Practical Advice from the Trenches:

Best Techniques for Handling Self-Represented Litigants

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As the society around us evolves, so too has the notion of justice and the role of judges in the court system. The need for such an evolution has never been greater than now. As the number of court filings increases and the ranks of the self-represented continue to rise, there is an increased desire for courts to take an approach that more adequately addresses the circumstances of self-represented litigants. Yet, the tension between accommodating individuals who often lack basic knowledge about the court process and the traditional role of the judge as the objective, neutral arbiter remains. The struggle is born out daily in courtrooms across the country, in all types of cases, leaving judges with the challenge of how best to proceed. Fortunately, through a concept called neutral engagement, judges now have a way to accommodate the needs of self-represented litigants while maintaining neutrality throughout the process.

NEUTRAL ENGAGEMENT

What is neutral engagement? Neutral engagement is an approach to cases involving self-represented litigants that permits the judge to make decisions based upon the merits of the case.[1] By conducting the proceedings in an even-handed manner and providing explanations for what the judge is doing, the judge can "ensure that the evidence gets before them and that the process is neutral."[2] Used appropriately, neutral engagement promotes the elements of procedural fairness by affording the parties voice, neutrality, respect, and trust.[3] While at first blush you may think that neutral engagement involves nothing more than judicial passivity, upon further analysis, the two could not be more different.[4]

Judicial passivity, unlike neutral engagement, is "characterized by a responsive and reactive attitude, in which the judge does no more or less than acts as an umpire, responding only when asked to do so by counsel."[5] In this way, the judge merely rules on objections, leaving it to the parties to get the facts and evidence before the trier of fact.[6] By contrast, neutral engagement requires the judge to actively interact with the parties, not just by eliciting the necessary facts and evidence or ensuring that each side gets to tell their story but by creating an atmosphere in the courtroom that allows the parties to be heard.[7]

Utilizing this approach, the great concern is that the judge may appear to be an advocate or may appear to be non-neutral or biased. However, judicial passivity itself can create a lopsided process by which a non-neutral outcome might come from:

- the judge not hearing facts or evidence because of the litigant's lack of understanding of its relevance to the ultimate issue;
- the judge not hearing facts or evidence because of the litigant's lack of knowledge of how to get it in front of the judge, in terms of establishing admissibility, foundation facts, etc.;
- the judge not understanding the relevance of facts before him or her because of the litigant's failure to explain and the judge's failure to elicit their relevance;
- the litigant being too intimidated from getting the story in front of the judge;
- the litigant not raising issues because he or she did not know they could impact the outcome or did not understand the legal analysis relating the two;
- the litigant getting so tangled in the story that he or she is unable to communicate a coherent version of events to the judge; or
- the litigant being intimidated or confused by objections raised by the opposing party, or, more likely, opposing counsel.[8]

Non-neutrality from judicial passivity may be observed from behaviors demonstrating a non-neutral attitude or approach.[9] Such behavior might include:

- asking questions from which a judicial state of mind might accurately or non-accurately be inferred;
- comments on the law or on required evidence, from

Footnotes

1. Center on Court Access to Justice for All, Access to Justice for the Self-Represented Litigant, Module A: Judges, Ethics and the Self-Represented Litigant—The Law Today (August 2013).
2. *Id.*
3. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 Ct. Rev. 4, 6 (2007) ("Voice: the ability to participate in the case by expressing their viewpoint; Neutrality: consistently applied legal principles, unbiased decision makers, and a 'transparency' about how decisions are made; Respectful treatment: individuals are treated with dignity and their rights are obviously protected; Trustworthy authorities: authorities are benevolent, caring, and sincerely trying to help the litigants—this trust is garnered by listening to individuals and by explaining or justifying decisions that address the litigants' needs."); Erin Farley, Elise Jensen & Michael Rempel, The Center for Court Innovation, Improving Courtroom Communication, A Procedural Justice Experiment in Milwaukee (January 2014).
4. Farley et al., *supra* note 3.
5. Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 Geo. J. Legal Ethics 423 (2004).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

which similar accurate or non-accurate inferences might be drawn;
- interruptions or redirection of witnesses, counsel, or parties, from which similar accurate or non-accurate inferences might be drawn; or
- tone of voice or other body language.[10]

All of these and perhaps more are potential non-neutral manifestations that may flow from judicial passivity.[11]

While neutral engagement may appear non-neutral, when properly utilized, it can provide a level field that ensures the parties are heard by:

- providing the parties with a general road map that informs all parties of the procedures the judge will use and how the hearing will be conducted;
- providing an explanation of evidentiary rulings and other legal issues, such as burden of proof or the elements of the cause of action or the ultimate decision reached;
- eliciting the necessary information from each party by allowing each party to give an initial opening statement or overview of their case;
- probing for more details through the use of non-confrontational questions such as "tell me more about . . ." or "give me some specific details about . . . "; and
- treating each party the same.[12]

Neutral engagement, therefore, provides the fact-finder with as much evidence as reasonably possible to create a complete and reliable record to support the decision.[13] To the extent that irrelevant evidence is admitted, the fact-finder need not rely upon it or even cite it in the decision.[14] Decisions are based upon the merits of the case rather than a procedural or technical deficiency.

ETHICAL CONSIDERATIONS

But what about the ethical considerations? How far is too far? How little is not enough?

The tension between accommodating self-represented litigants and maintaining neutrality necessarily raises the ethical dilemma: how does a judge do both without breaching the boundaries of the Code of Judicial Conduct? Fortunately, the United States Supreme Court, along with the 2007 ABA Model Code, has provided much-needed guidance and clarification in resolving this dilemma.

[W]hat about the ethical considerations? How far is too far? How little is not enough?

Although yet to be adopted in all states, the concepts embodied in the 2007 ABA Model Code have been included in most states' judicial code of conduct.[15] The ABA Model Code assigns one of the most important tenets of procedural fairness and due process, namely, the right to be heard, to judges for safekeeping.[16] Pursuant to Rule 2.6, "a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to the law."[17] The rule expressly makes the right equally applicable whether it is the "person . . . or that person's lawyer,"[18] and thus it is intended for self-represented litigants as well as represented litigants. It is not characterized as a lesser-included subcategory or as a reduced right when applied to self-represented litigants. Both self-represented litigants and represented litigants stand on equal footing, one with the other, when protecting the litigants' due-process right to be heard.[19] This does not mean that both must be treated the same.

Judges are required "to uphold the law and decide all cases with impartiality and fairness."[20] This means that "it is not a violation of this Rule, however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[21] Pursuant to the ABA Model Code, judges are authorized to "make reasonable accommodations" for self-represented litigants.

The case of *Turner v. Rogers*[22] further expands upon this concept. In *Turner*, a self-represented litigant sought to have his civil-contempt order for non-payment of child support reversed on the ground that he was not represented by counsel at the hearing. In fact, the petitioner who sought the civil contempt was not represented either. The contempt order resulted in the litigant's incarceration. While the Supreme Court rejected a civil right to counsel as argued by *Turner*, the Court did recognize that there were

> a set of "substitute procedural safeguards" . . . which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. . . . Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing

10. *Id.*
11. *Id.*
12. National Judicial College, Best Practices in Handling Cases with Self-Represented Litigants, Eliciting the Right Information (June 2012).
13. *Id.*
14. *Id.*
15. American Bar Association, State Adoption of Revised Model Code of Judicial Conduct, http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html.
16. American Bar Association Model Code of Judicial Conduct, Rule 2.6 (2007).
17. ABA Model Code of Judicial Conduct, Rule 2.6 (2007). The comment to rule 2.6 further states, "The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed."
18. *Id.*
19. *Id.*
20. ABA Model Code of Judicial Conduct, Rule 2.2 (2007).
21. *Id.* at Rule 2.2 cmt. 4.
22. 131 S. Ct. 2507 (2011).

Judges can inform self-represented parties about the issues that are critical to the outcome of the proceedings.

for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. . . . The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. . . . Under these circumstances Turner's incarceration violated the Due Process Clause.[23]

Furthermore, the Court made it clear that it is not just appropriate for judges to engage a self-represented litigant by asking questions to elicit relevant information; more may be required, especially in situations where the litigants' liberty is at stake.[24] After *Turner*, judges are expected to make reasonable accommodations for self-represented litigants.

So, which accommodations are reasonable, and which are not? Here again, the Supreme Court offers guidance. After *Turner*, it is clear that the use of forms to help self-represented litigants provide relevant information to the court is a permissible reasonable accommodation.[25] Judges are permitted to ask litigants questions and to provide the litigants with an opportunity to respond to statements contained on forms they have submitted.[26] Judges can inform self-represented parties about the issues that are critical to the outcome of the proceedings.[27] Other reasonable accommodations may include any of the following:

- using plain language rather than legalese or terms of art;
- explaining the reason for your rulings;
- allowing the parties to make amendments freely;
- allowing the parties to continue their case to get legal assistance or to gather evidence; and
- informing the parties about legal resources such as self-help centers, pro bono services, court-developed pamphlets, and court websites.[28]

Still, there are some accommodations that judges should avoid as unreasonable. These include, among others:

- telling the parties what claims or defense to raise or pursue;
- telling the parties what to write in pleadings; and
- ignoring the law.[29]

BEFORE YOU TAKE THE BENCH

Handling cases with self-represented litigants begins before you take the bench. As the judge, the litigants will look to you for direction and guidance regarding the procedure to follow, the information to submit, and the manner of interacting with other parties and witnesses, so it helps to be prepared.

In Maryland, a self-represented litigant will likely be female, with a high school education and an income of less than $30,000.[30] Self-represented litigants may appear in domestic cases or landlord-tenant and consumer-debt cases. For these litigants, especially those with limited resources, much is at stake; they may be at risk for homelessness, bankruptcy, or other life-altering outcomes. The numbers of self-represented litigants who are middle class or small businesses are increasing as well.[31] They may also be exposed to significant economic risks. The self-represented litigants who appear in court have expectations about the judicial process, how it operates, and what they need to do to present their cases effectively, which have been informed by prior experience in court, advice from friends, websites, and legal-service providers. Television programs about the law also play an important role in public expectations.[32]

There are many reasons why someone may be or decide to be self-represented in a court proceeding. These reasons include a lack of funds to pay a lawyer, a distrust of lawyers, a belief that he or she does not need a lawyer to handle the case because it appears uncomplicated, or a cost-benefit decision that the amount of money at stake in the case is less than the cost of retaining counsel. While some self-represented litigants are able to effectively present their civil cases, others realize, at some point just before or during trial, that they need a lawyer to represent their interests. This article will also discuss those situations and how the court can respond.

1. READ THE COURT FILE

It seems an obvious beginning, but its importance cannot be overstated. Reading the court file before you begin any case involving self-represented litigants can be tremendously helpful. At times, it can be a challenge to figure out what is being disputed when the parties are representing themselves. Unlike

23. *Id.* at 2511, 2514, 2516, 2519-20.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Proposed Best Practices for Cases Involving Self-Represented Litigants*, *in* CYNTHIA GRAY, AMERICAN JUDICATURE SOCIETY AND STATE JUSTICE INSTITUTE, REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND THE SELF-REPRESENTED LITIGANT (2005).
29. NATIONAL JUDICIAL COLLEGE, *supra* note 12.
30. The District Court Self Help Clinic (DCSHC) Walk-In Survey—FY 2014. The District Court of Maryland has a self-help resource center that provides limited legal assistance by telephone, online chat, or walk in to individuals who are not represented by counsel. Of the 3,449 who responded to the survey, 56.1% were female, 37.5% were African-American, 58% had an income of less than $30,000 per year, and 43.7% had a high school education or less.
31. John T. Broderick, Jr., Chief Justice, Supreme Court of New Hampshire, Remarks to the National Association for Court Management, The Changing Face of Justice in a New Century: The Challenges It Poses to State Courts and Court Management (Mar. 10, 2009).
32. Burke & Leben, *supra* note 3, at 11.

pleadings filed by lawyers, pleadings filed by self-represented litigants may contain rambling narratives about any number of matters covering a range of potential issues. They may include attachments from internet websites or may contain e-mail communications, text messages, photographs, or other documents. In short, the pleadings may consist of a hodgepodge of documents and information that expresses the litigant's dissatisfaction and upset but is only loosely woven together. Reading the court file in advance may help you to garner a better understanding of the issues to be presented in the proceeding. As the fact-finder, you will have a better starting point, after reading the court file, from which to elicit the facts relevant to the dispute. It is more likely that the resulting decision will be based upon the merits of the case rather than upon a procedural or technical deficiency.

When reading the court file, the pleadings should be construed liberally.[33] Sometimes self-represented litigants use forms and terms that they have obtained from internet sources other than your court's website. Occasionally, forms from office-supply stores are used by self-represented litigants. Although handy, these forms may have nothing to do with the dispute at hand. Even when using forms obtained from your court's website or clerk's office, litigants may misunderstand which forms are appropriate for their specific issues. Greater attention and focus should be placed upon the substance of these submissions rather than the form or terminology used within. Sometimes the substance of a filing can only be gleaned from reading the information contained in other documents within the court file.

Through a liberal reading of the pleadings, you may discover that a litigant has sued an individual employee of a company, when it is apparent that the litigant intended to bind the company. Or the self-represented litigant intended to sue the company but only included the company's trade name rather than its legal corporate name. As a consequence of reading the court file in advance, the self-represented litigant can be permitted to amend the incorrect party name to reflect the proper party and to pursue the dispute against the correct legal entity. The ultimate decision rendered is based upon the merits of the case with the proper parties included rather than upon a technical deficiency. All in all, through a liberal interpretation of the filings, you may be able to clarify the real issue in dispute or, at a minimum, identify the range of potential issues, even though they may not be expressly stated.

2. HAVE A PLAN AND TELL THE PARTIES

With popular "reality" TV shows such as *Judge Judy* or award-winning dramas such as *Boston Legal*, the public has a skewed and inaccurate impression of the legal system and the court process. Some people may have learned about the court process through the foggy lens of friends, neighbors, relatives, or coworkers who had confusing experiences with cases that may be nothing at all like theirs. As a result, potential litigants come to court with the notion that their experiences will be like the images portrayed in the media or like someone else's experience. Unfortunately, this may be the only impression that a potential litigant has of the legal system or the court process.

Although self-represented litigants may derive their expectations about the judicial system from a variety of sources of differing reliability, what they care about is respect and procedural fairness. As Burke and Leben have stated, "Most people care more about procedural fairness—the kind of treatment they receive in court—than they do about 'distributive justice,' *i.e.*, winning or losing the particular case."[34]

Drafting a script or opening statement to introduce the docket can lay the foundation for what the parties should expect.

To overcome such misimpressions, it can be helpful to develop a plan for how you will approach each docket, generally, and each stage of the case, specifically, and to inform the litigants as the case progresses. No need to create a complex strategic blueprint. In fact, a simple approach can be far more effective.

If there are preliminary matters, explain that they will be heard first because they can be handled quickly. You can encourage the parties waiting for trial to organize the documents, records, or photographs they want to introduce into evidence. This helps those sitting in the courtroom understand the order in which cases are called and demonstrates that the judge respects the time of everyone. It also sends the message that the judge expects the litigants to have their evidence ready when their cases are called. Additionally, you can mention that if the parties do not want to participate in mediation but want to try to settle the case themselves, they can go outside and talk. If they do not agree, they can have the trial, and nothing they discuss outside can be used against them.

Consider the types of cases that you will be handling on the docket assigned to you for that day. It is likely that a general announcement can be made at the start of the docket to provide an overview about the general procedure you will use to handle the docket of cases. Drafting a script or opening statement to introduce the docket can lay the foundation for what the parties should expect. Thereafter, when a specific case is called for trial, you may wish to provide more detailed procedures for the parties in that specific case. At each stage of the case as it progresses, you may wish to provide further information to the parties about the specific procedures being used. This not only helps everyone to become familiar with the process, thereby dispelling any misimpressions about court procedure, but also helps you to engage the parties in a fashion that maintains neutrality and transparency. In other words, you can explain the neutral reasons behind each procedure, making sure that all parties understand what is happening at each stage of the case and why. Information given in small pieces is more likely to be understood and followed by those who are unfamiliar with the legal system and court procedure. In this way, the case can proceed in an orderly fashion.

If you include a statement about the availability of legal ser-

33. *Proposed Best Practices*, *supra* note 28.

34. Burke & Leben, *supra* note 3, at 5.

After checking with the parties to see if they are ready, begin by summarizing the cause of action as well as the relief sought.

vices for those who are unrepresented in the general opening, then some self-represented litigants may decide that they want to request a postponement to obtain counsel. Have available a list of organizations that can provide or make referrals for legal services. Then be prepared to call the case as a preliminary matter to decide if you will postpone it for one or more parties to obtain counsel. This can be challenging: on one hand, the person seeking the postponement may have important interests at stake (*i.e.*, housing or possibility of a money judgment) while the other party has comparable competing interests and needs to have them addressed expeditiously. The rationale for your decision should include a brief summary of the reasons given by the parties and what considerations were important to you in granting or denying the postponement.

3. ASK IF THEY ARE READY FOR TRIAL

Next comes the specific information and instructions relating to the trials. The first question to ask the parties when they come forward is, "Are you ready for trial?" Even if the answer is affirmative, that does not always mean the parties are prepared, so consider what you will do if, during the trial, the self-represented litigant discovers that there is a witness or evidence that he or she needs and has not brought to court. After checking with the parties to see if they are ready, begin by summarizing the cause of action as well as the relief sought. If the defendant has entered a defense, summarize that also. Explain the elements of the cause of action. This will help the self-represented litigant, plaintiff, or defendant understand what the judge is expecting to hear regarding proof and sets up a framework to use in announcing a decision.

Before starting a trial, ask self-represented litigants if there are witnesses or documents they have brought. Self-represented litigants may have witnesses and not realize that they need to testify under oath, or, indeed, fail to call a witness who is present in the courtroom. They may not have brought or summoned the witnesses they need. Sometimes self-represented litigants will bring letters or affidavits from witnesses only to learn that the other side opposes their admission. There may be leases, titles, or contracts that self-represented litigants need to present as evidence. Ask if they have them ready. While some of these questions may sound basic or patronizing toward a self-represented litigant, consider the varying degrees of preparation for trial that you have seen during your time on the bench. Even well-prepared self-represented litigants may forget something because they are nervous when they appear before the court. As a result of these questions, self-represented litigants may realize that they have not brought the necessary proof and may request a postponement. If the defendant has not appeared, consider being liberal in granting the plaintiffs' postponement requests. Whether or not you grant it, articulate the reasons (*e.g.*, the case was postponed before; the other party or witnesses came from out of town or took leave from work to be here today; or the defendant has failed to appear today, so this matter will be postponed for the plaintiff to produce additional evidence to support the claim).

Even if a self-represented litigant has not produced evidence or brought witnesses to trial, there may be a way to avoid granting or denying a postponement. The judge can decide whether to ask the parties if they can agree on certain issues (*e.g.*, date, time, place, amount paid, and address) while making it clear to them that they do not have to agree to do this.

The parties have their witnesses and evidence. They are ready for the next step, to be placed under oath, testify, call witnesses, present evidence, and cross-examine witnesses. While we cannot tell them how to do this, let them know what they can do and when they can do it. For example, "You will each have an opportunity to testify, and when you do, show me and the other side any documents, photos, or other evidence that support your claim. The other side may object or have questions about what you are showing me. If they object, I will decide if I should consider the evidence in deciding the case."

Tell them you may ask questions of either side if you need to clarify something, and remind them that you know nothing about the case; therefore, they must tell you what they think you need to know.

4. INCLUDE THE COURT STAFF

Court staff generally, and courtroom staff in particular, can serve an important role in helping to set the stage for the day's docket. Self-represented litigants' first interactions are often with a bailiff or courtroom clerk before the judge takes the bench. Whether it is reminding litigants to be sure their cell phones and other electronic devices are turned off or pointing out which trial table to stand behind or answering questions, such as the proper way to address the judge, courtroom staff can help inform the litigants about some of the logistical court procedures that may be intimidating to those who are unfamiliar.

Handing out exhibit labels to the litigants and not just to the lawyers before court begins can help self-represented litigants organize their materials and mark them ahead of time. Making extra copies of documents for the parties to use during the proceedings can make it easier for everyone to follow along. It is surprising how many litigants do not bring paper or pen to court. Providing a few sheets of paper, along with a pen, at the trial table gives the litigant permission to jot down information they want to remember to tell the judge. These seemingly small actions undertaken by courtroom staff before you take the bench begin to establish the court procedures you will use once on the bench.

Clerks are an invaluable resource when it comes to handling self-represented litigants. They are able to distribute court-developed pamphlets or other information, such as checklists and forms, to the litigants before the proceedings. Making sure that clerks know and understand the difference between legal information, which they can provide, and legal advice, which they cannot provide, is critical. In this regard, access-to-justice programs can supplement this vital function.

5. BE PATIENT

Remember your first day in court as a new lawyer? Despite your training in the law and experience in the courtroom, the first time on your own was, no doubt, a stressful time. Filled with nervousness about your ability to be effective and apprehension about the process, the unexpected, and the outcome, you likely remember being grateful to those who kindly recognized that everyone has a first day and patiently allowed you to present the case. Imagine the stressfulness, nervousness, and apprehension a litigant who has no legal training and who is unfamiliar with the court system might experience.

Remembering their own first days, many judges will afford new lawyers some leeway, patiently allowing the proceedings to unfold in a reasonable fashion. Yet the need to afford patience and leeway to self-represented litigants may go unrecognized. Going to court can be a stressful experience for anyone. Allow the parties a reasonable time to present their information. In no way does this mean that a litigant is given days and days to ramble on. However, it is likely that the self-represented litigant will need more time than a litigant represented by an attorney. Accepting this fact allows judges to be prepared for the additional time commitment. Cases involving self-represented litigants may need to be scheduled on dockets that can accommodate the additional time requirements. Rushing the self-represented litigant can sometimes have the opposite effect. Just be patient and allow the litigant a reasonable time to present his or her case.

Suppose you have a self-represented litigant who has a disability. The person is sight or hearing impaired or may display symptoms of mental illness or intellectual challenge. Perhaps the person is not fluent in English. Ask if they have spoken to an attorney or if they want to before going to trial. Postpone for an interpreter if the self-represented litigant cannot understand you. Recognize that some self-represented litigants "just want to get it over with" and will resist a postponement even though they may not thoroughly comprehend what is happening. Job, family, or transportation issues may impede their ability to get to court if the case is postponed.

Finally, the Code of Judicial Conduct requires judges to "be patient, dignified and courteous to litigants . . . and others with whom the judge deals in an official capacity . . . ."[35] The comment to the rule further explains that the duty imposed upon judges "to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate."[36]

6. BE POLITE

Probably all of us remember a parent or grandparent or teacher admonishing us to remember our manners when we were in grade school. Being polite is a matter of showing respect to others and treating those who appear before you with dignity. In essence, being polite means remembering your manners. Begin each case by greeting each litigant with a salutation such as "good morning" or "good afternoon." Make sure to use the appropriate title whenever you address any litigant. To the extent possible, respect the litigants' requests regarding how they wish to be addressed. Thank the audience in advance for following the court procedures that you outline. Simply saying "thank you" and "please" can help to humanize a process that can seem harsh at times.

People are far more understanding and accepting of delays when judges acknowledge them.

Start the court day at the scheduled time. Those who appear before you are anxious and may want to "just get it over with." The old adage is true: the sooner you start, the sooner you finish. Moreover, it is inconsiderate to keep people waiting. If, however, you encounter circumstances that delay the timely start of the docket, acknowledge your tardiness, give an appropriate explanation, provide an apology, thank the audience for its patience, and then commence the docket. People are far more understanding and accepting of delays when judges acknowledge them.

While it is natural to interact in a more familiar manner with individuals who you regularly see, such as lawyers and other representatives, remember that for those who are new to the process or unfamiliar with it, such interaction may be viewed as favoritism or bias. Avoid overly familiar interactions with lawyers and others who may regularly appear before you.

For some litigants, not only is the court process an emotional experience, but the legal dispute that causes them to be in court may evoke great emotion. Litigants may become emotional or upset when recounting the events relevant to the dispute. Offer to take a recess so that they may regain their composure. Sometimes taking a recess during the middle of testimony can be helpful in redirecting the parties' focus when the level of emotion seems high or counterproductive.

While taking a recess can be helpful, abruptly cutting off a litigant, talking over someone, or constantly interrupting the parties can be counterproductive. Avoid interrupting the litigants unless necessary to keep the parties on track.

7. BE PROFESSIONAL

Judges are expected to exhibit a dignified demeanor and temperament at all times that reflects their role as the guardians of justice. The public's trust and confidence in the judicial process is influenced by judges' behavior, both on and off the bench. Derived from the Preamble section of the 2007 ABA Model Code, the Preamble to Maryland Rule 16-813 further explains this obligation: "Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and

35. MARYLAND RULE 16-813, CODE OF JUDICIAL CONDUCT, Rule 2.8(b). This rule is derived from the 2007 ABA Model Code of Judicial Conduct.

36. MARYLAND RULE 16-813, CODE OF JUDICIAL CONDUCT, Rule 2.8(b) cmt.

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personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence."[37]

We have often heard it said that it is not *what* you say but *how* you say it that leaves a lasting impression. This is certainly true when handling cases involving self-represented litigants. Albert Merabian, Ph.D., Professor Emeritus from UCLA, has conducted research regarding nonverbal communication.[38] His research shows that, in certain situations, 7% of communication relates to the specific words that are spoken, 38% comes from vocal elements (such as tone and cadence), and 55% is through nonverbal means such as facial expressions and body language.[39] This means that approximately 93% of the communication in certain circumstances is nonverbal. Tone, body language, hand gestures, and facial expressions can say far more than the spoken word. When interacting with litigants, keep in mind that how the information is communicated is at least as important as what information is communicated.

With technology occupying a more central place in the court process, it can be easy to go through an entire court case with your eyes trained on a computer screen. Even for those who still use paper and pen, making sure that all the boxes on the trial docket sheet are correctly completed can take your eyes away from the litigants. Eye contact is one of the best ways for litigants to assess whether the judge is paying attention or not. Although you may be able to successfully multitask—both listening to the litigants and completing docket sheets or signing paperwork—the loss of eye contact may cause any litigant to doubt your attentiveness or interest in his or her case. Try to make eye contact from time to time. This may require a conscious decision to look up and focus; however, eye contact can add to your understanding of the proceeding. Just as our body language communicates nonverbally, so too can we understand nonverbal communication through the body language of self-represented litigants. But we have to look to be able to see.

8. CONSIDER ALTERNATIVE DISPUTE RESOLUTION

Generally speaking, resolving cases without court intervention is seen as a good thing. Why wouldn't a judge welcome the opportunity to potentially remove one more case from the docket—or at least to remove one case that is likely to present a number of challenging issues? More than just resolving a dispute, Alternative Dispute Resolution (ADR) offers benefits beyond those that we typically think about. While any litigant might benefit from participation in ADR, self-represented litigants may be uniquely situated to derive benefits from it. Before you take the bench and after having reviewed the court file, consider whether ADR would be an appropriate way for the parties to resolve their dispute.[40]

Recent research has confirmed that there are benefits to ADR whether or not the parties reach an agreement. The Maryland Judiciary commissioned a study, completed in 2014, to evaluate ADR on a statewide basis. The study was conducted by a team of independent researchers led by Lorig Charkoudian, Ph.D.[41] "This research is unique and to our knowledge is the only one in the country that compares the attitudes and changes in attitudes of participants who went through ADR to an equivalent comparison group who went through the standard court process."[42] The research results demonstrate several positive outcomes related to the resolution of the issues, a sense of responsibility and empowerment, and a feeling of satisfaction with the judicial system. The following are just a few of the findings. Regardless of whether the participants reached an agreement in ADR or not, ADR participants were more likely to report that:

- they could express themselves, their thoughts, and their concerns;
- all of the underlying issues came out;
- the issues were resolved;
- the issues were completely resolved rather than partially resolved; and
- they took more responsibility for the situation than before.[43]

Participants in ADR were also less likely to report that no one apologized or took responsibility for the situation. Finally, researchers found that ADR was more likely to leave people with a positive view of the judicial system: "Participants who developed a negotiated agreement in ADR were more likely to be satisfied with the judicial system than others, while participants who reached negotiated agreements on their own (without ADR) were not more likely to be satisfied with the judicial system than those without negotiated agreements."[44]

CONSIDERATIONS WHEN ONE PARTY IS REPRESENTED BY COUNSEL

One of the dilemmas faced by judges is managing the pre-

37. MARYLAND RULE 16-813, CODE OF JUDICIAL CONDUCT, Rule 2.2.
38. Albert Merabian, Personality & Communication, Psychological Books & Articles of Popular Interest, http://www.kaaj.com/psych.
39. *Id.*
40. The District Court of Maryland offers day-of-trial and pretrial mediation services free of charge to litigants in civil cases. Judges may refer litigants to ADR at any stage of the case. In 2014, approximately 300 mediators volunteered more than 5,800 hours of their time as part of this program. ADR services are coordinated through the District Court ADR Office, Jonathan S. Rosenthal, Esquire, Executive Director of ADR Programs, www.mdcourts.gov/district/adr/home.
41. Statewide Evaluation of ADR in Maryland: Research on Alternative Dispute Resolution in the Maryland Judiciary, https://sites.google.com/a/marylandadrresearch.org/main/.
42. *Id.*
43. *Id.*
44. *Id.*

sentation of testimony and evidence when one side is represented by counsel and the other is not. In Maryland, small claims are governed by relaxed rules of evidence, so there are fewer problems in those cases.[45] But what of self-represented litigants who have claims or are defending against claims of $5,000 or more where the rules of evidence are applied? They will face difficulty at every stage—testifying, cross-examining witnesses, and presenting evidence. While the questions asked by the judge must be neutral, they should be designed to obtain the information needed to decide the case. Provide a framework—ask self-represented litigants why they brought the claim or why they are challenging the claim and what they have to show you and the other side that supports what they are telling you. Asking questions about date, time, and place can also clarify the issues. If possible, divide the trial into two parts: proof of liability and proof of damages. When self-represented litigants have completed testimony, ask if there is anything else they want to add before you move to the other side. This reinforces the structure that the judge set out initially and signals to them that if they have more information, now is the time to tell the judge. Some parties are focused on proving the cause of action and forget to prove damages. Under these circumstances, consider asking them why they are requesting the amount of damages stated in the complaint.

When an attorney objects to the testimony or evidence presented by the self-represented litigant, ask the attorney to explain the basis for the objection. The judge can then explain that the objection will be sustained and the evidence excluded, for example, unless the party can present testimony or evidence to overcome the basis for the objection.

Before cross-examination starts, explain to litigants that this is their time to ask questions of the other side about what they just said. Effective cross-examination is an art that takes attorneys many years of practice to become competent in, if not master. For so many self-represented litigants, the process of cross-examining an opposing witness devolves into denials of the witnesses' testimony without challenging its basis or accuracy. It may be acrimonious and personal ("Why are you lying?" "Why are you doing this to me?"). Refocus the litigants by reminding them that they have the opportunity to testify and tell their "side of the story."

ANNOUNCE AND EXPLAIN YOUR DECISION

When it is time to make a decision, either written or oral, acknowledge the interests that both parties have in the case and outcome. Use the framework you set forth at the opening of the trial to explain whether the plaintiff met the burden of proof or the defendant established a defense. Explain what was considered in calculating damages. Once the decision is made, explain the next steps for the prevailing party (*i.e.*, collecting the judgment) or the right to appeal if they are dissatisfied with the decision. Providing this information to the litigants in person "at the time of the hearing further emphasizes the finality of the order and also provides an opportunity to clarify misunderstandings about specific terms."[46]

Use the framework you set forth at the opening of the trial to explain whether the plaintiff met the burden of proof or the defendant established a defense.

MANAGE YOUR STRESS

As stressful as it may be to represent yourself in court, being the presiding judge can be stressful too. Judges may not always recognize the signs of stress within themselves. That's why stress is sometimes referred to as the silent killer.

Managing your stress starts the night before you take the bench. Sleep is one of the critical components to managing stress.[47] Our lives are chock-full of responsibilities and obligations concerning work, family, and community. Making sure that you get it all done can be a struggle. It is easy to convince yourself that you can accomplish more by staying up a bit later. After all, you can usually sleep late on the weekends to make up for the sleep you lost during the week.

Research has shown that sleep deprivation not only affects a person's response to stress but affects one's mood.[48] Going without sleep for up to 17 hours can be the equivalent of having a blood-alcohol level of .05%.[49] In many states, that would be probable cause for a driver to be criminally charged with driving while impaired. Obviously, when your body is impaired, your ability to perform at an appropriate level mentally is equally impaired.[50] Getting a good night's sleep can be a key factor to improving your mood and your response to stress.

Not wanting to diminish the important role of healthy eating and exercise, it almost goes without saying that healthy eating coupled with regular exercise is helpful in managing stress. Simply making sure that you eat breakfast and lunch every day can be a challenge. Resist the temptation to skip lunch, regardless of the busy demands of your day. Drinking plenty of fluids and eating healthy meals and snacks (you know the ones) can give you the necessary energy to stay focused and balanced.[51] Regular exercise likewise improves

45. Maryland Rule 3-701(f) states: "Conduct of trial. The Court shall conduct the trial of a small claim action in an informal manner. Title 5 [Evidence] of these rules does not apply to proceedings under this Rule."
46. Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 Ct. Rev. 8, 16 (2003).
47. Kimberly Babson & Matthew Feldner, Sleep and Affect: Assessment, Theory and Clinical Implications (2015).
48. *Id.*
49. A. Williamson & A. Feyer, *Moderate Sleep Deprivation Produces Impairments in Cognitive and Motor Performance Equivalent to Legally Prescribed Levels of Alcohol Intoxication*, 57 Occupational & Envtl. Med. 649 (2000).
50. *Id.* at xv. "Cognitive skills such as working memory, short term memory and logical reasoning are especially disrupted."
51. Keri Glassman, *13 Foods That Fight Stress*, Prevention, May 2014, http://www.prevention/mind-body/emotional health/.

energy and focus.[52] Working out at the gym or following an exercise program is wonderful, but simply taking a short stroll on a regular basis can be helpful too.[53]

Knowing a few techniques to implement during stressful moments can help you maintain an appropriate balance. It may seem obvious, but reminding yourself to take a recess during a trial or a challenging docket can make all the difference in your level of stress and fatigue. At first, you may think that it is a waste of valuable time to do so. However, getting off the bench for as little as 5 or 10 minutes will give you a chance to physically move around, clear your mind, and refresh your focus.

Breathing techniques are useful for stress management as well. Taking a few slow, deep breaths silently while on the bench can help to lower your heart rate and blood pressure.[54] This helps to reduce stress and improve your focus and concentration.

Being a judge can be a lonely experience. Finding a trusted colleague with whom you can discuss your concerns can help alleviate some of the stress and burden of being the sole decision-maker. Even listening to music can have a stress-reducing effect. Again, lowering the heart rate and blood pressure helps to reduce anxiety.

Managing your stress when handling cases involving self-represented litigants should not be overlooked. Not only does it help with the overall smooth progression of the case but it can literally be a lifesaver for the judge.

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Miriam Brown Hutchins has served as a judge on the District Court of Maryland in Baltimore City for nearly 15 years. During her years as a judge and before that as a Domestic Equity Master in the Circuit Court for Baltimore City, she has heard many cases where one or both parties were self-represented. In 2013 she organized a meeting of attorneys in the Baltimore community to establish a self-help center in the civil division of the district court in Baltimore City. As a result, Just Advice, a legal-services clinic serving the lower middle class and working poor and staffed by volunteer attorneys and law students from the Francis King Carey School of Law at the University of Maryland, expanded its services to the district court civil courthouse in Baltimore. Judge Hutchins is a member of the Standing Committee of the Court of Appeals on Pro Bono Legal Service.

52. Mayo Clinic, *Exercise and Stress: Get Moving to Manage Stress*, http://www.mayoclinic.org/healthy-lifestyle/stress-management/in-depth/exercise-and-stress/art-20044469.
53. *Id.*
54. Jeannette Maninger, reviewed by Michael W. Smith, *10 Relaxation Techniques to Zap Stress,* http://www.wedmd.com/balance.

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