving two represented parties that is more likely to be the exception. *See infra* Part III.

168. *See, e.g.*, Sales, et al., *supra* note 53, at 559-60 ("Self-representation may place the litigant at a disadvantage when facing the expertise and skills of an attorney."); McLaughlin, *supra* note 115, at 1124 ("The effective operation of the adversary system relies on the assumption that the parties to a lawsuit are approximately equal in their legal representation. This rough balance, however, is entirely upset when one side appears pro se." (footnotes omitted)).

169. Embedded in the ethical rules governing lawyers and judges is the underlying goal of providing fairness and justice. *See, e.g.*, Model Code of Judicial Conduct pmbl., at 3 (1990) ("Our legal system is based on the principle that an independent, *fair* and competent judiciary will interpret and apply the laws that govern us." (emphasis added)); Model Code of Professional Responsibility EC 7-19 to -39 (1982) (grouped under the title "Duty of the Lawyer to the *Adversary System of Justice*" (emphasis added)); *id.* EC 7-23 ("A tribunal that is fully informed on the applicable law is better able to make a *fair and accurate* determination . . . ." (emphasis added)); *id.* EC 7-24 ("In order to bring about *just and informed decisions* . . . ." (emphasis added)); *id.* EC 7-39 ("[P]roper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will . . . make their decisional processes *prompt and just* . . . ." (emphasis added)); Model Rules of Professional Conduct Rule 3.6 cmt. 1 (1984) ("It is difficult to strike a balance between protecting the right to a *fair* trial. . . ." (emphasis added)); *id.* Rule 3.3 cmt. 15 ("The object of an *ex parte* proceeding is nevertheless to yield a substantially just result."). The Preamble to the ABA Canons of Professional Ethics, which preceded the Model Code of Professional Responsibility, similarly referred to "the system for establishing and dispensing Justice." Canons of Professional Ethics pmbl. (1908).

jurisdictions, the prohibition is explicitly set forth by statute.[26] In other jurisdictions, this prohibition derives from restrictions that prohibit clerks from practicing law[27] and require clerks to remain impartial.[28] Although most jurisdictions have resisted efforts to provide a precise definition of the practice of law,[29] courts providing examples of what constitutes the practice of law routinely include the giving of legal advice in the list of activities incorporated within the definition.[30]

after Responding to the Needs] ("[I]t is important that court clerks not practice law by giving substantive legal advice . . . ."); Graecen, *supra* note 24, at 10 ("Members shall not give legal advice unless specifically required to do so as part of their office position." (quoting The National Association for Court Management, Model Code of Conduct art. II(B))). One survey of court administrators, administered nonrandmonly, revealed that 59% of courts with policies guiding court staff assistance to the public included the explicit prohibition against giving legal advice. *See* Goldschmidt, *supra* note 3, at 21. Forty-eight percent of the administrators reported that their courts had no policies at all. *See id.*; *see also* Meeting the Challenge, *supra* note 1, at 50, 123 (reporting that about half the responding courts had a policy concerning the giving of legal advice to unrepresented litigants).

26. *See, e.g.*, Ariz. Rev. Stat. Ann. § 11-403 (West 1990) (concerning the "practice of law prohibited to certain officers"); *In re Amendments*, 601 So. 2d at 1216 (stating that a clerk cannot practice law).

27. *See, e.g.*, Fed. R. App. P. 45(a) ("Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office."); Mass. Gen. Laws Ann. Rule 3:02(2) (West 1997) ("All clerks of court . . . and their assistants and employees in their offices are prohibited from engaging in the practice of law . . . ."); Greacen, *supra* note 24, at 11-12 (providing examples of various state rules prohibiting clerks from giving legal advice); Letter from Julia M. Freit, Assistant Attorney General, Office of the Maryland Attorney General, to the Honorable Mary Boergers, Senator 1 (October 22, 1991) (on file with the author) [hereinafter Freit Letter] ("The Annotated Code of Maryland, Business Occupations and Professions Article . . . § 10-603(b) provides that a clerk, deputy clerk, or employee of the clerk's office may not practice law . . . .").

28. *See, e.g.*, Greacen, *supra* note 24, at 14 ("Court staff must always remember the absolute duty of impartiality"); Open Letter from the Supreme Judicial Court of the Massachusetts Advisory Committee on Ethical Opinions for Clerks of the Courts 4 (November 8, 1995) (on file with the author) ("[T]he Canons [of the Code of Professional Responsibility for Clerks of Court], in particular Canons 4 and 5, require clerks to remain impartial . . . .").

29. *See, e.g.*, Committee on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. Baker, 492 N.W.2d 695, 701 (Iowa 1992) ("It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law." (citation omitted)); State Bar v. Guardian Abstract & Title Co., 575 P.2d 943, 948 (N.M. 1978) ("There is no comprehensive definition of what constitutes the practice of law in our basic law or the cases. The Court has specifically declined to take on the onerous task."); Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334, 337 (Or. 1992) (in banc) (citing State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 8-9 (Ariz. 1961), for the proposition that an exhaustive definition is impossible); Utah State Bar v. Summerhayes & Hayden, 905 P.2d 867, 869 (Utah 1995) ("The practice of law, although difficult to define precisely, is generally acknowleged to involve the rendering of legal services that requires the knowledge and application of legal principles to serve the interests of another with his consent."). An examination of cases discussing the unauthorized practice of law is beyond the scope of this Article.

30. *See, e.g.*, Florida Bar v. Schramek, 616 So. 2d 979, 984 (Fla. 1993) (stating that the giving of legal advice constitutes the unauthorized practice of law); People *ex rel.* Ill. State Bar Ass'n v. People's Stock Yards State Bank, 176 N.E. 901, 907-08 (Ill.

The ease with which courts announce the rule prohibiting advice-giving belies the difficulties in understanding and applying the rule. Some courts have sought to distinguish between the giving of legal advice, which is prohibited, and the giving of legal information, which is not.[31] Another opinion indicates that clerks may identify options, but may not assist the litigant in choosing among the options.[32] One jurisdiction prohibits clerks from preparing forms or providing sample pleadings;[33] but another permits the "routine" filling out of forms, while continuing to prohibit the giving of legal advice.[34] Notwithstanding the various efforts to help clerks draw the line, one clerk's candid assessment resonates from jurisdiction to jurisdiction: "We have been told here . . . not to give 'legal advice' but I have never heard this term defined so I do struggle with what to tell [pro se litigants] . . . because sometimes this can be a fine line."[35]

John M. Greacen provides a thoughtful exploration of these issues in his article *"No Legal Advice from Court Personnel" What Does that Mean?*[36] Greacen acknowledges that clerks are taught from day one that they must not give legal advice, but suggests that the clerks themselves are unable to identify what constitutes legal advice. Greacen ultimately argues that "the phrase has no inherent meaning."[37] As

1931) (same); *Baker*, 492 N.W.2d at 701-2 (same); *In re* Opinion of the Justices, 194 N.E. 313, 317 (Mass. 1935) (same); *Guardian Abstract*, 575 P.2d at 948 (same); R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 417 (Okla. 1972) (same); *Security Escrows*, 377 P.2d at 339 (same); *Summerhayes & Hayden*, 905 P.2d at 869 (same); *see also* Wis. Stat. Ann. § 757.30(2) (West 1981 & Supp. 1997) (stating that every person who gives legal advice is practicing law).

31. *See, e.g.*, *Walters*, 411 S.E.2d at 691 (distinguishing between the giving of information and the giving of legal advice by a magistrate); *see also* Freit Letter, *supra* note 27, at 1 (discussing the prohibition against lay persons practicing law).

32. *See, e.g.*, Massachussetts Advisory Comm. on Ethical Opinions for the Clerks of the Courts, Op. 95-6 (November 8, 1995) (identifying several scenarios in which a court clerk may assist a litigant without engaging in the practice of law).

33. *See* Freit Letter, *supra* note 27, at 2. According to one reading of the opinion put forth in this letter, "[t]he circuit clerk's office cannot provide information, forms, or sample pleadings to [unrepresented] clients." Advisory Council on Family Legal Needs of Low Income Persons, Increasing Access to Justice for Maryland's Families: A Joint Project of the Maryland Legal Services Corporation and the University of Baltimore School of Law 10 (1992) [hereinafter Increasing Access to Justice].

34. *See* Judicial Ethics Advisory Comm. of the Arizona Supreme Court, Op. 88-5 (1988).

35. *Pro Se Issues & Answers: An On-Line Forum*, FJC Directions, June 1996, at 33, 34 (quoting eletronic message from Pamela Mitchel, CJRA Staff Attorney, W.D. La., dated Oct. 20, 1995).

36. Greacen, *supra* note 24, at 10. A slightly different version of the article appears under the title *"Clerk's Office Staff Cannot Give Legal Advice" What Does that Mean?*, in Court Manager, Winter 1995, at 35, 35. When he wrote the articles, Greacen was the Clerk of the U.S. Bankruptcy Court in the District of New Mexico, Albuquerque, New Mexico.

37. Greacen, *supra* note 24, at 10. Greacen illustrates the difficulty by providing nine common scenarios that clerks face and suggesting that the prohibition against giving legal advice provides no insight as to how to answer the questions: (1) "Has a complaint . . . been filed?"; (2) "I just got this here summons and complaint. . . . What

tions that are unduly harsh or one-sided;[154] courts therefore should not approve agreements that are unduly harsh or one-sided. As contract principles underlie the interpretation and enforcement of the agreements, some courts may be expected to ask basic questions to determine whether the unrepresented litigant understands the terms of the agreement and has entered into the agreement voluntarily.[155] Occasionally, a court even articulates the need for judges to ensure that unrepresented litigants understand their options prior to agreeing to settlement terms.[156] The judicial principles articulated in the cases involving pro se pleadings and trials apply as well, requiring the judges to be impartial and neutral, granting the judges the discretion to provide at least some assistance to unrepresented litigants, and reserving for the judge the general role of overseeing a fair proceeding designed to provide substantial justice.[157]

The general principles of providing fairness and justice are severely challenged by the manner in which courts typically approve settlements. Particularly in the "poor people's courts," where the numbers of unrepresented litigants are the highest, the judicial oversight in settlement is typically minimal. Courts handling housing, consumer, and family law matters routinely face a high volume of cases and a high rate of settlement, with minimal judicial oversight.[158] Vast numbers of

154. *See, e.g.*, *Amsterdam Co. v. Levy*, N.Y. L.J., Mar. 9, 1987, at 14 (App. Term. Mar. 9, 1987) (vacating a "one-sided stipulation"); *McEvoy v. Chaplin*, N.Y. L.J., July 15, 1983, at 13 (App. Term. July 15, 1983) (holding that "it would be inequitable to hold the *pro se* [litigant] to the terms of the stipulation"); Solack Estates, Inc. v. Goodman, 425 N.Y.S.2d 906, 907 (App. Term. 1979) (holding that a stipulation of settlement may be vacated when "the stipulation is unduly harsh or unjust"), *aff'd*, 432 N.Y.S.2d 3 (App. Div. 1980).

155. *See, e.g.*, Benchmark Apartment Management Corp. v. Mercer, No. 96-00949, at 8-9 n.8 (Mass. Housing Ct. Jan. 3, 1997) (unpublished opinion, on file with the *Fordham Law Review*) (listing several determinations that a judge should make when approving a landlord-tenant settlement); *In re* Marriage of Foran, 834 P.2d 1081, 1090 (Wash. Ct. App. 1992) (affirming decision that a prenuptial agreement was unenforceable because it was patently unfair and wife did not have a full understanding of the legal consequences of the contract and could not voluntarily and intelligently waive her rights). For further discussion of mediation, see *infra* notes 311, 322 and accompanying text.

156. *See, e.g.*, *Table Run Estate, Inc. v. Perez*, N.Y. L.J., Feb. 23, 1994, at 21 (App. Term. Feb. 23, 1994) ("In the colloquy attending execution of the stipulation, these allegations were not examined. . . . It is clear that the unrepresented tenant did not appreciate the available alternatives to signing the stipulation . . . .").

157. *See supra* notes 118-20 and accompanying text. For a general discussion of the need for impartiality in settlement, see Goldschmidt & Milord, *supra* note 151, at 19-29. The author's primary recommendation for judges in the context of guiding or influencing settlement is: "The judge should guide and supervise the settlement process to ensure its fundamental fairness. In seeking to resolve disputes, a judge in settlement discussions should not sacrifice justice for expediency." *Id.* at 51.

158. *See* 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956, 960 (Civ. Ct. 1992) (discussing crushing volume in New York City Housing Courts); David Caplovitz, Consumers in Trouble: A Study of Debtors in Default 218-24 (1974) (discussing how debtors who do not default in debt collection cases are pressured into settling their cases without a trial); Bryan, *supra* note 153, at 937 ("Currently, however, for many

cases are resolved in under five minutes at the bench, often reducing the judicial role to that of a rubber-stamp.[159] Courts rarely exercise their power to vacate the agreements.[160]

Far from playing a minimal role in settlement, however, judges routinely encourage and pressure litigants to settle.[161] Court rules encourage judges to clear their dockets.[162] Judges will need to explain to their Administrative Judges why a relatively old case has remained unresolved before they will be asked to justify the fairness of a case settled on the first day. The frequent cautionary advice urging judges to refrain from coercing litigants in the settlement process speaks volumes about the temptation to do so.[163]

The unrepresented litigant, therefore, must expect to appear before a judge intent on clearing the docket by achieving a settlement. The typical judge will encourage and even pressure the litigant to settle. The judge will be cognizant of the difficulties involved in cases with unrepresented litigants, finding the cases easier where the parties have

reasons, judges pay only cursory attention to the actual provisions of divorce agreements." (footnotes omitted)); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 951, 956 (1979) (describing how most family cases settle, with minimal intervention of the court); Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 Denv. U. L. Rev. 357, 386-87 (1990) (similarly describing how most small claims debt collection cases in the District of Columbia do not make it to trial).

159. *See Lacrete*, 585 N.Y.S.2d at 960 (describing how most cases in New York City's Housing Courts are "disposed of at an average rate of five to fourteen minutes per case, with many settlements in the range of five minutes or less"); Bohmer & Ray, *supra* note 97, at 40 ("[J]udicial scrutiny [of settlements] is in fact *pro forma*."); McCulloch, *supra* note 80, at 504 (describing how judges in divorce cases "expect each case to take three minutes or less"); McEwen et al., *supra* note 93, at 1345-46 ("Court review [of mediated agreements] has traditionally been viewed as a check on only the most egregious and obvious unfairness, because the judge receives only the written result of negotiations and has no advocate for non-signature . . . . [T]he 'sheer quantity of cases . . . [prevents] a judge [from] attend[ing] to cases prone to injustice." (citations omitted)); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 Yale L. & Pol'y Rev. 168, 177 (1984) ("Divorce decrees are typically drafted for the parties after compromises reached through private negotiation. These compromises are then approved by a judge, who generally gives them only the most perfunctory sort of review.").

160. *See, e.g.*, Bryan, *supra* note 153, at 938 ("In support of the state's policy of favoring settlement of divorce disputes, the Illinois courts have created a presumption in favor of the validity of settlement agreements."); Engler, *supra* note 43, at 142-43 ("[T]o expect courts facing crushing volume to raise the [*vacatur*] challenge *sua sponte* or regularly to undo [the parties' settlement] work only to create more work is unrealistic.").

161. *See* Caplovitz, *supra* note 158, at 218-19; Gagnon, *supra* note 109, at 281. For a general picture of the situation faced by poor people in the court system and pressure placed upon them to settle, see *infra* Part III.

162. *See* Fiss, *supra* note 92, at 1073-75; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485, 491-93 (1985) (discussing effect of Federal Rule of Civil Procedure 16).

163. *See* Goldschmidt & Milord, *supra* note 151, at 41-56.

Greacen notes, "[a] deputy clerk's inability to define the term 'legal advice' and to apply it consistently to ambiguous situations puts him or her in pretty good company."[38] After examining some of the definitions provided by courts, Greacen concludes that none of the distinctions "is satisfactory for the poor deputy clerk who needs to decide whether to answer a question."[39] Arguing that the ambiguity has negative consequences for the courts and the public, Greacen ultimately argues for the adoption of principles for court staff in providing advice and information to court users in place of the "traditional prohibition against 'giving legal advice.'"[40]

If anything, Greacen understates the difficulties in employing a prohibition against the giving of legal advice. The term is used not only in the context of defining the practice of law and articulating the proper role of court personnel, but also in the context of alleged attorney malpractice,[41] efforts to obtain documents claimed to be protected by the attorney-client privilege,[42] and a lawyer's dealings with unrepresented adverse parties.[43] Given the varying contexts,

is an answer? What does one look like? What does it say?"; (3) "When is my answer due?"; (4) "What does 'interrogatory' mean?"; (5) "I got this summons for jury service . . . . What happens if I don't show up?"; (6) "When will the court decide my case?"; (7) "Do I have to do anything else?"; (8) "Here is the situation I am in . . . how should I bring this issue before the court for resolution?"; (9) "Hi. . . . I'm a new attorney . . . I need to file a motion . . . . Does the court have a local rule I should be aware of? . . . How is the judge likely to react . . . ." *Id.* at 10.

38. *Id.* at 11; *see also supra* notes 31-34 and accompanying text (discussing courts' attempts to explain what is meant by "legal advice" in the context of what is meant by "the practice of law" and the further attempts to provide guidance to clerks by distinguishing between "advice" and "information" and "law" and "procedure").

39. Greacen, *supra* note 24, at 12. As Greacen explains, "[c]ases are often won and lost on procedural issues. It is hard to know what is information, when an inquiring citizen is clearly going to rely and act on what you say." *Id.*

40. *Id.* at 15. Greacen articulates five such principles, which have begun to attract attention. *See id.* at 14-15; *see also* Committee on the Treatment of Litigants and Pro Se Litig., Report of the Minn. Conference of Chief Judges 14 (1996) [hereinafter Minn. Conference Report]; Jona Goldschmidt, Cases and Materials on Pro Se Litigation and Related Issues 11 (May 1997) (unpublished manuscript, on file with the author) (prepared for the ABA Lawyer's Conference Annual Meeting in Tuscon, Arizona). For an analysis of the principles, see *infra* Part II.B.3.

41. *See, e.g.*, Franko v. Mitchell, 762 P.2d 1345, 1351 (Ariz. Ct. App. 1988) (holding that an attorney is held to the same standard of care in proffering legal advice whether or not such advice is gratuitous); Togstad v. Vesey, Otto, Miller & Keefe, 291 N.W.2d 686, 693 (Minn. 1980) (holding that plaintiff was injured when defendant attorney advised her that she had no medical malpractice claim).

42. *See, e.g.*, Crane v. Crane, 614 A.2d 935, 940-42 (D.C. 1992) (Terry, J., concurring) (discussing the attorney-client privilege and the crime-fraud exception regarding communications involving an attorney).

43. *See generally* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 Cal. L. Rev. 79 (1997) (commenting on lawyers' abuses of ethical rules regarding the giving of advice to unrepresented parties). The ethical rules governing a lawyers' interactions with an unrepresented party prohibit not only the giving of "legal advice," but also of "advice." Depending on the context of the interaction, the terms may have little, if any, difference in meaning. *See id.* at 97-98.

confusion over the definition of "legal advice" is hardly surprising.[44]

The purpose of the unrepresented litigant's encounters with the clerks is to obtain help in a legal matter. The purpose of the inquiry is to gain advice, information, and assistance in the specific case in which the litigant is involved. Rules that prohibit the providing of information and assistance helpful to litigants in their cases either are doomed to be broken or would render clerks of very little use to litigants.

Even the most basic duties of the clerks might be construed as legal advice. For example, if a litigant, having been served with a complaint, appears at the clerk's office, the clerk might inform the litigant that the complaint needs to be answered. In jurisdictions that have developed forms for litigants, the clerk might simply hand the litigant an answer form; yet if the same litigant took the complaint to an attorney, a very different discussion might occur. Although the attorney might ultimately file an answer on behalf of the litigant, the attorney might first engage in a discussion as to what might go into the answer. The attorney also might discuss with the client the possibility of pursuing a different first step, such as filing a motion to dismiss. The process of deciding which step to take involves a discussion of options for the client, a process central to the attorney's role.[45] By deciding to file

44. It would not be surprising to find courts relying on a narrow definition of what constitutes "legal advice" where the "expected" or "routine" interactions between unrepresented litigants and clerks or opposing lawyers are at issue. A somewhat broader definition of the term is needed to protect clients or potential clients from the actions of attorneys on whose advice they have relied. *See generally supra* notes 31-43 and accompanying text (discussing the ambiguity of the meaning of "legal advice").

I have described elsewhere the importance of resisting the tendency to employ narrow definitions of the terms "advice" and "legal advice" in understanding and regulating a lawyer's interactions with unrepresented adversaries. *See* Engler, *supra* note 43, at 97-98. In understanding and enforcing the prohibition against advice-giving, I argued that context—in particular, the identity of the unrepresented party and the setting of the attorney's statement—is critical in determining whether a particular statement or action constitutes advice-giving. *See id.* at 98. Because the key to the inquiry is the effect or potential effect on the unrepresented party, I urged that for the prohibition on advice-giving to have any meaning, it needs to include "prohibiting a lawyer from both giving an opinion or counsel and proposing or recommending a course of action." *Id.*

45. *See, e.g.*, Model Rules of Professional Conduct Rule 1.4(b) (1998) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions."). Leading texts on the skill of client counseling make clear that this process includes a discussion of options for the client. *See, e.g.*, Robert M. Bastress & Joseph D. Harbaugh, Interviewing, Counseling, and Negotiating: Skills for Effective Representation 256 (1990) (describing the attorney-client encounter to include: "work[ing] together to identify priorities, alternatives, consequences, and action steps[,] . . . predict[ing] consequences, reflect[ing] and clarify[ing] clients' concerns and ensure that all consequences for each alternative are considered[, and] . . . guid[ing] the clients through discussion and analysis of the alternatives and their consequences"); *see also* David Binder et al., Lawyers As Counselors: A Client-Centered Approach (1991) (describing how lawyers can better serve their clients). Binder and his co-authors define "Counseling" as follows:

which the court's primary goal seems to be to deter litigants from "bypassing" lawyers. In Massachusetts, for example, judges presiding over small claims cases are required to "conduct the trial in such order and form and with such methods of proof as it deems best suited to discover the facts and do justice in the case."[140] In Florida small claims cases, "[i]n an effort to secure substantial justice, the court shall assist any party not represented by an attorney on: (1) procedure to be followed; (2) presentation of material evidence; and (3) questions of law."[141] In Illinois,

> [i]n any small claims case, the court may, on its own motion or on motion of any party, adjudicate the dispute at an informal hearing. At the informal hearing, all relevant evidence shall be admissible and the court may relax the rules of procedure and the rules of evidence. The court may call any person present at the hearing to testify and may conduct or participate in direct and cross-examination of any witness or party.[142]

Judges must assume similar roles in agency settings, such as Social Security cases. The Administrative Law Judges ("ALJs") have a "basic obligation to develop a full and fair record" which "rises to a special duty when an unrepresented claimant unfamiliar with hearing procedures appeals before him."[143] "To satisfy this special duty the administrative law judge must 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'"[144] The obligation for administrative judges to provide extensive assistance to litigants extends beyond Social Security law, to areas such as welfare[145] and unemployment benefits cases.[146]

140. Unif. Small Claims R. of the Mass. Trial Cts. 7(c).

141. *In re* Amendments to the Florida Small Claims Rules, 601 So. 2d 1201, 1209 (Fla. 1992).

142. Ill. S. Ct. R. Ch. 110A, Rule 286(b).

143. Lashley v. Secretary of Health and Human Servs., 708 F.2d 1048, 1051 (6th Cir. 1983) (citation omitted); Clark v. Schweiker, 652 F.2d 399, 404 (5th Cir. 1981).

144. *Lashley*, 708 F.2d at 1052 (citations omitted).

145. *See, e.g.*, Mass. Regs. Code tit. 106, § 343.450(A)(2) (1995) (describing the Powers and Duties of Hearing Officials in Massachusetts welfare benefits as including the duty "[t]o assist all those present in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved and to ascertain the rights of the parties").

146. In Massachusetts unemployment hearings, for example, the hearing officer, called a "Review Examiner," has obligations set forth in Massachusetts Regulations Code title 801, section 1.02(10)(g). The specific obligations include:

> 2. [to] assist all those present in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved and to ascertain the rights of the Petitioner;
>
> 3. [to] ensure that all Parties have a full opportunity to present their claims orally, or in writing; [and to] . . .
>
> 10. examine witnesses and ensure that relevant evidence is secured and introduced . . . .

Mass. Regs. Code tit. 801, § 1.02(10)(g) (1993).

The precedents from small claims courts and administrative agencies serve as an important reminder that impartiality does not require judges to be passive. Like other judges, small claims judges must remain impartial.[147] ALJs in Social Security,[148] welfare,[149] and unemployment benefits[150] cases must also remain impartial. Judges may therefore be active in assisting unrepresented litigants without compromising their impartiality.

In contrast to the many decisions articulating the judicial role where trials or pro se pleadings are at issue, few cases discuss the role of the judge in settlements involving unrepresented litigants. Yet, since most cases settle, the role of the judge in settlement perhaps is more important than the role of the judge at trial.[151]

A picture of the judicial role in settlement emerges by inference from cases involving motions to vacate settlements or consent agreements. For example, the Massachusetts Supreme Judicial Court discusses the propriety of vacatur by measuring whether the resulting agreement was "fair and reasonable";[152] the trial court therefore has a duty to consider the fairness and reasonableness of agreements before accepting them. Indeed, "[a]t the final hearing most jurisdictions impose a duty on the judge to review a divorce agreement for fairness or lack of unconscionability."[153] Decisional law in New York City housing cases allows courts to exercise their discretion to vacate stipula-

147. *See supra* note 118 and accompanying text.

148. *See, e.g.*, 5 U.S.C. § 556(b) (1994) ("The functions of presiding employees and of employees participating in decisions . . . shall be conducted in an impartial manner.").

149. In Massachusetts, for example, welfare hearings are "conducted by an impartial referee." Mass. Regs. Code tit. 106, § 343.110 (1997); *see also* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) ("And, of course, an impartial decision maker is essential.").

150. For example, Article 29 of the Massachusetts Declaration Of Rights, guaranteeing the right to have cases heard by impartial judges, applies to administrative agency officials as well. *See, e.g.*, Police Comm'r v. Municipal Court, 332 N.E.2d 901, 905 (Mass. 1975) ("Article 29 extends beyond judges to all persons authorized to decide the rights of litigants." (internal quotation marks and citation omitted)). *See generally* 38 Alexander J. Cella, Massachusetts Practice: Administrative Law and Procedure § 313, at 585 (1986) (requiring administrative agency officials and presiding officers to render impartial decisions); 39 *id.* § 581, at 68-69 (same).

151. The paucity of guidance regarding the judge's role in settlement is understandable, since, where cases settle, the conflicts ostensibly have been resolved. Contested trials and pleadings require judicial action.

A notable exception to the general lack of guidance for judges in settlement is Jona Goldschmidt & Lisa Milord, Judicial Settlement Ethics: Judge's Guide (1996). The driving force for the project was "the lack of adequate guidelines for judges and others who host settlement conferences." *Id.* at 1. Despite its impressive breadth, the project does not distinguish between cases involving unrepresented parties and cases involving represented ones; few of the cited cases appear to involve unrepresented litigants at all. The project is therefore at best a partial response to issues raised in this Article.

152. Moore v. Moore, 448 N.E.2d 1255, 1257 (Mass. 1983).

153. Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 Denv. U. L. Rev. 931, 937 (1997) (footnote omitted).

an answer, the client foregoes the choice of filing a motion instead. By choosing certain defenses or counterclaims, the client foregoes the opportunity to raise others. Few would question that the process of helping the client decide these issues involves the giving of legal advice. Yet a clerk's action in simply handing a litigant an answer form with certain defenses listed essentially helps the litigant decide to file an answer raising defenses from a limited list. A presentation of the broader range of choices available, and advantages and disadvantages of each, is missing.[46]

Viewed in this light, clerks are, at best, not giving legal advice. In reality, clerks are giving legal advice all the time. The context of the discussions and the nature of the inquiries necessitates this conclusion under any credible definition of "legal advice." Yet, notwithstanding the best of intentions, the legal advice could be viewed as poor legal advice. The presence of the rules and customs surrounding the clerk's office guarantees that what will not occur is a discussion of available options, along with the advantages and disadvantages of each. Even if the course of action taken is an appropriate one, the decision occurs as a result of limited information and advice. Litigants are being led to make choices without the information, guidance, or expertise necessary to ensure that the choices are informed ones.

The difficulties facing unrepresented litigants at the clerk's office are compounded by the bias and hostility some clerks exhibit toward unrepresented litigants. In the words of one observer, there exists a "pervasive institutional bias in our courts against self-represented litigants," a bias that includes the clerks' differential treatment of unrepresented litigants in comparison to their treatment of lawyers.[47] One

> Counseling is the process by which lawyers help clients decide what course of action to adopt in order to resolve a problem. The process begins with identifying a problem and clarifying a client's objectives. Thereafter, the process entails identifying and evaluating the probable positive and negative consequences of potential solutions in order to decide which alternative is most likely to achieve a client's aims.

Id. at 259-60 (footnote omitted). Their definition of advice-giving includes advising clients about the likely legal and/or nonlegal consequences of their decisions, as well as giving the lawyer's opinion "about which alternative a client should adopt." *Id.* at 260. Throughout their text, Binder and his co-authors underscore the importance of proposing solutions or options, and advising clients of the potential consequences of their choices. *See id.* at 28, 273-74.

46. The purpose of the illustration in the preceding paragraph is not to suggest that clerks should be giving advice to the full extent one's lawyer might. Rather, it is to demonstrate that prohibiting clerks from giving "legal advice" is an unworkable and ill-advised prohibition. For a discussion of suggested guidelines for clerks, see *infra* part II.B.3.

47. Steven R. Elias, Bias Against Pro Per Litigants 1 (n.d.) (unpublished manuscript, on file with the author). Elias suggests that posted signs stating "We don't provide legal advice!" most often mean that the clerks want the self-represented litigant to get a lawyer. *See id.* As Elias explains, "[i]f a lawyer's office calls the clerk and asks about a particular scheduling procedure, the clerk will provide all sorts of information without thinking twice. But let a self-represented person ask for the same (or

study of self-represented litigants found that "[s]ome judicial personnel even display a marked degree of antagonism for the self-helper."[48] The Massachusetts Gender Bias Report describes hostility from the clerks as a major problem facing unrepresented women in the Massachusetts courts.[49] Greacen frankly acknowledges that invoking the phrase "I am not allowed to give legal advice" is an easy way to "get rid of" an unrepresented litigant seeking assistance.[50]

Despite the extensive time and effort expended by clerks in assisting unrepresented litigants, the unrepresented litigant emerging from the clerk's office must be viewed as having made "choices" based on limited information and advice. Officially, litigants encountering court personnel will not have had the benefit of legal advice, since court personnel are prohibited from giving such advice. More probable, however, is that some litigants may receive "legal advice" which is likely to be limited and may even constitute poor legal advice. Moreover, the encounter may be permeated by bias or hostility toward the unrepresented litigant.

B. *Assistance Programs*

In addition to court personnel, unrepresented litigants may encounter various other actors during the course of the proceeding. The actors may include people in many of the assistance programs that have sprung up inside courthouses around the country, lawyers and lay people providing limited assistance to litigants outside the courthouse, and opposing lawyers. As shown below, however, unrepresented liti-

even much less) information, and it suddenly becomes legal advice." *Id.* at 5. Elias urges that clerks provide the same information to the self-represented as they would to lawyers and their staffs, that the boundary as to what is considered legal advice be pushed back, and that a requirement of being a clerk be a genuine desire to facilitate equal access regardless of whether a party is represented by counsel. *See id.*

48. Steven R. Cox & Mark Dwyer, A Report on Self-Help Law: Its Many Perspectives 50 (n.d.) (unpublished report, on file with the author) (sponsored by the ABA Special Committee on the Delivery of Legal Services but not formally endorsed by the ABA); *see also* Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 Fam. L.Q. 421, 435 (1994) (discussing lawyer and judicial prejudice toward pro se litigants).

49. *See* Gender Bias Study Comm., Supreme Judicial Court of Mass., Report of the Gender Bias Study of the Supreme Judicial Court 20 (1989) [hereinafter Mass. Gender Bias Study].

50. Greacen, *supra* note 24, at 12. Outside one clerk's office hangs the sign: "The District Court Clerk's Office Cannot Answer Any Questions Regarding Pro Se Cases." Goldschmidt, *supra* note 3, at 34. "While court clerks have traditionally assisted attorneys and their staff by providing instructions as to the appropriate rule to follow or form to file, they are hesitant to provide the same information and forms to self-represented litigants." Meeting the Challenge, *supra* note 1, at 3 (footnote omitted); *see also* Patricia Nealon, *Electronic Equality Is Tested in Court*, Boston Globe, August 5, 1997, at B1 (describing litigation by a non-lawyer denied access to a computer service in the Massachusetts Superior Courts, called Superior Court Remote Inquiry for the Bar, that allows lawyers to view court dockets from computers in their homes).

who otherwise seemed at a disadvantage through no fault of their own.[131]

While the principles may govern the decisions in one sense, the facts drive the selection of the principles. One can almost predict the outcome, and the choice of articulated principles, from the annoyance level of the court. The more annoyed the court is with an unrepresented litigant, the more likely the invocation of precedent requiring impartiality, the application of similar rules, and a prohibition of playing advocate for the litigant. The more sympathetic the litigant, and the more the absence of counsel seems beyond the litigant's control, the more likely the court will be to articulate a need to provide additional assistance to avoid a miscarriage of justice.

The decisions reflect not only judges' attitudes toward individual litigants, but also judges' general discomfort with cases involving unrepresented litigants. By resorting to a "strict" approach, judges often reveal a fear that accommodating unrepresented litigants might invite an increase in people choosing to by-pass lawyers and appear without counsel.[132] Unrepresented litigants must not be permitted to "capitalize" on their unfamiliarity with court procedure, because of a possibility that litigants will forego representation to gain a tactical advantage.[133] Thus, a number of the decisions begin their analysis from the proposition that the litigant has "chosen" to appear without counsel in the first place.[134]

At a minimum, the decisions consistently attempt to deter litigants from appearing without counsel.[135] Yet some judges do not simply

14 (Utah 1983) (discussing a judge's help and consideration for a pro se litigant harmed by unfamiliarity with court processes and the "factual compelexities of the case").

131. *See* Oko v. Rogers, 466 N.E.2d 658, 661 (Ill. App. Ct. 1984).

132. *See, e.g.*, *Kluczinsky*, 370 A.2d at 1308-09 (refusing to make allowances for a pro se litigant's lack of education); *Oko*, 466 N.E.2d at 662 (Barry, J., dissenting) (warning that leniency toward pro se litigants invites pro se representation and difficulties at trial). One survey of judges asked to describe the ideal pro se assistance program provoked responses revealing a fear that such programs "would open the floodgates and attorneys would revolt." Goldschmidt, *supra* note 3, at 18 ("I would not adopt such a program. Soon virtually every litigant would seek to be included in it. I think if too much attention is given to it, there will be a tremendous increase in pro se litigation, much of which will be by non-indigent parties.").

133. *See* Homecraft Corp. v. Fimbres, 580 P.2d 760, 762 (Ariz. Ct. App. 1978); Sunpower, Inc. v. Hawley, 296 N.W.2d 532, 533 (S.D. 1980) (per curiam).

134. *See* Jacobsen v. Filler, 790 F.2d 1362, 1365 n.7 (9th Cir. 1986); United States v. Pinkey, 548 F.2d 305, 310-11 (7th Cir. 1977); Austin v. Ellis, 408 A.2d 784, 785 (N.H. 1979); *Kluczinsky*, 370 A.2d at 1310.

135. *See* Robert W. Schachner et al., How and When to Be Your Own Lawyer 159 (1993) ("The majority of judges I have interviewed would just as soon not deal with a pro se situation if they had a choice . . . ."); Goldschmidt, *supra* note 3, at 13 ("Many judges make an effort to deter litigants from proceeding pro se."). At a minimum, judges frequently mention the "difficulties" involved in dealing with cases involving unrepresented litigants. *See id.* at 11-19. One judge phrases the negative ramifications differently:

deter unrepresented litigants, they silence them. One study of Baltimore's Rent Court described the systematic way in which judges intimidate and silence unrepresented tenants, effectively precluding the tenants from having their claims heard.[136] Observers report judicial silencing of unrepresented litigants in other settings as well.[137] In light of these types of behavior and attitude, some observers conclude that many judges are biased against unrepresented litigants.[138]

Decisions reflecting a discomfort with cases involving unrepresented litigants should not constitute appropriate precedent for courts in which unrepresented litigants are commonplace. Moreover, the decisions cited above typically come from courts in which the unrepresented litigant is still the exception, rather than the rule. The applicability of "precedent" from the federal or higher state courts, or from criminal cases, to courts handling a high volume of civil cases involving the unrepresented poor, should be suspect at best. Even if there should be concern about the judicial role where litigants truly have the means and opportunity to "choose" to appear without counsel, the concerns should dissipate when considering the role of judges in the "poor people's courts," where large numbers of litigants appear without counsel due to the shortage of available counsel for the poor.[139]

As unrepresented litigants become the norm in many courts around the country, precedent from the small claims courts and administrative agencies should provide more compelling guidance than cases in

> One of the sad things is that we are driving attorneys out of the practice [of law] because they can't afford to sit there all day as *pro se* people go on and on. Lawyers just can't afford that. The more that happens, the more you have the self-fulfilling prophecy of turning the court into a *pro se* system, which is not good. The responsibility of the court is to resolve disputes. It is not an emergency room of a hospital. It is not a therapy session.

Bench Conference: Judge Edward M. Ginsburg, Probate & Family Court, 25 Mass. Law. Wkly. 252, 252 (1996).

136. *See* Bezdek, *supra* note 23, at 566-75. The unrepresented tenants typically are poor, black women. *See id.* at 534 n.4.

137. *See, e.g.*, 5 Minute Justice, *supra* note 110, at 65-68 (observing New York City Housing Court judges in interactions with unrepresented tenants); Frank S. Bloch, *Framing the Clinical Experience: Lessons on Turning Points and the Dynamics of Lawyering*, 64 Tenn. L. Rev. 989, 999 (1997) (describing the silencing of an unrepresented tenant in an eviction case in Tennessee); Mark H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, *in* 1 The Politics of Informal Justice 119, 119-21 (Richard L. Abel ed., 1982) (describing the bias of judges in New York City Housing Courts against tenants, most of whom were unrepresented); Beatrice A. Moulton, Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 Stan. L. Rev. 1657, 1664-65 (1969) (discussing judicial intimidation of pro se litigants).

138. *See* Elias, *supra* note 47, *passim*; Goldschmidt, *supra* note 3, at 18 (observing "negative judicial philosophies about and attitudes toward pro se litigants": "some judges went beyond stating their fear of 'opening the floodgates' of pro se litigants; they evidenced a general anti-pro se litigant sentiment").

139. *See infra* Part III. For self-representation to comprise more than a hollow right, litigants should not be punished for exercising that right.

gants heading to mediators or judges must still be presumed to be making uninformed choices despite the array of assistance programs.

1. Limited Assistance Inside the Courthouse

As the numbers of unrepresented litigants have swelled, courts have created pro se clerks,[51] attorneys,[52] assistants,[53] law clerks,[54] or offices to assist unrepresented litigants.[55] In some courts, information tables staffed by non-lawyers,[56] court clinics staffed by law students,[57] and

51. *See, e.g.*, N.Y. City Civ. Ct. Act § 110(o) (McKinney 1989) (requiring a "sufficient" number of pro se clerks to assist persons not represented by counsel in housing court). The federal courts have made extensive use of pro se law clerks in the context of prisoner litigation. *See* Federal Judicial Ctr., Resource Guide for Managing Prisoner Civil Rights Litigation 35 (1996) (describing the role of the federal pro se law clerk).

52. The New York City Housing Courts have a "pro se attorney" on staff in each borough to assist litigants. *See, e.g.*, *infra note* 346 (discussing the lack of sufficient pro se attorneys to assist unrepresented litigants). Staff attorneys in the Pro Se Legal Services Unit in Family Court in Fort Lauderdale, Florida, provide assistance and advice to unrepresented parties. *See* Meeting the Challenge, *supra* note 1, at 69, 86.

53. *See* Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 St. Louis U. L.J. 553, 560 (1992) ("The Domestic Relations Division of the Maricopa County (Phoenix, Arizona) Superior Court hired a full time paralegal to provide procedural assistance to self-represented litigants."). One Florida Court has established a full-time assistant for family law cases, who reviews required documentation submitted by pro se litigants, schedules, and dockets hearings once the paperwork is in order. *See First Circuit's* Pro Se *Litigant System Delivers Results*, Full Court Press (Office of the Courts Administrator, Tallahassee, Fla.), July-Aug. 1994, at 2, 2.

54. *See* Harvey Halberstadter, *Help for the Pro Se Litigant*, State Ct. J., Winter 1982, at 9, 11.

55. *See, e.g.*, Erin St. John Kelly, *Yourself Esq.: When You're Up Litigation Creek Without a Lawyer*, N.Y. Times, Nov. 16, 1997, § 14, at CY3 (describing the Office for the Self-Represented in New York Supreme Court). Most federal courts have had a pro se division of the clerk's office since the early 1980s. *See id.*

56. *See, e.g.*, Responding to the Needs, *supra* note 25, at 20-23 (describing models for courthouse-based assistance to pro se family law litigants in the District of Columbia, King County, Seattle, Washington, and Maricopa County, Phoenix, Arizona). The City-Wide Task Force on Housing staffs information tables in many of New York City's Housing Courts. *See* Miller v. Silbermann, 832 F. Supp. 663, 667 (S.D.N.Y. 1993) (describing allegations of landlords' groups that the systemic operation of the Housing Court, including the presence of the information tables, deprives landlords of their due process and equal protection rights).

57. *See* Michael Millemann et al., *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 31 Clearinghouse Rev. 1178, 1178 (1997) (describing "an experimental project in which law students provide legal information and advice to otherwise unrepresented parties in family law cases").

"lawyers-for-the-day" programs staffed by volunteer lawyers[58] may be available to unrepresented litigants.[59]

In addition, various information sheets, booklets, and court forms are available in many courthouses for many types of proceedings;[60] websites increasingly provide information as well.[61] Courts in Arizona and Utah employ information kiosks "to enable court users to rapidly obtain the necessary forms and instructions for legal proceedings in which litigants often represent themselves."[62] Various states have begun to explore the concept of a "multi-door courthouse" or "self-service" center, pioneered by the Superior Court of Maricopa County, Arizona.[63] The concept is "a system of integrated services to assist primarily unrepresented litigants," including elements such as public education; intake services to identify needs of unrepresented

58. *See* Daniel Golden, *Probate Plaintiffs at Risk Without Lawyers*, Boston Globe, Nov. 27, 1995, at 1 ("[M]any lawyers who regularly practice in family court have begun volunteering one day each year to help impoverished pro se litigants. Most family courts now offer 'lawyer for the day' [('LFD')]services."); *see also* Family Law Section Comm. on the Probate and Family Court, Massachussetts Bar Ass'n, Changing the Culture of the Probate and Family Court 34-37 (1997) [hereinafter Changing the Culture] (describing such programs in the Probate and Family Court in Massachusetts in seven different counties).

59. *See* Meeting the Challenge, *supra* note 1, at 72-104 (describing fourteen "Illustrative Pro Se Assistance Programs and Services").

60. *See, e.g.*, Howard M. Rubin, *The Civil Pro Se Litigant v. The Legal System*, 20 Loy. U. Chi. L.J. 999, 1010 (1989) ("Some of the circuit courts in Illinois and several bar associations have written materials to assist the pro se litigant.").

61. *See, e.g.*, Supreme Court of Fla., *Florida Supreme Court: Self Help Center*, (visited Oct. 22, 1998) <http://www.flrn.edu/supct/selfhelp.html> (providing links to summaries, written by the Florida Bar for the layman, on various aspects of Florida law); HALT, *HALT—An Organization for Legal Reform*, (visited Oct. 22, 1998) <http://www.halt.org> (providing an online "Everyday Law Series" with answers to common legal questions); New York Law Journal & NYS Unified Court System, *New York Courts' Law Guide*, (visited Oct. 22, 1998) <http://www.nylj.com/guide> (including "more than 100 documents, written in plain English, that explain the courts and laws of New York to non-lawyers"); Nolo Press, *Nolo Home Page*, (visited Oct. 22, 1998) <http://www.nolo.com> (providing "Nolo's Legal Encyclopedia" for information on law relating to small businesses, wills and estate planning, employment, etc.).

62. Meeting the Challenge, *supra* note 1, at 69. Various reports around the country include descriptions of the Arizona kiosk, as other states prepare to implement a similar approach. As one such report describes the kiosk:

> [t]hese kiosks, called *QuickCourt*, permit persons to obtain information on how to bring or respond to certain family law actions and to fill out court forms. The kiosk prompts users with questions that are answered by utilizing a touch screen and keyboard. For example, in a divorce proceeding, the litigant is prompted to enter information such as gross income, household expenses, community assets, etc. The computer calculates child support and prints out documents with directions concerning notarization, filing and service.

Memorandum from David Long and Susan Lee to the Board Committee on Courts and Legislation, State Bar of California, regarding the Pro Per Crisis in Family Law 36 (Aug. 15, 1998) (on file with the author).

63. *See* Meeting the Challenge, *supra* note 1, at 71; Long & Lee, *supra* note 62, at 37-38.

necessarily an expression of careful exercise of judicial discretion and cannot be fully described by specific formula."[120] Not surprisingly, in one survey, "91% of the judges [reported] that their courts had no general policy addressing the manner in which pro se litigants should be handled in the courtroom or in the litigation process generally."[121]

In justifying their decisions involving unrepresented litigants, courts routinely recognize that unrepresented litigants generally must play by the same rules as represented litigants and can expect no special treatment.[122] Some decisions emphasize that the judge may not play the role of advocate or attorney for the unrepresented litigant.[123] Others suggest that the judge needs to provide a measure of assistance to the unrepresented litigant, particularly to avoid a miscarriage of justice, and is required to do so in construing pro se pleadings.[124] One Illinois court articulated this approach as follows:

120. *Austin*, 408 A.2d at 785 (quoting Standards of Judicial Administration, Trial Courts § 2.23) (alteration in original).

121. Goldschmidt, *supra* note 3, at 16.

122. *See, e.g.*, *Pinkey*, 548 F.2d at 311 (stating that pro se litigants have no greater rights than those represented by lawyers); Oko v. Rogers, 466 N.E.2d 658, 662 (Ill. App. Ct. 1984) (Barry, J., dissenting) ("Defendant was entitled to a fair opportunity to present his evidence, but nothing more."); Solimine v. Davidian, 661 N.E.2d 934, 934 (Mass. 1996) (stating that a pro se litigant "is held to the same standards to which litigants with counsel are held"); *Jackson*, 647 N.E.2d at 405 (holding that no lenience is required on the part of the judge toward a pro se defendant); *Barnes*, 504 N.E.2d at 629 (observing that the same rules of procedure apply to a pro se litigant as to those represented by an attorney); Mmoe v. Commonwealth, 473 N.E.2d 169, 172 (Mass. 1984) ("[T]he rules bind a pro se litigant as they bind other litigants."); *Wilson*, 443 N.E.2d at 1312 ("[A] *pro se* litigant is bound by the same rules of procedure as litigants with counsel."); Newsome v. Farer, 708 P.2d 327, 331 (N.M. 1985) (stating that a pro se litigant "enjoy[s] no greater rights than those who employ counsel"); Sunpower, Inc. v. Hawley, 296 N.W.2d 532, 533 (S.D. 1980) (per curiam) (holding that a judgment should not be set aside because a pro se litigant was unfamiliar with the rules of pleading or trial practice); *Nelson*, 669 P.2d at 1213 ("[A] party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar."); Osborn v. Manning, 685 P.2d 1121, 1125 (Wyo. 1984) ("[A] *pro se* litigant has no greater right that other litigants.").

123. *See, e.g.*, Mazur v. Pennsylvania, 507 F. Supp. 3, 4 (E.D. Pa. 1980) ("[A] judge may not become the surrogate attorney for a party, even one who is proceeding pro se."), *aff'd* 649 F.2d 860 (3d Cir. 1981); *In re Inquiry Concerning a Judge*, 357 So. 2d at 182 (stating that judges must not act as advocates for one side or the other); *Sunpower*, 296 N.W.2d at 533 (stating that the trial court "has no duty to practice law for the *pro se* litigant"); *Nelson*, 669 P.2d at 1213 (stating that a court should not attempt "to redress the ongoing consequences of the party's decision" to represent himself); Kim, *supra* note 79, at 1646 ("Courts cannot be expected to assume the awkward position . . . of serving as both adjudicator and counsel for the *pro se* litigant."); Long & Lee, *supra* note 62, at 7 ("Judges are not supposed to practice law on behalf of *pro pers*."). Some judges have been informed that they cannot provide legal advice and that they impermissibly practice law in providing various forms of assistance. *See* Meeting the Challenge, *supra* note 1, at 27-30.

124. *See, e.g.*, Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam) (holding that the trial court erred in refusing to allow pro se complainant to present evidence supporting his allegations); *Mazur*, 507 F. Supp. at 4 (noting that courts "must proceed painstakingly" to discern the nature of a pro se plaintiff's claim); *Oko*, 466

> The heavy responsibility of ensuring a fair trial in . . . a situation [involving a pro se litigant] rests directly on the trial judge. The buck stops there. . . . In order that the trial proceed with fairness . . . 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.[125]

Some commentators respond to the divergent statements regarding the judge's role by dividing the cases into those employing a "strict" approach in dealing with unrepresented litigants and those employing a "liberal" approach.[126]

An examination of the decisions, however, suggests that the outcomes may be driven as much by the particular facts of the case as by a given judge's approach. For example, some cases articulating a strict approach often arise in the criminal context, where the defendant has a right to counsel and has chosen to appear pro se despite the availability of counsel.[127] Others involve litigants who insist on remaining unrepresented, contrary to the recommendations of the court,[128] and litigants who persist in filing overbroad and unintelligible pleadings despite instructions from the court.[129] In contrast, cases generating a more "liberal" approach have appeared to the court to have more sympathetic litigants, such as litigants whose limited education or lack of understanding materially affected the substance of the case,[130] or

N.E.2d at 660 (noting that the trial judge ensured the pro se litigant received a fair trial); Standards Relating to Trial Courts § 2.23 (1992) ("When litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to insure a fair trial."); Indiana Comm'n on Judicial Qualifications, Op. No. 1-97 (1997) (stating that a judge should "ensure that a *pro se* litigant in a non-adversarial setting is not denied relief sought only on the basis of a minor or easily established defense").

125. *Oko*, 446 N.E.2d at 661.

126. *See* Rubin, *supra* note 60, at 1001-02; *see also* Kim, *supra* note 79, at 1644-46 (discussing the strict versus the liberal approach to pro se litigants); Goldschmidt, *supra* note 40, at 12-16 (discussing judges' views regarding pro se litigants); Long & Lee, *supra* note 62, at 7-8 (discussing the "compromise position" of family law judges in cases with unrepresented litigants); Maureen McKnight, Dealing with the Unrepresented Opponent 6-8 (1996) (unpublished manuscript prepared for the Oregon Family Law Conference 1996, on file with author) (discussing the court's need to assist pro se litigants without compromising the adversarial process).

127. *See, e.g.*, United States v. Pinkey, 548 F.2d 305, 310 (7th Cir. 1977) (affirming the trial judge's refusal to allow a pro se defendant to engage in irregular conduct); Commonwealth v. Jackson, 647 N.E.2d 401, 405 (Mass. 1995) (same); *see also In re* Tuntland, 390 N.E.2d 11, 14-16 (Ill. App. Ct. 1979) (upholding a petition for hospitalization alleging the respondent was in need of mental treatment where the respondent represented himself despite the right to appointed counsel).

128. *See, e.g.*, Connecticut Light and Power Company v. Kluczinsky, 370 A.2d 1306, 1310 (Conn. 1976); International Fidelity Ins. Co. v. Wilson, 443 N.E.2d 1308, 1312 (Mass. 1983) (noting that the litigant appeared pro se after the trial judge ordered the original counsel to withdraw); Blair v. Maynard, 324 S.E.2d 391, 396 (W. Va. 1984).

129. *See* Mmoe v. Commonwealth, 473 N.E.2d 169, 171-72 (Mass. 1985).

130. *See, e.g.*, Rodriguez v. Owaynat, 485 N.E.2d 438, 441 (Ill. App. Ct. 1985) (holding that a pro se defendant who failed to understand the nature of court proceedings was improperly denied his motion to vacate); Nelson v. Jacobsen, 669 P.2d 1207, 1213-

litigants; a variety of referral options, including referral to court processes, mediation, and social service agencies; and a self-help center with facilitators and computers to provide information on court procedures and assist litigants in completing forms.[64] The development of court forms has often been accompanied by simplification of court procedures, to increase accessibility and thereby reduce the demand for assistance.[65]

Despite the variation in detail and structure, the programs may be grouped into two categories: those designed to provide legal advice and those designed to provide assistance short of legal advice. Most programs, since they are staffed either by non-lawyers or by court personnel, are limited by the traditional prohibition against giving legal advice.[66] Even some programs staffed by volunteer lawyers or law students do not include providing legal advice as part of the program's stated goal.[67] Of the few programs in which the limited assistance includes the giving of legal advice, most involve a high volume of cases

64. *See* Long & Lee, *supra* note 62, at 37. The Self-Service Center in Maricopa County includes not only screening and referral services, but also user-friendly court forms and instructions, a list of professionals including lawyers prepared to provide representation at a reduced fee and alternative dispute resolution ("ADR") neutrals, and general education and information. The court has dedicated a floor in the courthouse, which includes videotapes, forms and instructions for filling them out, computers and printers for completing forms, serve advisors to answer questions about materials and court forms, a law library and access to an information specialist, and services from other agencies such as a volunteer lawyer program and the state division of child support enforcement. *See* Meeting the Challenge, *supra* note 1, at 73-75; Long & Lee, *supra* note 62, at 37.

65. Legal scholars have vigorously debated whether more formal or informal procedures might better protect the rights of the disempowered. *See, e.g.*, William H. Simon, *Legal Informality and Redistributive Politics*, 19 Clearinghouse Rev. 384, 384 (1985) ("Until recently . . . [t]he left critique [of the legal system] portrayed formality as facilitating the manipulation of the legal system by the privileged to the disadvantage of others.").

66. *See, e.g.*, Responding to the Needs, *supra* note 25, at 20-24 (describing models for courthouse-based assistance to pro se family law litigants in the District of Columbia, King County, Seattle, Washington, and Maricopa County, Phoenix, Arizona). In each model the assistance provided by the personnel does not include legal advice. *See id.* at 22. Maricopa County has since added a lawyer referral service component, which includes brief legal advice. *See id.* at 23; *see also* Kelly, *supra* note 55, at 3 (stating that in New York State Supreme Court, litigants should not expect legal advice from the Office of the Self Represented, but rather prepare to fill out all the forms themselves).

67. *See* Changing the Culture, *supra* note 58, at 35 (describing how participants in the Bristol County LFD program "are not allowed to give legal advice or provide actual representation" but merely "assist with the paper work, which relieves the clerks from the task"); *see also* Millemann et al., *supra* note 57, at 1187 ("The students gave legal information to any person who requested it but gave additional legal advice (pursuant to the state's student practice rule) only to indigent clients."). While cautioning that the clinic was located in Montgomery County, an affluent jurisdiction, Millemann and his co-authors reported that "80 percent of the *pro se* litigants who asked for legal information and advice were employed." *Id.* at 1187 n.28. Presumably, many of those seeking help from the clinic students were ineligible to receive legal advice.

per person.[68] The programs either serve a small number of those who need assistance or provide a limited amount of time per litigant.[69] In neither instance do litigants receive extensive legal advice. Programs rarely provide for continued assistance throughout the course of the proceeding,[70] with only a handful even mentioning the provision of representation.[71]

Despite the help these programs provide, the unrepresented litigants who have received the help still must be viewed as lacking the benefit of legal advice. Because the structure of most programs prohibits the giving of legal advice, by definition the users of the program have not received legal advice.[72] Similarly, the litigant receiving technological assistance alone cannot be viewed as having received legal advice.[73] Even where programs permit the giving of legal advice, the

68. *See* Changing the Culture, *supra* note 58, at 30 (concluding, with respect to Massachusetts LFD programs, "[w]e must develop the ability to provide education to potential litigants not only on procedural requirements, but also on their rights"); Responding to the Needs, *supra* note 25, app. H at 38 (describing program in Los Angeles in which local legal services organization staffs a part-time program to provide assistance to pro se litigants; the one to two lawyers see about 50 persons a day); Golden, *supra* note 58, at 1 ("Pro se litigants take a number and stand in line. Some wait as long as two hours . . . . With so much paperwork, [the LFD] can help only a dozen people in eight hours—just a small fraction of all the pro se litigants . . . ."); Millemann et al., *supra* note 57, at 1181 ("During a 17-month period in 1995-96, 34 law students conducted diagnostic interviews and gave basic legal information and advice (generally 30-60 minute sessions) to approximately 4,400 people . . . .").

69. *See, e.g.*, Responding to the Needs, *supra* note 25, at 23 (describing the courthouse lawyer referral service component of the Maricopa County program, which does not arrange for overall representation but provides on-the-spot legal advice for up to 30 minutes for a $20 fee); Mark Thompson, *Help Wanted: Few Programs Aid Pro Pers in Maneuvering Though Legal System*, L.A. Daily J., Feb. 1, 1995, at 1 (describing pro per counseling projects in some California county courts as so busy that they do not advertise, since they are barely able to help walk-ins).

70. The more typical scenario is the description of the Massachusetts LFD program: "Most court personnel see the LFD role as only assistance for the day, not as representation." Changing the Culture, *supra* note 58, at 37.

71. Indeed, attempts to provide representation led to the demise of the LFD program in Barnstable County, Massachusetts. "Previously, the person performing [LFD] services provided actual representation where appropriate. A disgruntled litigant in a custody battle sued the [LFD] who assisted the opposing party. Since then the bar has been understandably wary of involvement." Changing the Culture, *supra* note 58, at 34-35. Where representation arises from contact with the LFD, the representation typically is for a fee or reduced fee. *See, e.g.*, *id.* at 36 (describing Plymouth County Massachusetts LFD program).

72. In reality, the litigants may be receiving what should properly be defined as limited or partial legal advice. *See supra* Part I.A. That reality does not eliminate the propriety of viewing the litigants as uninformed actors, or the need to revisit the restrictions on those who provide assistance.

73. The technological and procedural innovations are a critical component of any effort to increase the accessibility to the court of unrepresented litigants. For some litigants, the ability to overcome traditional barriers of mystifying and complicated procedures may be the primary form of assistance needed. It is hard to imagine that the developers of the information kiosks would contend that the kiosks are providing legal advice.

participate. The mediation will proceed, with the mediator pressing for an agreement, and prohibited from protecting the unrepresented litigant from waiving significant rights. In mediated settlements, the routine waiver of rights by unrepresented litigants flows from presumptions that the choice to mediate is voluntary and informed; that the litigant has a realistic opportunity to obtain counsel and chooses to forego counsel; that the litigant has access to independent advice; and that the litigant appears in mediation aware of her legal rights and capable of participating in mediation.[110]

In theory, judges could provide a check on the dangers identified above in mediation, because mediated agreements are usually sent to them for approval.[111] In reality, judges typically rubber-stamp agreements reached in mediation, as revealed by the following examination of the judge's role, both in trial and settlement.[112]

D. *The Judges*

By the time the unrepresented litigant appears before a judge for resolution of her case, the litigant most likely has interacted with clerks in the clerk's office and possibly with a variety of other court personnel. Depending on the context, the litigant may have consulted outside counsel or someone in a program providing additional assistance to unrepresented litigants. The litigant may have engaged in negotiations with an opposing attorney or appeared before a mediator in a court-connected mediation program. Mediation or negotiation may have resulted in a settlement awaiting court approval, or the case may be awaiting resolution by a judge.[113]

Although the role of judges in dealing with unrepresented litigants has received attention both in the case law[114] and in legal scholarship,[115] the attention largely has been limited in two key respects.

110. Precisely this scenario occurs in Boston Housing Court, where mediation is often a more favorable forum for landlords than resolution before the judges. *See infra* Part III.C.1. Similarly, observers in the New York City Housing Courts have commented that the landlords' attorneys control the mediation process. *See* Monitoring Subcomm., City Wide Task Force on Housing Ct., 5 Minute Justice or "Aint [sic] Nothing Going on But the Rent!" 42-43 (1986) [hereinafter 5 Minute Justice].

111. Where settlement is not reached, the cases are sent to a judge for resolution as well.

112. *See* McEwen et al., *supra* note 93, at 1345-46; *infra* Part I.D.

113. The sequence may be different. The unrepresented litigant may appear before the judge earlier in the sequence, resulting in a recommendation that the unrepresented litigant try to settle the case with the attorney, go to mediation, go to the clerk's office for assistance, or seek assistance from some other court-connected or outside source. The analysis discussed in this section applies regardless of the actual sequence.

114. *See infra* notes 116-32.

115. *See, e.g.*, Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. Chi. L. Rev. 659, 660 (1988) (advocating the use of a "sliding scale" test which will result in more leniency for pro se civil litigants); Kim, *supra* note 79, at 1643 (proposing an alternative to attorney representation); Rubin, *supra* note 60, at

First, although most cases settle, the decisions rarely focus on the judge's role in settlement. They focus instead on either the court's role in dealing with pro se pleadings and other filings[116] or with the court's role during a trial involving an unrepresented litigant.[117] Second, the discussions largely ignore the more general context in which the case arises. They resort instead to general language regardless of whether the case is civil or criminal, whether the setting is one in which unrepresented litigants are commonplace or rare, or whether the law involved is relatively complex or simple.

The basic principles surrounding the judge's role are easily recited. Judges must remain impartial and neutral.[118] Judges should be fair and provide substantial justice.[119] Beyond the general rules, however, "[t]he proper scope of the court's responsibility to a pro se litigant is

1000-01 (discussing judges' dilemma of balancing fairness and order in pro se proceedings); Joseph M. McLaughlin, Note, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 Fordham L. Rev. 1109, 1112 (1987) (arguing that judicial notification of the requirements of the summary judgement rule is a necessary element of the right of access to the courts).

116. *See* Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam); Mazur v. Pennsylvania, 507 F. Supp. 3, 4 (E.D. Pa. 1980), *aff'd*, 649 F.2d 860 (3d Cir. 1981); Solimine v. Davidian, 661 N.E.2d 934, 934 (Mass. 1996); Mmoe v. Commonwealth, 473 N.E.2d 169, 171-72 (Mass. 1985); Rubin, *supra* note 60, at 1004-05; McLaughlin, *supra* note 115, at 1115.

117. *See* United States v. Pinkey, 548 F.2d 305, 308-09 (10th Cir. 1977); Homecraft Corp. v. Fimbres, 580 P.2d 760, 762-63 (Ariz. Ct. App. 1978); Connecticut Light and Power Co. v. Kluczinsky, 370 A.2d 1306, 1308-09 (Conn. 1976); Commonwealth v. Jackson, 647 N.E.2d 401, 405 (Mass. 1995); Commonwealth v. Barnes, 504 N.E.2d 624, 628-29 (Mass. 1987); International Fidelity Ins. Co. v. Wilson, 443 N.E.2d 1308, 1312 (Mass. 1983); Austin v. Ellis, 408 A.2d 784, 785 (N.H. 1979); Nelson v. Jacobsen, 669 P.2d 1207, 1213-14 (Utah 1983); Standards Relating to Trial Courts § 2.23 (1992); Rubin, *supra* note 60, at 1001-07.

118. *See, e.g.*, *In re* Inquiry Concerning a Judge, 357 So. 2d 172, 179 (Fla. 1978) (stating that a judge "may not withhold justice from one litigant in favor of another"); *Austin*, 408 A.2d at 785 (stating that the courts' essential function is "to serve as an impartial referee"); Indiana Comm'n on Judicial Qualifications, Op. No. 1-97 (stating that the judge must ensure that pro se litigants are not denied relief only of the basis of minor deficiencies in their case); Model Code of Judicial Conduct Canon 3 (1990) ("A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently").

119. *See, e.g.*, *Kluczinsky*, 370 A.2d at 1308 (stating that courts should "endeavor to see that . . . a [pro se] litigant shall have the opportunity to have his case fully and fairly heard" (alteration in original) (citation omitted)); Rodriguez v. Owaynat, 485 N.E.2d 438, 441 (Ill. App. Ct. 1985) (holding that fundamental fairness and justice required vacatur of the judgment entered after a trial involving a pro se litigant who failed to understand the nature of court proceedings); Blair v. Maynard, 324 S.E.2d 391, 396 (W. Va. 1984) ("The fundamental tenet [is] that the rules of procedure should work to do substantial justice . . . . The court should strive . . . to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake." (footnote omitted)); Indiana Comm'n on Judicial Qualifications, Op. No. 1-97 (1997) ("Fairness, courtesy, and efficiency also are hallmarks of an honorable judicial system."); Standards Relating to Trial Courts § 2.23 (1992) ("When litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to ensure a fair trial.").

limited and rushed nature of the encounter between the lawyer and litigant similarly precludes a presumption that the litigant has received the benefit of full and complete legal advice. Not surprisingly, proponents of the programs, while praising their utility, uniformly acknowledge that the programs alone are often inadequate and require follow-up or supplemental measures.[74]

2. Limited Assistance Outside the Courthouse

Outside the courthouse, unrepresented litigants may receive advice and information from a variety of sources, including books, videos, websites, lay people, and lawyers. The lay advice may come from family and friends, presumably ranging from helpful and accurate to misleading, incorrect, and harmful.[75] Help from lay advocates is limited in most jurisdictions by the legal profession's prohibition on the unauthorized practice of law.[76] Though still unwilling to eliminate the restrictions on lay advocacy, the legal profession has begun to relax these restrictions.[77] This trend is apparent in "do-it-yourself" kits and form preparation services for pro se litigants.[78] While the profession increasingly has recognized that some amount of advice-giving and providing of information can, and perhaps should, accompany the services, it typically prohibits the giving of legal advice.[79]

74. *See, e.g.*, Responding to the Needs, *supra* note 25, at 34 ("[A]ny program to provide direction to pro se litigants should include resources for giving substantive advice."); Changing the Culture, *supra* note 58, at 42 ("[O]ur committee was inclined to agree that court appointments for indigent persons or restoration of funded legal services are necessary long-term solutions."); Millemann et al., *supra* note 57, at 1190 ("The qualified success of limited representation does not suggest that the nation needs fewer, rather than significantly more, legal services attorneys and pro bono lawyers."); *id.* at 1191 ("Some people would need no more than onetime-only legal information and advice such as that given by the project students. More would need follow-up legal assistance, however."); Thompson, *supra* note 69, at 9 ("Those who helped set up [the California pro bono] counseling programs have no illusions that they are solving the problems stemming from the flood of pro pers into family courts."); Robert B. Yegge, *Divorce Litigants Without Lawyers*, Judges' J., Spring 1994, at 8, 10 ("Yet, in certain circumstances, pro se litigants must be warned about the need for the advice—if not actual representation—of a lawyer.").

75. As one scholar recently noted in the context of client counseling: "Lawyers often represent clients who are uninformed or misinformed about the law. The clients may have only received information from the media, from well-meaning, but inaccurate friends or relatives, or from the street." Kimberlee K. Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 Clinical L. Rev. 359, 367 (1998).

76. *See* Model Rules of Professional Conduct Rule 5.5 (1998).

77. *See generally* Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 Geo. J. Legal Ethics 209, 216-21 (1990) (discussing the extent to which enforcement of the prohibition against the unauthorized practice of law has diminished). For an excellent overview of the history and current trends in lay advocacy, see Commission on Nonlawyer Practice, American Bar Ass'n, Nonlawyer Activity in Law-Related Situations 13-72 (1995) [hereinafter Nonlawyer Practice].

78. *See* Rhode, *supra* note 77, at 213-14.

79. *See supra* notes 24-27. One commentator describes the practical restriction: "Since paralegals may not provide fact-specific advice in light of unauthorized practice of law regulations, paralegals conducting classes may either refuse to respond [to fact-specific questions] or choose to explain the law in only general terms." Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 Yale L.J. 1641, 1654 (1987) (footnote omitted).

Where unrepresented litigants seek assistance from attorneys, private and public lawyers provide limited assistance, including helping litigants with pro se pleadings or motions for court. Legal services offices may offer various pro se assistance programs, including telephone advice and in-person clinics.[80]

The phenomenon of limited assistance by lawyers, although widespread, has caused problems for a profession that recognizes only two types of litigants: those who are represented and those who are not.[81] Courts have therefore condemned the practice of "ghost-writing," in which lawyers prepare papers for unrepresented litigants without disclosing to the court that the pleadings were written by lawyers.[82] As one court explained, "ghost-writing is far more serious than might appear at first blush[ ]" since it "necessarily causes the court to apply the wrong tests in its decisional process and can very well produce unjust results."[83]

80. *See, e.g.*, Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 Fla. L. Rev. 481, 481-83 (1996) (discussing problems with legal services designed to aid pro se litigants); Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 B.Y.U. J. Pub. L. 123, 137 n.66 (1993) (describing pro se programs run by the Legal Aid Bureau in Maryland).

81. *Compare* Model Rules of Professional Conduct Rule 4.2 (1984) (prohibiting lawyers from communicating with represented parties), *with id.* Rule 4.3 (providing guidelines for communications between lawyers and unrepresented parties).

82. *See, e.g.*, Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) (condemning attorneys who help pro se litigants with materials they know will be used in court); Somerset Pharm., Inc. v. Kimball, 168 F.R.D. 69, 72 (M.D. Fla. 1996) (finding that "ghost-writing" taints the legal process); Johnson v. Board of County Comm'rs, 868 F. Supp. 1226, 1232 (D. Colo. 1994) (holding that "ghost-writing" may subject lawyers to contempt charges), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996); Klein v. H.N. Whitney, Goadby & Co., 341 F. Supp. 699, 702-03 (S.D.N.Y. 1971) (condemning a pro se litigant's surreptitious enjoyment of the benefits of an attorney); Klein v. Spear, Leeds & Kellogg, 309 F. Supp. 341, 342-43 (S.D.N.Y. 1970) (stating that ghost-writing "smacks of . . . gross unfairness"); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1414 (1978) [hereinafter ABA Informal Op. 1414] (discussing the appropriate conduct for lawyers assisting pro se litigants).

83. *Johnson*, 868 F. Supp. at 1231. The *Johnson* court relied on a variety of cases and ethics opinions to support the proposition that ghost-writing without disclosure of the lawyer's identity amounted to "a deliberate evasion of the responsibilities imposed on counsel" by Fed. R. Civ. P. 11 and misrepresentation in violation of Model Code of Professional Responsibility DR 1-102(A)(4). *Id.* at 1231-32 (citing Ellis v. Maine, 448 F.2d 1325, 1328 (1st Cir. 1971)). Other courts have condemned such practices by attorneys. *See H.N. Whitney*, 341 F. Supp. at 702-03; *Spear, Leeds & Kellogg*, 309 F. Supp. at 342-43. Ethics opinions, therefore, typically require disclosure of the fact of the lawyer's participation, and often the lawyer's identity as well. *See, e.g.*, ABA Informal Op. 1414, *supra* note 82 ("Extensive *undisclosed* participation by a lawyer . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper . . . .") (emphasis added); Committee on Prof'l Ethics, Massachusetts Bar Ass'n, Op. 98-1 (1998), *reprinted in* 26 Mass. Law. Wkly. 2350, 2350 (1998) (noting "concerns about substantial and undisclosed involvement by at-

outcome of cases involving unrepresented litigants.[98] A mediator initially asked:

> Is a mediator who becomes aware that a plaintiff in a wrongful death action is making no claim for loss of consortium, which claim would appear to the mediator to be appropriate under the circumstances, bound to inform that party of this matter?[99]

The panel replied, "[i]t is the opinion of the panel that it is an ethical violation for a mediator to give legal advice to a party."[100] The mediator asked whether he could tell the plaintiff of the right to make a claim without advising as to whether the claim should be made, and also whether he could ask why the claim was not being made.[101] He inquired further as to how he could ascertain whether a party "does not understand or appreciate how an agreement may adversely affect legal rights or obligations" and how he might "assure that the plaintiff understands the legal consequences" of the agreement.[102]

The Advisory Panel emphatically responded that the prohibition against giving legal advice barred the mediator from informing the plaintiff of the right to make a certain claim, or even to ask why a claim was not being made, regardless of whether the mediator is an attorney.[103] The mediator's approved course of action is to "advise the participants to seek independent legal counsel."[104] With respect to whether the parties are competent to enter into negotiations, the panel recommended that the mediator ask questions such as "Have you consulted legal counsel? Do you wish to? Do you feel comfortable that you have considered all possible legal rights and responsibilities in this situation?"[105]

98. *See* Florida Mediator Qualifications Advisory Panel, MQAP 96-003 (1997).

99. *Id.* at 1 (quoting Florida Mediator Qualifications Advisory Panel, MQAP 95-005C).

100. *Id.* (quoting Florida Mediator Qualifications Advisory Panel, MQAP 95-005C).

101. *See id.* Rule 10.090(a) of the Florida Rules for Certified and Court-Appointed Mediators permits a mediator to "provide information" that the mediator is "qualified by training or experience to provide." *Id.*

102. *Id.* Rule 10.060(a) of the Florida Rules for Certified and Court-Appointed Mediators provides that the mediator "shall assist the parties in reaching an informed . . . settlement." *Id.* The mediator asked for answers first assuming that plaintiff was represented by counsel, and then assuming that the plaintiff was pro se. *See id.* Noting that Rule 10.020(b) of the Florida Rules for Certified and Court-Appointed Mediators declares that mediation is a "nonadversarial process," the mediator ended the inquiry as follows:

> How much deference must be given by mediators to the idea (clearly drawn from the adversarial trial model) that legal issues (such as defenses and claims) may only be raised by the parties, and never by the third party? If mediation is intended to be truly not adversarial, then the role of the third party should be markedly different than that of a judge in an adversarial trial system.

Id. at 2.

103. *See id.* at 2-3. The mediator in this case was a qualified mediator and a member of the Florida Bar. *See id.*

104. *Id.* at 3 (citing Rule 10.090(b) of the Florida Rules for Certified and Court-Appointed Mediators).

The mediator may encourage the unrepresented party to seek counsel or may terminate the mediation if he determines that one party is not competent to participate. Otherwise, he must attempt to mediate. Since efforts to inform an unrepresented litigant that the agreement entails the waiver of certain rights apparently amount to impermissible legal advice, the mediator must simply watch silently while the unrepresented litigant's rights are waived.[106]

From a mediator's point of view, the role described in the Florida decision flows naturally from the concept of mediation, a process voluntarily selected by the parties as a means of dispute resolution different from an adversarial trial.[107] From an unrepresented litigant's point of view, however, the effect of the rules can be devastating. The pressure exerted by courts to send cases to mediation and the lack of explanation of the mediation process raise serious questions about the "voluntary" nature of the decision to mediate.[108] Once in mediation, the pressures on mediators to obtain settlements are immense.[109] With a large number of unrepresented litigants, this pressure guarantees that mediators will rarely, if ever, exercise the option to terminate the mediation due to the incapacity of an unrepresented litigant to

105. *Id.*

106. The panel also answered that it is improper for the mediator to intervene with respect to represented parties. *See id.* ("If the party is represented, the mediator must assume that counsel is competent and has considered all relevant issues and causes of action. It is improper for a mediator to substitute his or her judgment for that of counsel.").

107. The Florida opinion should be viewed as representative of how similar bodies in different jurisdictions would answer the queries. The decision flows from basic rules such as the prohibition against giving legal advice and the need for impartiality. *See supra* notes 95-96 and accompanying text. Individual mediators, of course, may vary greatly in the manner in which they conduct mediation. The practices of some mediators may diverge from the general rules described in this section. That some mediators may choose to ignore or bend the rules, however, does not eliminate the need to assess the rules as written and change them as necessary to require the desired practices. For an additional case study illustrating similar harm to an unrepresented litigant, see Nolan-Haley, *supra* note 92, at 67-71.

108. Yet, voluntariness is a cornerstone of successful mediation. *See, e.g.*, John D. Feerick et al., American Arbitration Assoc. et al., Model Standards of Conduct for Mediators Standard 1 (n.d.) ("Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement."), *available in* <http://www.adr.org/standard.html>; Henikoff & Moffitt, *supra* note 95, at 103 ("Voluntariness in the mediation context means *both* that a party must be free to accept or reject possible settlement options *and* that a party must be free to accept or reject continued participation in the mediation process.").

109. *See, e.g.*, Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 Harv. Women's L.J. 272, 281 (1992) (discussing how mediators handling family law matters in the Massachusetts Probate and Family Courts—called "family service offices"—report pressure from judges to settle cases, and indicate that they believe their job effectiveness is evaluated based on how many cases they settle).

In response to the profession's difficulties in dealing with limited attorney assistance, a growing call for the "unbundling" of legal services has emerged. Forrest Mosten, a leading proponent of the movement, has contrasted the notion of "unbundling" with the full service package involved in traditional legal representation.[84] As Mosten explains, "[u]nbundling these various services means that the client can be in charge of selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly."[85] While the concept has attracted increased attention,[86] the profession clings to its dualistic recognition of litigants as either represented or unrepresented.

Despite the various forms of assistance potentially available outside the courthouse, the presumption must remain that the unrepresented litigant does not appear as an informed actor at the decision-making stages. As non-attorneys are prohibited in most jurisdictions from giving legal advice, unrepresented litigants assisted by non-attorneys must be viewed as litigants who have not had the benefit of legal advice. Limited encounters with lawyers may not have provided the litigants with enough assistance and information to enable them to make informed choices. Such encounters may have produced partially-prepared, and often confused, litigants. Moreover, it may not be clear,

torneys in cases where the client is acting pro se"); Committee on Prof'l Ethics, New York State Bar Ass'n, Op. 613 (1990), *reprinted in* N.Y. L.J., Oct. 15, 1990, at 4 (requiring disclosure both of the fact that the pleading was prepared by a lawyer and the lawyer's name).

84. *See* Mosten, *supra* note 48, at 422. The full package may, implicitly or explicitly, involve: "(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court." *Id.* at 423.

85. *Id.* at 423. Mosten continues:

> Further, the client may, in some cases specify the depth or extent of each service. For example, a client may want representation at trial, but may want to handle court filings, discovery, and negotiations without the lawyer. Conversely, a client may seek the advice and support of a family lawyer in negotiating a settlement, but may choose to self-represent or retain another attorney for actual court representation.

Id. With respect to "service depth" the client may desire research in the form of a five-minute check, or an exhaustive memorandum. *See id.*

86. *See, e.g.*, Minn. Conference Report, *supra* note 40, at 16 (recommending support for unbundled legal services); Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 Wake Forest L. Rev. 295, 335-39 (1997) (cautioning attorneys who may provide unbundled legal services to the elderly); Millemann, *supra* note 57, at 1178 (encouraging increased use of limited lawyer representation); Ilene Mitchell, *Unbundling Legal Services and Access to Justice*, Mass. B. Ass'n Access to Justice Sec. News (Massachussetts Bar Inst., Boston, Mass.), April 1998, at 1, 3 (noting the benefits of unbundling whiled encouraging careful consideration of possible ethical conflicts); Lonnie A. Powers, Pro Bono *and* Pro Se: *Letting Clients Order Off the Menu Without Giving Yourself Indigestion*, Boston B.J., May/June 1998, at 10, 10-11 (discussing ethical concerns in providing unbundled legal services); Long & Lee, *supra* note 62, at 40-41 (recommending support for unbundled legal services).

absent inquiry, which litigants have received assistance, how much they have received, and how much they have understood.

3. Interactions with Opposing Counsel

Where the unrepresented litigants' adversaries are represented by counsel, the opposing counsel becomes a source of information upon which unrepresented litigants often rely. In some courts, such as those handling housing and debt collection cases, the typical case involves an unrepresented party pitted against a party represented by counsel.[87] In other contexts, such as courts handling family law cases, some cases involve two represented parties, some involve two unrepresented parties, and some pit a lawyer against an unrepresented party.[88] Despite the good intentions of many lawyers forced to deal with an unrepresented party, attorney misconduct permeates the interaction between counsel and an unrepresented adversary.[89] Lawyers routinely engage in impermissible advice-giving, often including a misleading presentation of the law or facts, and over-reaching.[90] Lawyers present legal and factual issues in a strategically favorable light, selectively control the flow of information, and manipulate their unrepresented adversary by misusing argument, appeals, threats, and promises.[91] Whatever assistance an unrepresented litigant has received may be undercut by the litigant's encounter with the opposing lawyer.

4. The Limits of Limited Assistance

Despite the array of people from whom unrepresented litigants may receive assistance, unrepresented litigants heading toward judges and mediators must not be presumed to be informed actors. The litigants may have received extensive help, some help, or no help at all. Where the help is from forms, hand-outs, and kiosks, the litigants cannot be viewed by the court as having received trained and expert counseling regarding the existence and merits of their potential claims and defenses, or having had the benefit of advice as to various courses of action. Where the help is from lay advocates, such help presumptively did not include legal advice. Where the help is from lawyers, the unrepresented litigant may or may not have understood the advice or have been capable of acting on it. Regardless of the source and na-

87. *See generally* Engler, *supra* note 43, at 104-22 (discussing the prohibition of advice giving in housing and consumer cases).

88. *See id.* at 122-30.

89. *See generally id.* at 130-57 (discussing steps for addressing attorney misconduct with unrepresented litigants).

90. *See id.*

91. *See id.* at 103. The broader issue of the profession's need to regulate and eliminate lawyer misconduct in interactions with unrepresented parties is beyond the scope of this Article. *See id.* at 83-84 (discussing alternative responses to attorney misconduct with unrepresented litigants).

ture of the help, the advice would not reflect subsequent encounters with clerks, other court personnel, opposing parties, or opposing counsel, which may have confused the unrepresented litigants' understanding of their cases and undercut the effectiveness of the assistance.

C. *Court-Connected Mediation*

Courts, including those with significant numbers of unrepresented litigants, have increasingly turned to mediation as a means of docket control.[92] In some settings, mediation is mandatory.[93] More often, the mediation is labeled voluntary, but often appears to be mandatory to the uninformed litigant.[94]

Despite the varying contexts for court-connected mediation, standard restrictions govern the mediator's role. As with clerks, mediators are prohibited from giving legal advice.[95]

92. For articles generally referring to the increased use of mediation, in part as a means of docket control, see Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1075 (1984); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 Fla. St. U. L. Rev. 1, 3 (1991); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 Wash. U. L.Q. 47, 57-63 (1996); and Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. Rev. 2079, 2081-84 (1993). For references to courts with significant numbers of unrepresented litigants using court-connected mediation, see *infra* parts III.A, III.C (discussing courts' handling of family law and housing cases).

For the purposes of this Article, I define the concept of mediation broadly enough to include all forms of court-connected ADR. Absent explicit rules to the contrary, the constraints on the person conducting the court-connected ADR session will be similar to the rules governing mediators discussed in this section.

93. *See, e.g.*, Karla Fisher et al., *Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117, 2150 (1993) (discussing the use of mediation in divorce and child custody cases as well as criminal assault and battery cases); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317, 1357 (1995) (discussing mediation in family law cases in Maine). California's mandatory mediation includes the feature of excluding lawyers from the mediation. *See* Cal. Fam. Code § 3182(a) (West 1994).

94. *See, e.g.*, Access to Justice Project, American Civil Liberties Union, Justice Evicted: An Inquiry into Housing Court Problems 15 (1987) ("This inquiry [of the New York City Housing Courts] observed . . . the frequent lack of consistently clear explanations regarding the mediation process . . . ."); Fox, *supra* note 23, at 91-92 (describing how unrepresented tenants in the Boston Housing Court are simply referred by court officials "upstairs to mediation" with little or no explanation as to what mediation is, that mediation is voluntary, and that there might be advantages or disadvantages to mediation).

95. *See, e.g.*, Mass. Unif. R. on Dispute Resolution 9(c)(iv), *reprinted in* 26 Mass. Law. Wkly. 2129, 2131 (1998) ("A neutral . . . shall not provide legal advice . . . ."); Florida Mediator Qualifications Advisory Panel, MQAP 96-003 (1997) (answering questions posed by an attorney regarding a mediator's duty not to give legal advice); Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 Harv. Negotiation L. Rev. 87, 90 n.14 (1997) ("Neither attorney-mediators nor non-attorney-mediators may provide parties with legal advice."); Robert B. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. Tex. L. Rev. 669, 675 (1997) ("Many bar ethics committees have distinguished between giving 'legal advice,' which is often prohibited, and giving 'legal information,' which generally is permitted." (citations omitted)); James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. Tex. L. Rev. 769, 770 n.2 (1997) ("In addition to the Joint Standards [of Conduct for Mediators], the *ABA Standards of Practice for Lawyer Mediators in Family Disputes* (1984) and mediator codes in Colorado and Texas either limit or prohibit legal advice by a mediator."). As with court personnel generally, the prohibition against giving legal advice often flows from the fact that mediators often are not lawyers, and therefore are prohibited from "practicing law." *See, e.g.*, Henikoff & Moffitt, *supra*, at 90 n.14 ("Non-attorney mediators, like all non-attorneys, would likely be prohibited from dispensing legal advice because such actions would probably constitute the unauthorized practice of law."). In the mediation context as well, however, commentators have recognized the difficulty in identifying what constitutes information and what constitutes legal advice. *See* Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. Disp. Resol. 53, 83, 90 (1997); Moberly, *supra*, at 677; Stark, *supra*, at 784-86.

Mediators also must remain "impartial" and/or "neutral"[96] and are required to be "fair."[97] A 1997 Florida advisory opinion illustrates the devastating effect these seemingly innocuous rules can have on the

96. *See* Mass. Unif. R. on Dispute Resolution 9(b), *reprinted in* 26 Mass. Law. Wkly. 2129, 2131 (1998) ("A neutral shall provide dispute resolution services in an impartial manner."); John D. Feerick et al., American Arbitration Assoc. et al., Model Standards of Conduct for Mediators Standard II (n.d.) (developed jointly by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution) ("The concept of mediator impartiality is central to the mediation process."), *available in* <http://www.adr.org/standard.html>; Henikoff & Moffitt, *supra* note 95, at 101 ("Virtually every proposed code of mediator ethics mentions the importance of neutrality . . . ." (citations omitted)); Kurtzberg & Henikoff, *supra* note 95, at 81-84. This requirement provides a further source of the prohibition against giving legal advice. *See, e.g.*, Florida Mediator Qualifications Advisory Panel, MQAP 96-003 (1997) (explaining mediators' obligation to refer participants to independent legal counsel in certain situations); Moberly, *supra* note 95, at 677 (discussing the interrelationship between impartiality and providing legal advice).

97. The general proposition that mediators must conduct the mediation fairly is widely accepted. *See, e.g.*, John D. Feerick et al., American Arbitration Assoc. et al., Model Standards of Conduct for Mediators Standard VI (n.d.) ("A Mediator shall Conduct the Mediation Fairly"), *available in* <http://www.adr.org/standard.html>. The "fairness" debate focuses around the issue of whether mediators must simply provide "procedural" fairness, or must provide for "substantive" fairness and a fair outcome as well. For an overview of the "fairness" debate, see McEwen et al., *supra* note 93, at 1323-29. For an exploration of the complexities in defining fairness, see Carol Bohmer & Marilyn L. Ray, *Notions of Equity and Fairness in the Context of Divorce: The Role of Mediation*, 14 Mediation Q. 37 (1996). For an example of this debate in the context of the rules for court-connected mediation in Massachusetts, compare Lawrence D. Shubow, *Neutrals Should Have Ethical Responsibility*, 25 Mass. Law. Wkly. 1921, 1921 (1997) (contending that the Uniform Rules on Dispute Resolution mistakenly define the responsibility of neutrals in aiding disputants to reach agreements out of a "loyalty to a rigid and utopian shibboleth about mediation"), with Peter W. Agnes, Jr., *Mediator's Duty to Ensure Fairness Limited*, 25 Mass. Law. Wkly. 1921, 1921 (1997) (arguing that a neutral's observance of all the responsibilities set forth in the Uniform Rules is the best assurance that justice will be achieved in the adjudication).