Proposed Judicial Guidelines
Self-Representation Study Committee
Judicial Subcommittee[1]

# JUDICIAL GUIDELINES APPLICABLE TO CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS INCLUDING COMMENTARY

## Preface

These Guidelines have been developed specifically for judicial interactions with self-represented litigants in civil cases in which there is no right to counsel. Although these Guidelines may be a helpful resource in criminal cases and civil cases in which there is a right to counsel, they must be applied in light of the special considerations presented in those cases.

These Guidelines are advisory. The issues and challenges presented by self-represented litigants may vary in different courts throughout this state. Judges, therefore, are encouraged to use the Guidelines in a way which best suits the needs of their individual court and the litigants appearing before them. To the extent there is any conflict between these Guidelines and the Code of Judicial Conduct, the Code governs.

The Commentary has not been reviewed by the Justices of the Kansas Supreme Court.

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[1]Liberally taken from "JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS WITH COMMENTARY," authored by the Subcommittee on Judicial Guidelines of the Supreme Judicial Court Steering Committee on Self-Represented Litigants, appearing at http://www.mass.gov/courts/judguidelinescivhearingstoc.html.

## 1. General Practices

**1.1 Plain English. Judges should use plain English and minimize the use of complex legal terms when conducting court proceedings.**

Commentary

Most self-represented litigants are unfamiliar with complicated legal terms. The use of such terms can delay proceedings and necessitate lengthy explanations of concepts that are more readily understood if stated in plain English.

**1.2 Language barriers. Judges should be attentive to language barriers experienced by self-represented litigants. Judges should take the necessary steps to provide qualified interpreters to self-represented litigants who are not fully conversant in English or who are hearing-impaired.**

Commentary

Judges should not require any litigant who is not fully conversant in English or any hearing-impaired litigant to go forward at trial or any other significant event without a qualified interpreter. Judges should not assume that friends or family members accompanying the litigant are proficient enough in English or sign language to serve as translators or interpreters. When, during court proceedings, judges become aware of the need for an interpreter, judges should grant a continuance and order an interpreter for the next scheduled date.

K.S.A. 75-4351 provides, in part: "[A] qualified interpreter shall be appointed in the following cases for persons whose primary language is one other than English, or who is a deaf, hard of hearing or speech impaired person . . . in any civil proceeding, whether such person is the plaintiff, defendant or witness in such action ...."

**1.3 Legal representation. Judges should inform litigants that they have the right to retain counsel and the right to be represented by counsel throughout the course of the proceedings. Judges should also acknowledge that parties have a right to represent themselves. Judges should confirm that the self-represented litigant is not an attorney, understands the right to retain counsel, and will proceed without an attorney. Judges also may inquire into factors relevant to an understanding of self-representation.**

Commentary

Judges should make self-represented litigants aware of the consequences of proceeding without an attorney. Judges should explain that self-represented litigants have no right to a relaxation of the standards that apply to litigants who

are represented by counsel. See *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, 595-96, 730 P.2d 1109 (1986). Judges may point out the complexities of the case and the advisability of obtaining or at least consulting with counsel.

Judges should explain that counsel for the opposing party does not represent the self-represented litigant and that opposing counsel may not advise the self-represented litigant, other than to suggest that the self-represented litigant secure independent counsel. See KRPC 4.3 (2007) and the Comment thereto.

Judges should encourage litigants who proceed without counsel to consult resources developed specifically for self-represented litigants and inform self-represented litigants that they have the responsibility to become familiar with and to comply with the rules of procedure. Litigants also should be made aware that referral and pro bono services and alternative forms of dispute resolution are available. (See Guideline 2.3, infra.) If a self-represented litigant appears to be mentally disabled, judges should take additional steps to involve counsel, support services, and court-connected programs.

**1.4 Application of the law. Judges shall apply the law without regard to the litigant's status as a self-represented party and shall neither favor nor penalize the litigant because that litigant is self-represented.**

Commentary

"A pro se litigant in a civil case is required to follow the same rules of procedure and evidence which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment of all litigants. To have different rules for different classes of litigants is untenable. A party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or to see that his or her case is properly presented to the court. A pro se litigant in a civil case cannot be given either an advantage or a disadvantage solely because of proceeding pro se." *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, 595-96, 730 P.2d 1109 (1986).

Pro se pleadings are to be liberally construed so that relief may be granted if warranted by the facts alleged. See *Jackson v. State*, 1 Kan. App. 2d 744, Syl. 3, 573 P.2d 637 (1977), *rev. denied*, 225 Kan. 844 (1978). However, this simply means that the substance of the pleading controls over its label. The liberal construction rule does not mean that statutory requirements may be ignored. *In re Estate of Broderick*, 34 Kan. App. 2d 695, 701, 125 P.3d 564 (2005)

**1.5 Materials and services for self-represented litigants. Judges should encourage the provision of information and services to better enable self-represented litigants to use the courts. Judges also should encourage self-represented litigants to use these resources.**

Commentary

While, at first glance, this role seems more appropriately assigned to court staff, it is important that judges support this function. Many courts have informational handouts that can be made available in the courtroom, as well as in the Clerk's Office. Judges should encourage the use of such materials. These handouts may include the phone numbers of lawyer referral services and may contain language that explains the advisability of retaining counsel. They also may include frequently asked questions and court-specific information, such as information on alternative dispute resolution services, lawyer-for-a-day programs, housing specialists, and crisis centers.

It is important that judges support the provision of services, as well as information, to self-represented litigants. Judges should encourage and work with bar associations, law schools, legal services providers, and other organizations on programs that will provide in-person assistance to self-represented litigants in their courts. These may include, for example, lawyer-for-a-day programs and programs in which attorneys and those working under their supervision meet with litigants in the court and provide advice, assistance, and appropriate referrals. Judges also should endeavor to manage cases involving self-represented litigants in coordination with other services that may be used by or provided to litigants (*e.g.*, mental health and substance abuse services).

## 2. Guidelines for Pre-Hearing Interaction

**2.1 Trial process. Judges should make a reasonable effort to ensure that self-represented litigants understand the trial process. Judges should inform litigants that the trial will be conducted in accordance with applicable evidentiary and court rules.**

Commentary

When explaining the trial process, it is proper to do so in the same manner that a judge would explain it to a jury. Although judges may explain rulings, court policies and procedures, judges may not tell litigants what legal action to take. The following are examples of specific explanations judges may wish to give:

***Burden of production of evidence and proof of claim***

The judge may and should explain that the party presenting a claim or a defense to a claim must prove the claim or defense, and that proof must be based on evidence. Evidence must, with few exceptions, come from witnesses appearing in court, and documents, records or other relevant items which are brought to court by witnesses who have possession of those things.

The parties, not the court, are responsible for subpoenaing witnesses and records.

There are limits on the kinds of evidence that may be admitted. It is the duty of the court to enforce those limits by deciding whether evidence offered by a party should be heard or seen by the court (admitted into evidence).

The evidence admitted by the court must be relevant to prove the elements of the plaintiff's claim, or a defense to it, according to the required legal standard.

The elements of claims and defenses, as well as the burden of proof may be explained, with appropriate syntactical changes, in the same manner that they would be explained to a jury. See, e.g., PIK Civ. 4th 124.01-A (essential elements of a breach of contract claim); PIK Civ. 4th 102.10 (meaning of burden of proof).

***Ex parte communication***

Where necessary or appropriate, the judge may explain the following. The parties may not communicate about the case with the judge outside formal court proceedings. The judge, as a general rule, is prohibited from communicating with a party unless all parties are aware of the communication and have an opportunity to respond or be present. The parties must file all communications directed to the judge (petitions, motions, affidavits, letters) with the Clerk's Office along with a notice that copies of those materials have also been given to the opposing party.

***Judge as fact finder***

If the case is to be heard without a jury, an explanation similar to the following might be given. The judge is the fact finder and the facts are determined by the judge from the evidence presented. For example, if plaintiff presents a witness who testifies the light was red and defendant presents a witness who testifies the light was green, it is the judge's responsibility to determine the color of the light and that determination becomes a fact of the case.

***Courtroom conduct***

Except when examining or cross-examining witnesses, litigants should address their remarks and questions to the judge. They should not speak to the opposing party or the attorney for the opposing party.

**2.2 Settlement. In cases in which settlement may be appropriate, judges may discuss the possibility of settlement. This may occur at any stage in the litigation, but particularly at a case management, pretrial, or status conference.**

Commentary

Many cases can be settled equitably with the involvement of the judge; however, to avoid later misunderstandings, JUDGES ARE STRONGLY URGED TO RECORD ALL SETTLEMENT CONFERENCES.

It may be particularly helpful for the judge to provide the opportunity for the parties to discuss settlement in the presence of the judge in cases where one party is self-represented and the other party has an attorney. In such cases, the self-represented litigant may be afraid to deal with the attorney for the opposing party outside of court, and the attorney for the opposing party may be reluctant to negotiate with the self-represented litigant for fear of being accused of overreaching or misleading the self-represented litigant.

At settlement conferences, judges should explain that the conference is an opportunity for the parties to resolve the issues themselves without the formality and expense of a trial; that they have the ability to reach their own resolution of the issues and to "write the judgment" through an agreement which is tailored to their needs. In addition to explaining that the judge is there to listen to both parties and ensure that the proceedings are conducted fairly, judges also should tell the parties that, if they are unable to settle, they have a right to a trial at which a judge or jury will make the decision based on the evidence admitted and the applicable law, and that this result may differ from what each of the parties is seeking. Judges may point out the complexities of the case and the advisability of obtaining or at least consulting with counsel.

In cases involving self-represented litigants, just as in cases where all parties are represented, judges may encourage settlement, but they may not require parties to reach a settlement. See Kan. Sup. Ct. R. 601A, Canon 3 (B) (7) (d) & Commentary ("[a] judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle civil matters pending before the judge," implicitly acknowledging that judges can play an important role in the settlement process). See also, Commentary to Canon 3 (B) (8) ("[a] judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.")

If the parties do not settle, a judge's participation in settlement discussions may disqualify the judge from sitting as fact finder in the trial of that matter. See generally, Goldschmidt & Milord, Judicial Settlement Ethics: Judges Guide 21-29 (American Judicature Society 1996); Agnes, *Some Observations and Suggestions Regarding the Settlement Activities of Trial Judges*, 31 Suffolk U. L. Rev. 263 (1997).

**2.3 Alternative Dispute Resolution (ADR). When a case is appropriate for ADR, judges should discuss the availability and benefits of such services. This may**

**occur at any stage in litigation, but particularly at a case management, pretrial, or status conference.**

Commentary

In cases involving self-represented litigants, just as in cases where all parties are represented, the parties may be able to settle their disputes early and effectively using mediation, case evaluation, arbitration, or another form of alternative dispute resolution. ADR often helps parties maintain their ongoing family or business relationships after the stress of litigation, and can be an effective case management tool, eliminating much time, effort and expense brought about by litigation.

Generally, ADR in Kansas is governed by K.S.A. 5-501 *et seq.* and Kan. Sup. Ct. Rule 901 *et seq.*

Judges should inform the parties that: (1) the decision to participate in a dispute resolution process is voluntary; (2) they are not required to make offers and concessions or to settle; (3) if the parties do not settle the matter through ADR, they still may have the matter tried in court; (4) courts cannot impose sanctions if the parties do not settle, but courts may impose sanctions for failure, without good cause, to attend a scheduled dispute resolution session; (5) the court will give particular attention to the issues presented by unrepresented parties, such as the need for the neutral to memorialize the agreement and the danger of coerced settlement in cases involving an imbalance of power between the parties; (6) in cases in which one or more of the parties is not represented by counsel, a neutral has the responsibility, while maintaining impartiality, to ask the parties to consider whether they have the information needed to reach a fair and fully informed settlement of the case; (7) the court may establish a deadline for the completion of a court-connected dispute resolution process, which may be extended by the court upon a showing that continuation is likely to assist in reaching resolution; (8) communication with the court during the dispute resolution process is conducted only by the parties or with their consent; and (9) unless the parties agree otherwise, the ADR program or neutral will only provide the court with: a request by the parties for additional time to complete dispute resolution, the neutral's assessment that the case is inappropriate for dispute resolution, or the fact that the dispute resolution process has concluded without the parties having reached agreement.

## 3. Guidelines for Conducting Hearings

**3.1 Courtroom decorum. Judges should maintain courtroom decorum cognizant of the effect it will have on everyone in the courtroom, including self-represented litigants. Judges should ensure that proceedings are conducted in a manner that is respectful to all participants, including self-represented litigants.**

Commentary

As role models in the courtroom, judges should provide a positive environment for those who represent themselves. Self-represented litigants should be addressed with titles connoting equal respect to that afforded opposing counsel.

**3.2 Evidence. Judges shall adhere to the applicable rules of evidence, but may use their discretion, when permissible, to provide self-represented litigants the opportunity to meaningfully present their cases. Judges may ask questions to elicit general information and to obtain clarification. Judges should explain why the questions are being asked and that the questions should not be taken as any indication of the judge's opinion of the case.**

Commentary

Judges may require counsel to explain objections in detail, and judges should explain their evidentiary rulings. In some proceedings (*e.g.*, small claims), the applicable rules may permit even greater informality and participation by judges in eliciting facts. See K.S.A. 61-2712 ("[i]t is the purpose of this act to provide a forum for the speedy trial of small claims, and to this end, the court may make such orders or rulings, consistent with the provisions of this act, as are necessary to promote justice and fairly protect the parties."

Judges may have more flexibility in proceeding informally when all the parties to a case are self-represented. In such cases, judges may have the parties stipulate that each can tell the relevant facts uninterrupted for a set time, and the court will ask questions. Cases which are non-adversarial, e.g., name changes and certain uncontested divorces, also allow for increased flexibility.

**3.3 Right of self-representation. In jury trials, judges should ask self-represented litigants whether they want a right to self-representation instruction.**

Commentary

Sample instruction: "The [plaintiff/defendant] has decided to represent [himself/herself] in this trial, and not to use a lawyer. [He/she] has a perfect right

to do that. [His/her] decision has no bearing on the merits of this case, and it should have no effect on your consideration of the case."

3.4 **Approval of settlement agreements. Judges should review the terms of settlement agreements, even those resulting from ADR, with the parties. Judges should determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent possible, whether the waiver is knowing and voluntary.**

Commentary

Self-represented parties should be informed that once the agreement is approved it becomes an order of the court; therefore, self-represented parties should raise any questions they have about the agreement before it is approved.

If a self-represented litigant has limited ability to understand or speak English, the agreement should be translated verbatim into that individual's primary language by a qualified court interpreter before it is approved. There should be an endorsement on the agreement that it was translated for the non-English speaking party by a qualified court interpreter. The judge may wish to make an affirmative finding that the agreement was reviewed by the court and translated into the self-represented litigant's primary language by a qualified court interpreter. If a qualified court interpreter cannot be obtained, the matter should be continued until one can be present.

Judges are statutorily required or permitted to independently determine that certain types of settlement agreements are fair and reasonable, *e.g.*, court may review and approve settlement agreement involving a minor; K.S.A. 60-1610(b)(3) (separation agreement must be found by the court to be valid, just and equitable). When such a duty is not imposed by law, there is no consensus on the extent to which judges are obligated to ensure that settlement agreements are substantively fair and reasonable. See Goldschmidt & Milord, Judicial Settlement Ethics: Judges' Guide 53 (American Judicature Society 1996).

## 4. Guidelines for Post-Hearing Interaction

4.1 **Issuing the decision. Judges should exercise discretion in deciding whether to issue a decision at the close of the hearing while both parties are present, or to inform the parties that the matter will be taken under advisement and that a written decision will be mailed to them. In cases where there is no immediate need to enter an order, the judge may inform the parties that the judge wishes to consider their evidence and arguments before making a decision. If possible, the judge should give a time frame within which the case will be decided.**

Commentary

Depending upon the circumstances, there may be practical reasons not to issue an immediate order, apart from the judge's need to review the file and the law. In some sessions, the judge may be dealing with a high volume of self-represented litigants unfamiliar with the court system. A self-represented litigant may be angry, volatile, or upset with the court and opposing party or counsel over the "need to be there." A decision issued from the bench, particularly if it is not favorable to the self-represented litigant, may result in an outburst directed to the other side, disruption of the court session, or security concerns. Sometimes the self-represented party will seek to reargue the case to be sure the judge "understands." These problems can cause serious delays in busy sessions. A written decision, issued by mail, allows the parties to receive it privately, away from the stress of the proceedings, and to reflect on how they wish to proceed.

**4.2 Judges may issue written decisions, judgments and rulings. Judges may draft and file written judgment forms, orders and other memoranda setting forth their rulings and judgments.**

Commentary

K.S.A. 60-258 and Kan. Sup. Ct. Rule 170 clearly provide that a court may draft and file judgment forms, orders and other documents setting forth its judgments, orders, and decisions. Only when the court so directs, are the parties required to draft and submit journal entries, orders, and the like. See also, K.S.A. 60-254.

**4.3 Appeals. If asked about the appellate process, judges may refer the litigant to the appropriate authority.**

Commentary

Each court should have resource material available about the appellate process.

**Send Comments to Art Thompson**