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

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INTRODUCTION

This Article analyzes and suggests an approach as to how judges can deal appropriately and neutrally with the hugely increased numbers of those who appear in court without counsel in civil cases.[1]

Notwithstanding the numerical evidence of the importance of this phenomenon, and the obviousness of its impact on the both litigants and judges, during most of the recent period of rapid growth there has been little public academic or judicial attention, and indeed little ABA or state regulatory attention, to how the judiciary should be responding to the challenge of this change in the courtroom.[2]

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1. In many courts, well over 50 percent of litigants appear without lawyers. For example, in California, a court study found that in child support cases, only 15.95 percent of the cases had counsel on both sides and that in 63 percent of cases *neither* parent was represented (let alone the children). JUDICIAL COUNCIL OF CALIFORNIA, REVIEW OF STATEWIDE UNIFORM CHILD SUPPORT GUIDELINES 6-21 (1998). More recent California figures show that 81 percent of eviction proceedings had at least one party without a lawyer. John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know*, at 7, *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatweknow.pdf [hereinafter Greacen, *Self-Represented Litigants*]. This last paper includes a general summary of the state of research knowledge about *pro se* litigants and their cases. *Id.* at 1-3. Given the importance of the issue, the state of our collective knowledge can only be described as abysmal. *Id.* at 2, 32 (describing what is not known).

2. The lack of attention is well-illustrated by ROBERT E. KEETON, JUDGING IN THE AMERICAN LEGAL SYSTEM 172 (1999), in which the only analysis, beyond passing mentions, is a three paragraph section, which draws attention to the judge's duty under *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (per curiam), to construe *pro se* pleadings liberally.

This reticence is in contrast to the substantial attention now being paid to how courts may appropriately assist litigants in dealing with the front end of the system and in giving them general information. AMERICAN

Recently, however, there has finally been some growing attention to the question of how judges[3] should deal with such cases and of their implications for the judicial role.[4] This attention now includes a recently launched State Justice

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JUDICATURE SOCIETY, A NATIONAL CONFERENCE ON *PRO SE* LITIGATION: A REPORT AND UPDATE (2001) (including the November 1999 Report of the National Conference on *Pro Se*, that again focused mainly on court preparation and support); PATRICIA A. GARCIA, LITIGANTS WITHOUT LAWYERS: COURTS AND LAWYERS MEETING THE CHALLENGES OF SELF-REPRESENTATION (2002) (ABA "Road Map" including descriptions of programs and resources that again focus on activities outside the courtroom); JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF *PRO SE* LITIGATION: A GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998) (including a listing of programs then in place, most of which did not affect the courtroom itself) [hereinafter GOLDSCHMIDT ET AL., MEETING THE CHALLENGE]; John M. Greacen, *No Legal Advice from Court Personnel: What Does that Mean*, JUDGES' J., Winter 1995, at 10 (the seminal line-drawing article that addresses the role of clerks and non-judicial staff) [hereinafter Greacen, *No Legal Advice*]; JOHN GREACEN, MAY I HELP YOU? LEGAL ADVICE VERSUS LEGAL INFORMATION, A RESOURCE GUIDE FOR COURT CLERKS (2003), *available at* http://www.courtinfo.ca.gov/programs/access/documents/mayihelpyou.pdf [hereinafter Greacen, *May I Help You*]; BETH M. HENSCHEN, LESSONS FROM THE COUNTRY: SERVING SELF-REPRESENTED LITIGANTS IN RURAL JURISDICTIONS (2002) (focusing on rural programs outside the courtroom); CHARLES L. OWEN, ET AL., ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS (2002) (study of how technology can redesign the process, focus is on extra-courtroom aspects). Particularly influential has been the Position Paper issued by the Conference of Conference of State Court Administrators, *see* Conf. of State Ct. Admin., *Position Paper on Self-Represented Litigants* (2000), *available at* http://cosca.ncsc.dni.us/PositionPapers/selfreplitigation.pdf [hereinafter COSCA Position Paper], and the joint report issued by the Conference of Chief Justices and the Conference of State Court Administrators, *see* Conf. of Chief Justices & Conf. of State Ct. Admin., *Final Report of the CCJ COSCA Joint Task Force on* Pro Se *Litigation*, July 2002, *available at* http://cosca.ncsc.dni.us/PositionPapers/TaskForceReportJuly2002.pdf [hereinafter CCJ-COSCA Final Report]. Efforts in countries other than the US are collected in Tiffany Buxton, *Foreign Solutions to the U.S.* Pro Se *Phenomenon*, 34 CASE W. RES. J. INT'L L103 (2002).

The lack of regulatory attention to the role of judges is in similar contrast to the substantial changes in the rules governing attorney conduct with respect to the self-represented, as evidenced by the changes proposed and adopted by the Ethics 2000 committee to the ABA's *Model Rules of Professional Conduct* ("*Model Rules*"), particularly changes to Model Rule 1.2 and the new Model Rule 6.5, *see* AM. BAR ASS'N, COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES (Aug. 2001), *available at* http://www.abanet.org/cpr/e2k-report_home.html, and by parallel changes in the states, *see* Am. Bar Ass'n, Ctr. for Prof'l Responsibility, Joint Comm. on Law. Reg., *Ethics 2000 & MJP Review Status Chart*, *available at* http://www.abanet.org/cpr/jclr/state_contact_list.doc. *Cf.* Brian Holland, *The* Code of Judicial Conduct *and the* Model Rules of Professional Conduct*: A comparison of Ethical Codes for Judges and Lawyers*, 2 GEO. J. LEGAL ETHICS725, 734-38 (1989) (discussing the dynamic relationship between the two codes and arguing for coordination between them).

3. The focus on judges in this Article should not be read to suggest that other players in the system do not also bear appropriate responsibility for ensuring access for those without lawyers. For a comprehensive multi-player study and recommendations, see Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks*, 67 FORDHAM L. REV. 1987, 2028-31 (1999). The judge, of course, does have the ultimate responsibility for the result that goes beyond that of the other players in the system.

4. Rebecca Albrecht, et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGES' J., Winter 2003, at 16; Engler, *supra* note 3; Jona Goldschmidt, *The* Pro Se *Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2000) [hereinafter Goldschmidt, *The* Pro Se *Litigant's Struggle*]; RICHARD ZORZA, THE SELF HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (2002). Judicial and court administrative engagement is illustrated by Recommendation 10 of the COSCA Position Paper, which states, "COSCA should identify strategies and protocols to assist trial court judges in managing cases and in conducting proceedings

Institute funded study being conducted by the American Judicature Society,[5] with a particular focus on the ethical issues faced by judges dealing with such cases; it also includes an inquiry by the recently established ABA task force into exploring the possible need for changes in the *Model Code of Judicial Conduct* ("*Model Code*").[6] The urgency of this attention has been highlighted by the growing realization that those who appear in court without lawyers are, as a general matter, only "choosing" to do so in the most formal sense. Rather, that "choice" is a product of their economic situation and the cost of counsel.[7]

Part One of this Article suggests an intellectual structure for analyzing this issue. Its core thesis is that our focus on the *appearance* of judicial neutrality has caused us improperly to equate judicial engagement with judicial non-neutrality, and therefore to resist the forms of judicial engagement that are in fact required to guarantee true neutrality. The intellectual structure proposed in the Article attempts to "unpack" that confusion.

Having built a structure for analyzing the distinction between neutrality and disengagement, the Article then suggests a theoretical approach for how a judge might obtain the benefits of engagement and true neutrality without running the risk of creating the appearance of non-neutrality.

The remaining parts of the Article commence an exploration of the implications of this analysis for how judges might conduct their courtrooms on a day to day basis (Part II), for changes that might be considered in the Canons of, or Comments to, the *Model Code* (Part III), for standards of appellate review of judicial decisions made in managing cases (Part IV), and for future research (Part V).

In summary, the paper concludes that:

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including self-represented litigants with special attention to cases in which only one of the parties is represented." *See* COSCA Position Paper, *supra* note 2, at 7. The CCJ-COSCA Final Report states,

> To secure the cooperation of the trial bench in these endeavors, judges should be given adequate tools (*e.g.*, judicial guidelines, recommended practices and procedures) with which to structure their interactions with self-represented litigants in the courtroom. The discussion of what these guidelines might entail has only just begun in a handful of states, and to date there is no clear consensus of where the lines should be drawn between appropriate and inappropriate judicial assistance for self-represented litigants. The sooner that the topic is placed on the table for discussion, the sooner that judges can begin to formulate concrete ideas for improving the in-court experience of self-represented litigants.

CCJ-COSCA Final Report, *supra* note 2, at 9-10. Particularly noteworthy in offering an early comprehensive state-focused approach to several aspects of the problem is Barrie Althoff, *Ethical Considerations for Lawyers and Judges When Dealing with Unrepresented Persons*, WASH. ST. BAR NEWS, Jan. 2000, *available at* http://www.wsba.org/media/publications/barnews/archives/2000/jan-00-ethics.htm.

5. *See* State Justice Inst., Grant Info. For Application of Technology, *available at* http://www.statejustice.org/grantinfo/apptech.htm (including SJI Grant SJI-03-N-108 to the Washington State Bar Association).

6. Am. Bar Ass'n, Joint Comm'n on Evaluation of the *Model Rules of Judicial Conduct*, Notice of Public Hearing, Dec. 5. 2003, *available at* http://www.abanet.org/cpr/dec2003/hearing.html.

7. For research data on the income levels of the self-represented, see *infra* note 47.

- Judicial neutrality and judicial passivity are very different, and should not be confused.
- In the *pro se* context, the appearance of neutrality and true neutrality are often very different, and true neutrality often requires a form of engagement that may seem inconsistent with traditional expectations for the appearance of neutrality.
- This apparent contradiction can be resolved by the development of a transparent style of judging, in which judicial engagement is demonstrated to be in the service of true neutrality. Moreover, while the perceived fears of the dangers of engagement are perhaps greatest at the (rarely occurring) trial phase, such an approach is equally valid and needed in the other phases of judicial involvement with cases, including supervision of the participation of other components of the court system.
- Such transparency can be achieved by relatively simple courtroom techniques, many of which are already in use and have been written about.
- Such innovations, and the dialog needed to advance them, could be greatly assisted by additional comments to the *Model Code*, which could clarify that such changes in courtroom conduct are in no way inconsistent with the Canons of the *Model Code*.
- Current case law, including its general approaches to review of cases challenging judicial management of the courtroom, provides guidance for the development of additional ways of thinking about judicial courtroom management that will help provide an accessible forum.
- Finally, additional empirical research is urgently needed into these matters.

I. AN INTELLECTUAL STRUCTURE FOR ANALYSIS OF THE NEUTRALITY PROBLEM IN JUDICIAL MANAGEMENT OF PRO SE CASES

A. THE TWO DIMENSIONS OF JUDGING: NEUTRALITY VERSUS NON-NEUTRALITY AND ENGAGEMENT VERSUS PASSIVITY.

It is a truism that there is no concept more fundamental to the common law and United States legal systems that judicial neutrality. Without such neutrality, the entire legitimacy of the legal system, indeed its reason for existence within the democratic experiment, fall.[8]

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8. While it is hard to define "neutrality," one verbally effective effort is Justice Cardozo's, which also highlights the importance of the concept of neutrality to the social order: "One of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in its actions that savors of prejudice or favor or even arbitrary whim or fitfulness." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921). The *Terminology* section of the *Model Code* defines "impartiality" as follows: " 'Impartiality' or 'impartial' denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." *See* http://www.abanet.org/cpr/mcjc/pream_term.html#TERMINOLOGY. These support the commonsense meaning of the word as evenhanded and not taking sides.

Because such neutrality is so crucial and so entwined with the legitimacy of the system, society and the legal system have built up a complex and multi-faceted structure to protect and emphasize this neutrality. The components of this structure include the general impartiality language of the *Model Code*,[9] the

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9. Canon 2 of the *Model Code* currently reads, in relevant part,

> A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES.
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> A. A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1997) [hereinafter MODEL CODE].

Canon 3 of the *Model Code* similarly reads as follows:

> A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.
> A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.* In the performance of these duties, the following standards apply.
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> B. Adjudicative Responsibilities.
> (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.
> (2) A judge shall be faithful to the law* and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.
> (3) A judge shall require* order and decorum in proceedings before the judge.
> (4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.
> (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.
> (6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.
> (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
> (a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

explicit prohibitions on *ex parte* communications in the *Model Code* and the common law,[10] and, of greatest relevance here, the entire ideal judicial courtroom persona on which we have been reared, and which we take absolutely for granted.

This ideal persona, known to generations of attorneys and TV watchers, 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.[11]

However, the conception of this ideal persona is completely grounded in the inaccurate and now outdated courtroom model in which both parties have counsel. Today, since such a courtroom is no longer the statistical norm,[12] the model represents a serious oversimplification of how fairness and neutrality can be achieved and in particular of the consequences for the *actual,* as opposed to *perceived,* neutrality of the system when the judge acts according to this persona.

As the tables below suggest, in fact a judge can be neutral or non-neutral[13] and

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(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law* to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of court personnel* subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.

MODEL CODE Canon 3 (1997).

10. MODEL CODE Canon 3 (1997).

11. Of course, as part of this persona, the judge must also maintain unchallenged control of the courtroom so that counsel always have the full opportunity to do their jobs of presenting arguments and evidence to this umpire and, where relevant, the jury.

12. *See* studies citied *supra* note 1.

13. *See* definitions cited *supra* note 8.

at the same time can be either engaged[14] or passive. This Article suggests that there are two dimensions on these issues (neutral or non-neutral and engaged or passive) rather than one (passive or non-neutral), and therefore four possible judicial behavior choices rather than two. Under this way of looking at things, the consequences with respect to the fairness and actual neutrality[15] of the proceeding as a whole for the parties depend on how the judge behaves with respect to both of the two available dimensions, not just his or her formal lack of bias.[16]

The table below details these two dimensions and describes, albeit in a simplified way, judicial behavior and the general consequences for neutrality and fairness in each of the four "cells" of the table.

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14. While this Article uses the phrase "engaged," a better term might be "purposefully engaged," in the sense that the engagement has a purpose – access to justice and a truly neutral result. One can imagine forms of engagement that are neither non-neutral, nor particularly productive of access to justice.

15. It is axiomatic in this Article that a proceeding that appears or is even intended to be neutral, but leads to an unfair result, as fairness is defined in terms of the governing law, is not neutral in any ultimate sense. In other words, it is neither the intent, nor the appearance that counts, but what is achieved in terms of neutrality.

This entire analysis deals only with the fairness and neutrality of the proceeding, not the substantive fairness of the underlying law. Put another way, a result that is "unfair" because of the perceived unfairness of the underlying substantive law that is applied cannot be said to be unfair as the result of a non-neutrality of the proceeding.

It should be emphasized that nothing in this entire analysis challenges the fundamental conception of an adversary system. Unlike other proposals which have suggested that the United States should move toward more of an inquisitorial system, *e.g.*, Goldschmidt, *The* Pro Se *Litigant's Struggle*, *supra* note 4, at 40-50, the theoretical goal of this Article is to make sure that the adversary system does what it is supposed to do at its best – to get to truth and justice through a competition between two versions of fact and law before a neutral decision-maker.

16. This approach is in intentional contrast to the general perception that engagement in such situations is equivalent, or at least close to, non-neutrality. *See, e.g.*, GOLDSCHMIDT ET AL., *supra* note 2, at 29 ("The data collected in this survey show that the most serious concern of trail judges [about *pro se* issues] is their perceived inability to assist a *pro se* litigant due to their duty to maintain impartiality.").

More generally, it should be noted that while this analysis is offered primarily as an aid to understanding the dynamics of the *pro se* courtroom, its two dimensions of neutrality/non-neutrality and engagement/passivity, may well work just as well in understanding other situations in which traditional conceptions of the required aloofness of the judge no longer serve court and social needs. For example, traditional views of judicial neutrality are coming under similar pressure in the context of specialty courts such as drug courts, community courts, and domestic violence courts. *See, e.g.*, GREG BERMAN & JOHN FEINBLATT, JUDGES AND PROBLEM SOLVING COURTS 16-18 (2002) (discussing problems of judicial independence); Nat'l Ass'n of Drug Ct. Prof'ls, *Defining Drug Courts: The Key Components*, Jan. 1997, *available at* http://www.nadcp.org/whatis. For a state rule response, see CAL. RULES OF CT., STDS. OF JUD'L ADMIN. § 39 (2004) (allowing judges to play community outreach, education, and information-gathering roles); *see also* CAL. RULES OF CT., STDS. OF JUD'L ADMIN. *§ 39 Drafter's Notes*, Apr. 1999 (stating that the amendments and new rule "encourage judges to provide leadership for and personally engage in community collaboration and outreach activities as part of their judicial functions").

A judge in such a court is similarly often today considered to be caught between engagement and neutrality, as if the two are opposites. It may be that understanding neutrality as being on a different dimension from, rather than on the same dimension as, engagement may help transcend the apparent tension, and it may be that in this context too that transparency, see discussion *infra* Part I.D, is the key to reaching and sustaining acceptance of engaged neutrality.

TABLE I
THE TWO DIMENSIONS OF JUDGING

	Engaged	Passive
Neutral	Creates an environment in which all the relevant facts are brought out; Engages the parties, *as needed,* to bring out these facts, and their foundation; Ensures neutrality by making sure that each side gets their side fully out.[17]	Leaves it to the parties to get their evidence and foundations before the court; Does not engage the parties, but rules on motions and objections; Relies on the balance of the system to ensure neutrality.
Non-Neutral	May intervene to deter or prevent one side getting story before court; May also allow bias to cloud how evidence is seen.[18]	Acts as above but allows bias to cloud whether and how evidence is admitted and seen.

17. Cases in support of a duty of engagement include: Breck v. Ulmer, 745 P.2d 66, 75 (Alaska 1987) (holding that the trial judge has "explicit" duty to advise self-represented litigants of rights and procedures for opposing a summary judgment motion, but that the failure to do so here was not prejudicial); Keating v. Traynor, 833 P.2d 695, 696 (Alaska 1992) (finding a similar duty to inform one seeking to intervene of proper procedure); Collins v. Arctic Builders, 957 P.2d 980, 982 (Alaska 1998) (reversing a dismissal of appeal for procedural defect; stating that the court was "not concerned that specificity in pointing out technical defects in *pro se* pleadings will compromise the superior court's impartiality"); Lombardi v. Citizens Nat'l Trust & Sav. Bank of Los Angeles, 289 P.2d. 823, 824-25 (Cal. Ct. App. 1955).

> It is the duty of a trial judge to see that a cause is not defeated by 'mere inadvertence'or by 'want of attention' and 'to call attention to omissions in the evidence or defects in the pleadings' which are likely to result in a decision other than on the merits and 'within reasonable limits' by proper questions 'to clearly bring out the facts so that the important functions of his office may be fairly and justly performed.' He is not, however, required to act as counsel for a litigant in the presentation of his evidence.

Lombardi, 289 P.2d at 824-25 (finding no error in the failure to assist given the complexity of the dead-man's statute and given the non-neutral advocate role the judge would have had to adopt to assist self-represented litigant) (citations omitted); *see also* Gamet v. Blanchard, 111 Cal. Rptr. 2d 439 (Cal. Ct. App. 2001) (finding a judicial obligation to make sure that the court's communications are not prone to misunderstanding by the self-represented); Oko v. Rogers, 466 N.E.2d 658, 660 (Ill. App. Ct. 1984) (finding no error in the judge's role in the case, including the fact that "[w]henever necessary, the trial judge would make his own brief and limited examination of a witness in order to clarify the testimony. The court also guided the defendant through parts of his own testimony in order to avoid a long narrative on irrelevant matters"); Ind. Comm. on Jud. Qualifications, Formal Op. 1-97 (1997) (opining that it would be a judge's duty in a non-adversarial situation to point out a technical omission, the remedying of which would make possible the granting of relief). The Indiana opinion also states that "[n]either the interests of the court nor of the litigant are served by rejecting the petition on the basis of this type of deficiency." Ind. Comm. on Jud'l Qualifications, Formal Op. 1-97 (1997).

18. Examples of such non-neutral engagement include Pavilon v. Kaferly, 561 N.E.2d 1245, 1255-58 (Ill. App. Ct. 1990) (holding that reversal was required based on judicial comments and objections that revealed bias against a self-represented defendant); Bullard v. Morris, 547 So. 2d 789, 791-92 (Miss. 1989) (finding an abuse of discretion in requiring an unrepresented litigant to appear in person before a decree of divorce would be issued).

Table I is therefore self-explanatory. At the first level of this mode of analysis, the table shows that a passive judge may or may not be neutral and an engaged judge may or may not be non-neutral. At the second level of analysis, the table suggests that a neutral judge may or may not achieve a fair result. This is because, as discussed in detail below, if the whole story does not get before a passive judge because of that judge's passivity, then, notwithstanding the judge's apparent evenhandedness the result can not be truly neutral.

B. WHETHER THE RESULT IS TRULY NEUTRAL, AND WHAT IS OBSERVABLE WITH RESPECT TO NEUTRALITY, VARY AND DIFFER DEPENDING ON REPRESENTATION STATUS

The non-neutrality of the result from a neutral, but passive judge, can come in a wide variety of ways, a preliminary exploration of which is useful for understanding both the ultimate non-neutrality of the result, and how a judge might be able to manage a courtroom to avoid it. All these reasons can occur with or without counsel, but they are far more likely to occur when a party does not have counsel. The non-neutrality in the 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 of evidence because of the litigants' lack of knowledge of how to get it 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, the 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.
- The litigant being intimidated or confused by objections raised by the opposing party, or, more likely, opposing counsel.

As the tables below illustrate, the risks and benefits of judicial behavior with respect to fairness and neutrality in each of the "cells" therefore depend on the skill and knowledge of the parties, and more precisely therefore on whether they have counsel.

Equally important, however, is the impact of judicial engagement or passivity, and neutrality or non-neutrality, upon the observabilty of the ultimate neutrality of the proceeding. Judicial behavior which may be viewed as demonstrating non-neutrality, *regardless of whether it is in fact related to non-neutrality*, might include behaviors such as the following:

- Asking of questions from which a judicial state of mind might accurately or non-accurately be inferred.
- Comments on the law or on required evidence, from which similar accurate or non-accurate inferences might be drawn.
- Interruption or redirection of witnesses, counsel, or parties, from which similar accurate or non-accurate inferences might be drawn.
- Tone of voice or other body language.

As the tables below also show, the extent of the observability of the risks and benefits of engagement with respect to true neutrality also depends not only on which "cell" most accurately characterizes the judge's behavior, but the relationship of that "cell" to the representation status of the parties, *i.e.*, whether they or their opponent have counsel. Crucially, it is the relationship between judicial behavior and representation status which governs the appearance of justice.

As the tables show, the relationship between the two is not the same for actual fairness and for the appearance of justice. The differences explain and highlight the disconnect between justice and the appearance of justice.

TABLE II.A
CONSEQUENCES AND OBSERVABILITY WHEN BOTH PARTIES HAVE COUNSEL

		Judge Engaged	**Judge Passive**
Judge Neutral	*Consequences*	Fair result.	Fair result.
	Observability	Fairness of process; More accurate observation as to likely fairness of result.	Fairness of process; Implied fairness of result.
Judge Non-Neutral	*Consequences*	Likelihood of unfair result.	Likelihood of unfair result.
	Observability	Greater chance of evidence of unfairness of process; Greater chance of evidence from which unfairness of result may be inferred.	Apparent fairness of process; Absence of evidence of unfairness of result.

This table highlights a fact little noticed in the dialogue about neutrality, that judicial passivity *increases* the risk that a non-neutral process will nonetheless be seen as neutral, particularly when the presence of counsel for both sides provides a veneer of process neutrality.

TABLE II.B
CONSEQUENCES AND OBSERVABILITY WHEN NEITHER PARTY HAS COUNSEL

		Judge Engaged	Judge Passive
Judge Neutral	*Consequences*	Lesser risk of unfair result.	Risk of unfair result;
	Observability	Risk of non-symmetry of process (depending on capacity of parties), from which there is a risk that unfairness may be inferred; Greater evidence from which an informed judgment as to fairness of process and result may be drawn.	Apparent symmetry of process; Lack of evidence of judicial behavior from which fairness of process or result maybe inferred.
Judge Non-Neutral	*Consequences*	Likelihood of unfair result.	Likelihood of unfair result.
	Observability	Likely apparent lack of symmetry (depending on capacity of parties); Greater chance that evidence of unfair process and result will be visible.	Apparent symmetry; Little chance that evidence of unfair process or result will be visible.

As shown in this table, when neither party has counsel, the nature of judicial intervention becomes critical as to the two separate questions of whether the result is unfair and whether the result is perceived to be unfair.

TABLE II.C
CONSEQUENCES AND OBSERVABILITY WHEN ONLY ONE PARTY HAS COUNSEL

		Judge Engaged	Judge Passive
Judge Neutral	*Consequences*	Lesser risk of unfair result.	Substantial risk of unfair result.
	Observability	Risk that asymmetry of engagement will lead to incorrect inference of unfairness of process and result.	Likelihood that asymmetry of process will lead to correct inference of unfairness of process and result.
Judge Non-Neutral	*Consequences*	Likelihood of unfair result.	Likelihood of unfair result.
	Observability	Most likely that engagement will be non-neutral and support correct inference of unfairness of process and result. There is a possibility that asymmetry of process could lead to inference of bias towards unrepresented party and conclusion that ultimate result in favor of represented party is fair.	Likelihood that asymmetry of process will lead to correct inference of unfairness of process and result, even though the real reason for the unfairness is the non-neutrality of the judge.

Generally, it is when only one party has counsel that the consequences of passivity are likely to be greatest. In addition, however, is the fascinating result that non-neutral behavior may be masked by a judicial engagement that appears to balance the unfairness of one side having counsel.

C. THE APPARENT CONFLICT BETWEEN THE NEEDS FOR ENGAGEMENT WITH THE REQUIREMENT OF THE APPEARANCE OF NEUTRALITY

Taken together, these results lead to the following conclusions about the disconnect between the consequences for true neutrality and the observabilty and appearance of such neutrality.

TABLE III
SUMMARY OF CONSEQUENCES AND OBSERVABILITY

1. Passivity is less likely to produce a fair result	This risk is greatest when only one party has counsel.
2. Engagement is more likely to produce a fair result	This engagement is least needed when both parties have counsel.
3. Passivity is more likely to give an inaccurate observation of a just process and result (appearance of neutrality without neutrality).	This risk is greatest when there are counsel, since in the absence of counsel on both sides, disparities in presentation ability may in themselves lead to a perception of unfairness, although the perception will wrongly ascribe the reason to the capacity of the parties rather than the attitude of the judge, and this erroneous perception will provide a mask of legitimacy to the result, and make correcting it harder.
4. Engagement is more likely to produce inaccurate observation of an unjust result and process (neutrality with the appearance of non-neutrality).	This risk is minimized when both sides have counsel, and is most acute when only one side has counsel.

In short, and only at a first cut, the conclusions that this more detailed analysis highlight are that passivity tends to appear neutral when it is not and that engagement is more likely to appear non-neutral when it is in fact neutral. The implication is that we need to be skeptical that passivity is really neutral, or that engagement is truly non-neutral.

In other words, justice and the appearance of justice appear to pull in different

directions, at least when it is not the case that both sides have counsel.[19]

Moreover, deep institutional and ideological pressures, as described above,[20] lead us to choose the appearance of justice over justice itself. There is particular irony in this disconnect, given that the system's concern for the appearance of justice is driven largely by its ultimate desire for justice itself, and its view of the appearance of justice as a proxy for justice.

This disconnect is precisely parallel to the one that has until recently been reflected in the rule that "clerks don't give legal advice", which, has been interpreted to prevent clerks from providing any information to the self-represented. That over-interpretation has derived from the fear that an engaged clerk would result in the court being seen as non-neutral, and from ignoring the barrier to neutral access the justice erected by that interpretation.[21] What is suggestive about this example is that the clear thinking about how clerks' information provision to litigants can be neutral has within a few short years transformed how state courts think about this issue, resulting in the establishment of wide changes in practice, and a network of court-based information-providing institutions.[22]

The question for the next portion of this paper is whether we can similarly break out of the parallel disconnect with respect to courtroom neutrality, and what forms of judicial behavior might break out of the conundrum of the disconnect.[23]

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19. As Barrie Althoff puts it: "If there is no one else to provide assistance to the unrepresented person, the judge or the judge's staff may need to do so, and the more assistance given, the more likely the opposing parties will be deprived or feel deprived of themselves receiving a fair and impartial hearing." Althoff, *supra* note 4. He also notes that

> [i]n this context the test of impartiality and fairness is not merely whether the judge assisted an unrepresented party, but rather whether that assistance would lead a 'reasonably prudent and disinterested observer' to conclude that all parties had not had a 'fair, impartial, neutral hearing.' The judge's role is neither to so assist an unrepresented party as to equalize the resources of the litigants nor to oversee a travesty of justice. But it is difficult for a judge to know where between the Scylla of seeking a level playing field and the Charybdis of presiding over a litigation massacre the judge may safely sail.

Althoff, *supra* note 4 (quoting State v. Ladenburg, 840 P.2d 228 (Wash. Ct. App. 1992)).

20. *See* discussion *supra* Part I.A.

21. *See generally* Greacen, *No Legal Advice*, *supra* note 2. For more recent developments, see John Greacen, *Legal Information vs. Legal Advice: Developments During the Last Five Years*, 84 JUDICATURE 198 (Jan.-Feb. 2001).

22. These innovations, which include court-based self-help centers and re-definition of the clerk's role to include the giving of information are described in detail in the materials listed *supra* note 2.

23. The task should be made less daunting with a recognition that Administrative Law Judges in many state and federal contexts, as well as state judges in small claims courts, have to do this every day. *See generally* Engler, *supra* note 3, at 2017-18.

Nor should it be forgotten that the mediation process often proceeds without counsel, and that there may be much to be learned from its practitioners. While as a general matter it is perceived that the formality of the proceedings means that judicial aloofness is more important that mediator aloofness, it may well be in fact that the formality of judicial proceedings provides protections against bias that make judicial engagement less likely to lead to non-neutrality or the appearance of non-neutrality, provided that the correct non-prejudicial mechanisms of engagement can be found. That is the task that this Article urges.

D. TOWARDS TRANSPARENCY: THE USE OF STRUCTURE, MODULARIZATION, EXPLANATION, AND INQUIRY AS FORMS OF ENGAGEMENT THAT DEMONSTRATE THE NEUTRALITY OF, AND NEED FOR, SUCH ENGAGEMENT

The disconnect between the needs of justice and the appearance of justice may well most helpfully be seen as a symptom of the lack of transparency in the system. People are simply not seeing the truth about neutrality. Their misunderstanding of judicial behavior comes from a natural focus on what is observable, or more accurately from what the judicial systems chooses to make observable. Having created expectations about judicially neutral behavior shaped by the needs of cases with counsel, and having failed to develop methods of transparency that give the public the tools to make fully informed decisions about true neutrality, the system can not blame the public. Rather it needs to develop techniques of true transparency relevant to the current situation so that the public can make fully informed choices about the true neutrality of the procedures it views.[24]

In attempting this path in their day-to-day work, judges have a lot to work with. They have a significant reservoir of respect and credibility,[25] they have near total authority in their courtrooms, and they face a public with a desperate desire to feel that they will be listened to when they go to court.[26] At the same time, it has to be recognized that these ways of thinking are far from the traditional approach of most judges, and their adoption will require substantial rethinking and openness. The ideas will strike some as increasing the risk of being viewed as non-neutral, as increasing the risk of complaints, and as increasing the risk of being reversed on appeal.[27] These fears will only dissipate when the entire culture of the legal system takes a broader view.

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24. At least in theory there are three ways to align the needs of justice and those of the appearance of justice. The first way, providing counsel for all, is far from currently financially practical. A recent study, for example, found that 88 percent of legal needs were being met without the assistance of an attorney. *See* WASH. ST. CIVIL LEGAL NEEDS STUDY 25 (2003), *available at* http://www.ejc.org/cln_093003.pdf. The second option, radically to change the way the public perceives the appearance of justice so that changes in procedure will not be viewed as non-neutral, seems highly ambitious, and little within the control of the justice system, although it should not be ignored. The third, however, worthy of more immediate inquiry, is to explore whether there are forms of judicial behavior and courtroom organization that may result in greater actual justice while being consistent with public expectations about the appearance of justice. Put another way, the question is whether judges can find a way of being engaged that nonetheless demonstrates both the fundamental neutrality of that engagement and the need for engagement to provide neutrality.

25. *See* NAT'L CONF. ON PUBLIC TRUST AND CONFIDENCE IN THE JUSTICE SYSTEM, 9, 10 (1999) *at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_NatlActionPlanPub.pdf (79 percent agree with statement that judges are "generally honest and fair in deciding cases," but other data raise disturbing questions about perceptions of access and non-discrimination.). It should be noted that the second highest priority identified in the process of the Conference was the "[h]igh cost of access to the justice system." *Id.* at 16.

26. *Id.* at 9.

27. While concern on the part of judges that they appear neutral is not only highly desirable but required by Canon 2A of the *Model Code*, *see* MODEL CODE Canon 2A (1997), as a practical matter, fear of disciplinary retribution appears exaggerated. As cases demonstrate, judicial remarks must be way beyond the pale to attract

Perhaps most important for the approach suggested here and for its ultimate acceptance, is that the needs of transparency align with the needs of justice itself. Just as transparency allows the public to judge neutrality, so it allows the litigants to engage the court with their stories in their search for access to justice.

True transparency is not just openness. Openness describes the attitude of the institution to outsiders. Transparency, in contrast, describes a state of the relationship between the institution and the audience in which the audience actually does see what is going on. In the legal neutrality context, this requires not only that the institution is trying to be open, but that the institution has adopted means of operating that guarantee that the audience, (here the public) actually does know and understand that the judge and the system are being neutral, and how they are being neutral. When there are counsel present, this transparency is achieved in part from the visibility of the interplay between counsel and the judge, and in part from the faith that if the judge was not being neutral, then counsel would take appropriate action. When there are no counsel, far greater responsibility therefore falls on the court.

This Article suggests that when one or other or both parties do not have counsel, judges can achieve such transparency by the general techniques which may be labeled, at the risk of jargonizing, Structural Transparency, Sequential Transparency, Explanation, Inquiry and Consistency.[28]

1. STRUCTURAL TRANSPARENCY (SHOWING THE NEUTRALITY OF THE STRUCTURE)

The core idea is that that each particular procedure or event is put in the context of an appropriate overall structure, broadly defined, that is seen to meet the overall goals sought to be achieved by the institution or process.

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the attention of disciplinary bodies. *See* JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 118-25 (3d ed. 2000). As the authors comment,

> So long as the judge keeps an open mind about the final outcome of the case, comments or remarks made in court expressing a reaction to or attitude about the evidence are not indicative of improper bias. In fact, the case law suggests that a judge can successfully fend off a charge of improper bias or prejudice merely by stating on the record that his or her mind is still open and that a final decision on the matter will not be made until the close of all the evidence.

Id. at 119-20 (citations omitted).

28. This analysis assumes that judges will continue to play their roles as both courtroom traffic cop and, absent a jury, decider of the facts as well as the law. An alternative structure would be to divide these tasks in all cases in which there was other than a full complement of counsel, with an expert layperson or group making the decision while the judge played the role of neutrally drawing the evidence out for all sides. This role would be very different from that of the judge sitting with a jury.

Yet a different model would be to maintain the current judicial role, while having a court employee, presumably an attorney, drawing out the narrative of, and laying the required foundation for evidence of, all parties. This last model might be seen as an extension of the court Self Help Center approach, in which court staff provide information to all sides. *See, e.g.*, CAL. RULES OF CT., GUIDELINES FOR THE OPERATION OF FAMILY LAW INFORMATION CENTERS AND FAMILY LAW FACILITATOR OFFICES, *available at* http://www.courtinfo.ca.gov/rules/appendix/appdiv5.pdf.

When, as here, the goal is neutrality, this means that the process of the court is structured so that those present and observing understand what is going to happen is neutral – in other words that the judge creates a procedure which is neutral and in which the relationship of what will happen to the desired goal of neutrality is clear to all. The structure of the process itself is neutral and can be seen to be neutral, even when the parties may be very differently situated.

This occurs when the processes can be analyzed at a level of generality and totality that makes them neutral as a whole. If what happens is analyzed only in moment to moment terms it may seem non-neutral, when, for example a judge asks a question of one party. But if that question is established as part of a process in which all are asked questions when needed for the judge to understand what happened, then a process that is seen to be neutral in an overall sense has been created. Similarly, if the judge sees himself or herself as establishing a structure, for example, in which he or she checks at each step whether the whole story has been told, then that structure is neutral, even if it may help more those who need to be helped because they lack counsel or education or both.

2. SEQUENTIAL TRANSPARENCY (STEPS)

A similar technique is sequential transparency, the use of steps, in which the proceeding is broken up into a number of phases, in which the relationship between these steps is clear, and in which the relationship of what happens in each of these steps is clear to the participants and the audience. For example, in the courtroom, a judge might separate the steps required in fact-finding, explaining the relationship of each step to those that have passed, and those that have followed.

3. EXPLANATION

Explanation is crucial to transparency. Explanation of the process, of the relationship between the process and neutrality, and of the reasons for the conclusion make it possible for the participants and audience to understand. Explanation is particularly important when participant perceptions are shaped by pre-existing assumptions about what they will see and its implications. Those trained to expect the traditionally passive judge are much more prone to see engagement as non-neutral, and explanation is all the more critical.

One way such explanation enhances the appearance of neutrality is that it focuses the participants and audience on the level of neutrality that the explanation emphasizes. If the explanation explains the judge's goals and criteria for asking a question, for example, then the neutrality preserving role of those interventions will be much clearer than if those present are forced to make their generalization as to motive.

4. INQUIRY

Transparency requires a feedback mechanism. Judicial inquiry of the parties as to whether they understand what is expected of them, what the judge is doing, what has been decided, and the consequences of that decision, are all ways of ensuring that there is such a feedback mechanism. The mechanism serves justice by making it possible to obtain more information when misunderstanding has led to lack of information, and serves the appearance of justice by showing the interest of the judge in justice.

5. CONSISTENCY

Finally, visible, predictable consistency is crucial to transparency, neutrality, and the appearance of neutrality. Whatever the judge does, engagement or passivity, inquiry or explanation, must be done in a consistent manner. Consistency does not require absolute symmetry, the same number of questions for each party, for example. What is does require is predictability, regardless of the party. Thus, it requires a set of rules for behavior which are seen as neutral, and from which behavior can accurately be predicted from factors that are appropriate.

The trick in obtaining neutrality is stating the rule in general enough terms. "I will inquire about what self-represented litigants want from the court" may seem biased, even though it leads to consistency and predictability. "I will ask about what the parties want from the court whenever it is not clear to me" is neutral, since it relies on an appropriate factor, and remains relatively predictable.[29]

Of course the existence of the practices, and their content, must be explicit, visible, and understandable.

E. TRANSPARENT JUDGING AS TRANSCENDING THE APPARENT CONFLICT BETWEEN THE NEEDS FOR ENGAGEMENT WITH THE REQUIREMENT OF THE APPEARANCE OF NEUTRALITY

In short, use of these transparency techniques means that a judge can structure the proceeding so that it is truly neutral without running significant risk of the appearance of non-neutrality. As discussed in detail below, transparency means that the audience will see that the proceeding is fully neutral, even if the conduct of the court is not necessarily in accordance with the participants' and audience's traditional prior expectations as to how neutrality is achieved and manifested.

It should be emphasized that this general approach applies with equal force not

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29. Interestingly, truly neutral rules tend to be more general, and thus lead to less predictability of behavior, which is one reason their application may seem less consistent with the appearance of neutrality. *Cf.* CARDOZO, *supra* note 8, at 112-13 ("Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare."). The overall remedy is greater transparency.

only to the trial, but to all aspects of the judge's involvement with the case, including the possible referral to, and supervision of, other components of the court and affiliated agencies. Judicial management of discovery, adjournments, the paper flow, settlements, mediation, etc., should all be viewed as benefiting from transparent engagement aimed at maximizing access to justice. That the examples used here draw mainly on the drama of the courtroom comes from a desire to take head-on the fact that the greatest fears about judicial engagement (as well as the decided cases) appear to focus on the trial itself.[30]

II. WHAT THIS STRUCTURE SUGGESTS AS TO HOW JUDGES SHOULD APPROACH CONCRETE ISSUES IN JUDICIAL MANAGEMENT OF *PRO SE* CASES

The fundamental touchstone against which any change in procedure should be measured is whether it contributes to a truly neutral and accessible forum, that is to say whether it helps make sure that any litigant, regardless of whether he or she has a lawyer, is able to present his or her case to a neutral decision-maker. True neutrality is the creation of a forum in which such a goal is achieved. This is done by creating protocols, rules, and procedures which are, as a general matter, applied to all, regardless of whether they have lawyers, and which ensure that both those with and without lawyers have a chance to tell their story.

The above analysis should suggest that it is in fact far easier than is generally understood for a judge to move in this direction, and that if a judge does so, there will be no claim of non-neutrality. In other words, it is not "leaning over the bench," "putting a hand on the scale of justice," or "intervening to level the playing field." Rather it is, from day one, creating a fully level playing field in which those with or without lawyers are able to tell their stories and, in the words of Canon 3B(7), be "heard."

A brief medical analogy may be helpful. Assume that you have two people in a room, and both will be exposed to a disease. You know that one has already been vaccinated, and who it is. You are determined to be neutral. There are three approaches, all arguably neutral, but having very different consequences. You can refuse to vaccinate both. This is formally neutral, and is what the traditional view of legal neutrality says should be done. To follow that choice means that one person will get sick. You can vaccinate them both. This is equally neutral, and has a good public health outcome. It is the approach being advocated here, in large part because of its unassailable neutrality. Or, you can choose to vaccinate only the one who has not yet been vaccinated, saving resources, but arguably facing a charge of at least formal non-neutrality – one which interestingly would never be made in the public health context.[31]

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30. *See, e.g.*, cases cited *supra* notes 17-18.

31. There is one major place where the vaccination analogy breaks down. A courtroom is, at least to the first order, a zero-sum environment, one wins and one loses. Where the analogy is still correct, we hope, is that we do

A. GENERAL APPROACHES TO THE COURTROOM PROBLEM

These general approaches are offered as the beginning of a debate on how to best create a truly neutral courtroom. They apply primarily to the relatively simple problem of non-jury proceedings, although the general approaches offered may be of help in thinking through equivalent approaches for cases in which there is a jury.[32]

1. THE JUDGE SHOULD SET THE CONTEXT AND STRUCTURE OF THE HEARING

As described above, the key to combining neutrality and the appearance of neutrality in the courtroom is to establish from the start a general neutral process that will guarantee that all are given a true opportunity to be heard regardless of whether they have counsel and regardless of their literacy and language status.[33]

Such a general neutral process can be established by the judge explaining at the beginning of the proceeding that:[34]

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not believe that outcomes in that zero-sum game, who wins and who loses, should be too greatly determined by the ability to access a lawyer.

32. When a jury is present, a judge has to be concerned not only with signaling to the parties or the audience that he or she is non-neutral, but also with the even greater danger of the jury believing that it is being signaled to by the judge in his or her conduct. Moreover, the process of keeping inadmissible evidence from a jury is far more complicated than that of a trial judge giving only legal weight to properly admitted evidence. On the other hand, some of the explanation techniques detailed here might be helpful for a jury too.

33. This is the core recommendation in Albrecht et al., *supra* note 4, at 45-46. The detailed discussion below is in large part an elaboration of the analysis of that article. Indeed, the whole approach of this Article is very much inspired by Judge Albrecht's concrete day-to-day practice in Maricopa County Superior Court in Phoenix, Arizona, and her powerful descriptions of that practice in various forums, including Albrecht et al., *supra* note 4, at 45-46. *See also* ZORZA, *supra* note 4, at 75; Engler, *supra* note 3, at 2028-31.

34. There are similarities, but far from identity, with Minn. Conf. of Chief Judges, *Pro Se* Implementation Comm., Proposed Protocol to be Used by Judicial Officers During Hearings Involving *Pro Se* Litigants, *available at* http://www.ajs.org/prose/pdfs/Proposed_Protocol.pdf [hereinafter *Minnesota Proposed Protocol*]. In particular, this proposal suggests a greater structuring of the case, and permits greater engagement in the reception of evidence. For a more radical approach, see Goldschmidt, *The* Pro Se *Litigant's Struggle*, *supra* note 4, at 48-49.

Several judges have commented to the author that use of this full list is unrealistic, given the time constraints they face in their courts. In the end, the legal system may have to decide whether it is cheaper to increase judicial resources to enable the court to slow down, or to pay for counsel who would allow courts to maintain their momentum. A more optimistic analysis would suggest that time saved in avoidance of re-litigation and enforcement would repay investment in explanation.

In the somewhat different context of mediation, see MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION Standard III(A) (2001), *reprinted in* AM. BAR ASS'N SECTION OF DISPUTE RESOLUTION, DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 265 (Phyllis Bernard & Bryant Garth eds., 2002) (recommending that a family mediator commence the proceedings with an overview which is to include: the consensual nature of the proceedings, distinctions from other proceedings, the requirement of court approval of any settlement (where applicable), the right to independent advice, the possibility of separate sessions, the governing rules dealing with presence of counsel or others, confidentiality obligations, the possibility of suspension or termination of the process, and the right of the parties to terminate at any time).

- The procedures in the court are structured so that each side has the greatest possible opportunity to be heard.
- The judge will give each side the opportunity to explain whey there are in court and what they want, and then tell their story, and may ask anyone for clarification, explanation, or more detail. Each side has the right to object to evidence, but must give a good legal reason, and each side has the right to ask courteous relevant questions of the other.
- The judge may have to limit or cut off one or other party if they are drifting too far from what is relevant to the decision that has to be made.
- The judge will break the case up into steps and will explain what is happening in each step.
- The judge will explain at the beginning of each step what the basis for decision will be in that step, and what the parties need to prove or undercut in order to prevail.[35]
- When someone offers certain kinds of evidence, the judge will explain what must be shown about that evidence in order for it to be considered. If those conditions are not met, then the evidence may not be able to be considered, or may be given less weight. If the evidence is excluded, the judge will not consider it.
- That the other side may object to certain evidence, or what someone is saying. That evidence will only be ignored if those objections go to the reliability of the evidence, or must, for some other reason that will then be explained, be ignored.
- The judge may decide to stop the hearing and recommend that one or another party consult with the Self Help Center (if available), or with a lawyer, in order that they move forward as well as possible.
- If one party has counsel, explaining that the attorney will, of course, be allowed to play the traditional role of counsel within this structure, but that counsel will not be permitted to inappropriately take advantage of the fact that only one party has counsel.

If these explanations are part of the general introduction, they will come as no surprise and be seen as confirmation of the underlying neutrality of the proceeding, rather than inconsistent with it.

Several judges have noted the practical time difficulty of such a detailed recitation. Consideration should be given to alternative means of communicating

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35. *Cf. Minnesota Proposed Protocol, supra* note 34, at 1 ("Explain the elements"). This is an area in which a Self Help Center or other court preparation program is perhaps most appropriate to play this role, given the extent to which it may involve a dialog about facts with each party.

There is a lurking fear among some that if you tell litigants what they need to prove, those litigants will then lie to the court. Of course, litigants with lawyers can obtain this information from lawyers, but there is perhaps a faith that counsel will not allow themselves to be so used. *But see* ROBERT TRAVER, ANATOMY OF A MURDER 32, 35 (St. Martin's Press 1958) (Counsel to murder defendant, prior to explaining the law and possible defenses to murder, including insanity, comments that now they will discover if he is as clever as he thinks he is.).

the information. However, in the end, nothing can substitute for the parties hearing the neutrality commitment directly from the judge.

2. THE JUDGE SHOULD HAVE A PLAN AND FOLLOW IT

To be effective in this mode, the judge needs to have a plan for how to handle the case. If there are detailed papers, this plan needs to be based on the matters apparently in dispute. In any event, the plan should be a simple walk through the decisions needed to resolve the case, allowing each side to be heard. That plan clearly needs also to be based on an understanding of the governing law.

3. THE JUDGE SHOULD EXPLAIN WHAT HE OR SHE IS DOING

At each step the judge should explain what is going on – including repetition of the previously explained overall plan, and particularly any deviations from it, and the relation of the activity to general neutral practices. As decisions are made they might be announced and explained, heightening transparency.

4. THE JUDGE SHOULD ASK THE PARTIES AND PARTICIPANTS IF THEY UNDERSTAND WHAT IS HAPPENING

Throughout the process, the judge should have in place protective processes to make sure that the parties do understand what is going on and why. This should include asking if they understand, and seeking confirmation of understanding at critical points.

B. SPECIFIC EXAMPLES

These examples are drawn from conversations with a number of judges, who are nonetheless in no way responsible for the final product or suggestions, some of which might make them uncomfortable. For simplicity, these examples generally assume that neither party has counsel. If one party has counsel, then the same model might be followed, but permitting counsel to follow the traditional path, if desired, for each component, and subject to any needed and appropriate regulation of actions by counsel that might prevent the unrepresented party from having the full opportunity to present their case.

1. TAKING OF DIRECT TESTIMONY

The judge should swear in all the parties and witnesses at the beginning, then explain again that each side has the opportunity to tell their story on each of the issues that has to be decided, and the structure of the issues, and begin the first issue.

On the first issue to be decided, the judge may invite one party to tell their story, encouraging them to start by saying what they want from the court, or why

they are there and reminding them of what needs to be shown in order to obtain this.[36] Once completed, and once any clarification questions have been answered, the judge turns to the other party, allowing him or her first to ask clarification questions, and then to present their own story, itself subject to clarification questions. The judge may want to introduce this segment by explaining that the party may ask questions that might reasonably be expected to cast doubt on the story already heard.

When all has been heard on that issue, including checking with the parties that they understand what has been said, and that they feel that all has been laid out, the judge may issue a decision on that issue, and make clear the implications for the case as a whole.[37]

The judge then proceeds to the next issue, following the same template, ultimately making a decision on the merits, issuing a decision and order (preferably there in the courtroom) and checking that the parties understand the order, its details and what they are required to do. It might also be appropriate to check with the parties if there are any barriers anticipated to compliance, and if so to increase the specificity of the order, add reporting requirements, or the like.

2. HEARSAY EVIDENCE

Traditionally, hearsay evidence raises some of the greatest problems for the self-represented. It can lead to incomprehensible objections from opposing counsel, confused attempts to develop a foundation, and resentment all around.

Applying modularity and explanation when hearsay issues arise, the judge might want to refer to his or her introduction, ask the proponent of the evidence what they are trying to admit, explain the general law and then establish whether the relevant foundational facts are there, and if so, announce it.

3. DOCUMENTARY EVIDENCE

Documentary evidence raises the same issues, although it is more likely that there may be a need for a continuance to obtain foundational evidence. Such foundations should only be insisted upon if there is objection. Such objection should be asked to focus on the risk of non-accuracy of the proffered evidence.

4. REQUIRED DOCUMENTS

Where documents are required, there is nothing non-neutral about the judge making that clear in his or her initial summary of the case, and where appropriate,

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36. This might be by reference to, and repetition of, what has already been mailed out or given in printed form. *See* Albrecht et al., *supra* note 4, at 45.

37. *Compare with id.* at 46.

providing extra time to produce the needed document.[38]

5. FAILURE TO MEET THE ELEMENTS OF A PRIMA FACIE CASE

Similarly, the frequency of failure to meet the elements of a prima facie case or defense should be greatly reduced by the judge explaining those elements early in the proceedings. The difficult question is the extent to which a judge, at the end of a case-in-chief, should point out any missing element, even when the need for that element has been made clear at the beginning. Each judge needs to develop a consistent answer to this question. One possibility is for the judge to ask what in the testimony, in the opinion of the profferor, meets that element, without explicitly drawing repeated attention to any possible need for additional evidence. It may indeed be that the party has failed to make explicit an inference clear to him or her, but not yet to the judge, and which an attorney would have known the need to emphasize.

6. OBJECTIONS

Finally, judges must develop a consistent set of responses for situations when an attorney or a well-informed self-represented litigant uses disruptive objections to prevent a party from presenting his or her case. Objectors should, especially when an unrepresented party is present, always be required to give the reason for the objection, and not just in shorthand. If the objections are legally incorrect, then it is easy to overrule them, with explanation. If they are legally correct, but needlessly disruptive, and/or not preventing the receipt of irrelevant or harmful and correctly excludable testimony, then the objector should be asked to explain why the objection is helping the truth finding process and why the objection would lead to the exclusion of inadmissible evidence.[39]

III. WHAT THIS STRUCTURE SUGGESTS AS TO WHAT THE *MODEL CODE OF JUDICIAL CONDUCT* SHOULD SAY ABOUT THE NEUTRALITY PROBLEM IN JUDICIAL MANAGEMENT OF *PRO SE* CASES

One way of understanding the conundrum in which judges find themselves is to imagine a dialog between two judges on what the Model Code of Judicial Conduct tells them about how to act when they feel that a self-represented litigant is being taken advantage of by an attorney-represented one, or indeed by a better prepared or more belligerent self-represented one. Let's call the judges Judge Over Fray and Judge Into Fray. (Notwithstanding the fact that they are brother's, they sit in reasonable amity in the same jurisdiction.)

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38. *Compare with id.* at 48.
39. *Compare with id.* at 48.

Judge Into Fray: I just can't understand how you can stay aloof when a litigant loses just because they don't know, for example, that they have to show a change in circumstances to get a change in child support.

Judge Over Fray: Look, if I help someone by telling them what they have to show me, then I am in violation of Canon 2, which requires me to "promote[] public confidence in the integrity and impartiality of the judiciary."[40] And also Canon 3(B)(5) which says that "Judges shall perform judicial duties without bias or prejudice."[41] It is underlined by the comment to Canon 3(B)(5) which states: "A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."

Judge Into Fray: But if you don't do help, then aren't you failing to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law" as required by Canon 3 (B)(7).[42]

Judge Over Fray: No, you are ignoring the phrase "according to law." So long as I follow the substantive rules and procedure of the jurisdiction I can not be in violation of that section. Indeed, if I do intervene, then I may well be violating those rules themselves, and therefore also Canon 3 (B)(7).[43]

Judge Into Fray: Wait a minute, that's following form over substance. If your passivity leads to an obviously unjust result, aren't you in fact undercutting "public confidence in the integrity and impartiality of the judiciary" under Canon 2, and aren't you in fact stopping them from being "heard" in any real sense under Canon 3 (B)(5).[44] Remember that Canon (B)(5) which you relied

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40. Canon 2 of the *Model Code* reads, "A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES." MODEL CODE Canon 2 (1997). Section A of Canon 2 reads, "A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." MODEL CODE Canon 2A (1997).

See also id., Terminolgy, for the definition of impartiality in the *Model Code*, " 'Impartiality' or 'impartial' denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge."

41. Canon 3B(5) of the *Model Code* reads in full,

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

MODEL CODE Canon 3B(5) (1997).

42. Canon 3B(7) of the *Model Code* reads, "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." MODEL CODE Canon 3B(7) (1997).

43. *Id.*

44. MODEL CODE Canon 3B(5) (1997) ("A judge shall perform judicial duties without bias or prejudice . . . .").

The Comment to Canon 3B(5) reads,

> A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial

> on says that "A judge shall perform judicial duties without bias or prejudice . . .," and that the comment to (B)(5) adds that "A judge must perform judicial duties impartially and fairly." I repeat, "and fairly."
>
> Judge Over Fray: If I lean over the bench to help someone out, *no matter how impartial and fair I am trying to be in an ultimate sense,* I will be seen as violating Canon 2, because I will not be seen as acting consistent with the "impartiality of the judiciary, or Canon 3, because I am acting with bias."

Obviously this debate can go on forever. It suggests, however, that in the end the whole matter hinges on the definition of "fair[ness]" and that it would therefore be useful if the code, or rather perhaps just a Comment to Canon 3(B)(5) and (7), were to clarify that a judge who engages in neutral and transparent practices of engagement not inconsistent with governing law to make sure that all are heard, would not be undercutting the appearance of impartiality, but would be enhancing it.[45] The long term goal would be to advance an understanding that transparency and engagement are required for true neutrality.

One specific suggestion is that a new Comment to Canon 3B(7) should read as follows:

> When one or both parties is proceeding *pro se,* non-prejudicial and engaged courtroom management may be needed to protect the litigants equal right to be heard. This may include questioning witnesses, modifying the traditional order of taking evidence providing information about the law and evidentiary requirements and making referrals to agencies able to assist the litigant in the preparation of the case. A careful explanation of the purpose of this type of management will minimize any risk of a perception of biased behavior.

Under this proposal, a similar new comment to Canon 3B(5) would read:

> When a litigant is appearing *pro se,* affirmative, engaged, and non-prejudicial steps taken by a judge who finds it necessary to take such steps, as described in the Comment to Canon 3B(7), to make sure that all appropriate evidence is properly before the court, are not inconsistent with the requirements of Canon 3B(5).[46]

> expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

MODEL CODE Canon 3B(5) cmt. (1997).

45. Richard Zorza, Testimony to the ABA Joint Commission on Evaluation of the *Model Code of Judicial Conduct* (Dec. 5, 2003); *see generally* David Tevelin, Executive Director, State Justice Institute, Testimony to the ABA Joint Commission on Evaluation of the *Model Code of Judicial Conduct* (Dec. 5, 2003).

46. It is suggestive that the history of the *Model Code* shows a solicitude for "indigent persons and other disadvantaged persons and their lawyers." *See* E. WAYNE THODE, REPORTER'S NOTES TO *CODE OF JUDICIAL CONDUCT* 52 (1973). The Reporter to the Special Committee on Standards of Judicial Conduct described complaints about judicial behavior and the request made to "set a specific standard of courtroom conduct for judges" dealing with the indigent, as well as the rejection of the need for any population specific language: "The

IV. AN APPROACH TO APPELLATE REVIEW OF JUDICIAL ACTIONS IN *PRO SE* ACCESS CASES

It is far from easy to reconcile the relatively small number of cases dealing with judicial responses to the self-represented.[47] This Article suggests that the best way to understand them is as being about judicial discretion. The cases can best be read to suggest that judges have broad discretion concerning how to deal with the needs and circumstances of *pro se* litigants, provided they act within broad boundaries.

Not surprisingly, appellate courts are not sympathetic to trial judges refusing to correct errors within their own bureaucracies,[48] nor do they see courts generally having the power to waive jurisdictional requirements for those without a lawyer.[49] But between those two limits, they tend to be sympathetic to the dilemmas suffered by trial judges, and reluctant to second-guess them.[50] Thus almost all the cases sustain what the trial judge did, relying, when it is a self-represented litigant who appeals, on language that those who do not have a lawyer can not expect any special treatment,[51] and, more rarely, when it is the opponent of the self-represented litigant who appeals, on the care the judge took to maintain the underlying neutrality of the courtroom procedures.[52]

Committee rejected the suggestion as unnecessary. The standards of patience, dignity, and courtesy are the same in every proceeding . . . . Compliance with Canon 3A(3) [now Canon 3B(4)] will do far towards changing the image of our courts in the minds of a substantial segment of the public." *Id.* at 52; *see also id.* at 51 (citing a similar decision that no specific language needed to remedy problems of judicial misconduct towards the indigent, since the general requirement of "faithful[ness] to the law" of Canon 3B(2) (then Canon 3A[1]) met the need). This history highlights the need to make sure that neutral and all encompassing language does indeed protect the indigent and disadvantaged. *See generally* LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE (1992).

47. A relatively comprehensive listing, and attempted synthesis, appears in Albrecht et al., *supra* note 4

48. Rappleyea v. Campbell, 884 P.2d 126, 129-31 (Cal. 1994) (vacating default judgment even after a six-month period, since the default was caused by the clerk's misinformation to a self-represented litigant); Gamet v. Blanchard, 111 Cal. Rptr. 2d 439, 445 (Cal. Ct. App. 2001) (reversing the trial court's dismissal and citing the "confusing, indeed misleading, nature of the various orders and communications" from the court to the plaintiff). *But see* Boyer v. Fisk, 623 S.W.2d 28, 30 (Mo. Ct. App. 1981) (reinstating a default judgment notwithstanding assurances from the clerk's office that a filing was sufficient and holding that a self-represented couple did not exercise due diligence in relying on this advice, nor did they serve the document as was required on the face of a summons).

49. Kelley v. Sec'y, United States Dep't of Labor, 812 F.2d 1378, 1380 (Fed. Cir. 1987) (holding that a court cannot waive the consequences of a *pro se* litigant's failure to file an action within 60 days of notice in the federal register); Bowman v. Pat's Auto Parts, 504 So.2d 736, 737 (Ala. Civ. App. 1987) (holding that a trial court cannot waive the fourteen-day rule for the entry of an appeal following the entry of judgment on the docket).

50. Often the appellate opinion includes a lengthy, and sympathetic, recitation of the trial judge's efforts on behalf of the still unhappy litigant.

51. *E.g.*, Brown v. City of St. Louis, 842 S.W.2d 163, 165 (Mo. Ct. App. 1992) (dismissal for failure to comply with appellate rules).

52. Oko v. Rogers, 466 N.E.2d 658, 660-61 (Ill. App. Ct. 1984).

> Considerable latitude must be allowed in conducting a trial. The conduct and remarks of the judge are grounds for reversal only if they are such as would ordinarily create prejudice in the minds of the jury

However, beyond this deference, there may be a largely unspoken consensus that how judges deal with such cases goes very much to the core integrity of the judicial system, and must ultimately remain under the control of the appellate courts. This would suggest that now that the number of these cases is drawing attention to their significance, appellate courts may be open to a process for developing a more coherent body of law on how that discretion must be exercised, and the factors that should be taken into account in deciding how a trial judge should act, and how the judges actions should be reviewed.[53]

Among the factors that might be included in such a jurisprudence, and which already find some support in the cases are:[54]

A. NECESSITY OF RELIEF FOR A PARTY TO BE HEARD AND TO OBTAIN ACCESS TO JUSTICE

Whether the judicial intervention sought is critical to the party's obtaining access to justice and the right to be heard, or whether it is collateral to obtaining that right, should make a significant difference in how a refusal of intervention is viewed, or in whether the intervention being granted is open to challenge on appeal by the opponent. This factor should be crucial, required as it is by our conceptions of justice.[55]

HOW COMPLICATED IT WOULD BE FOR THE JUDGE TO ENGAGE IN THE REQUESTED BEHAVIOR

If what is being sought would be complicated and difficult for the judge to do, that is a factor mitigating against error in its denial.[56]

> . . . . 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.

Oko, 466 N.E.2d at 660-61.

53. As Professor Engler points out, too much should not be made of language apparently hostile to judicial sensitivity to *pro se* litigants. Engler, *supra* note 3, at 2014-16. Some come from criminal cases with a right to counsel, others depend on particular facts showing judicial patience and litigant provocativeness, and others a (hopefully changing) general discomfort with *pro se* litigants. *Id.*

54. It should be noted that these cases generally deal either with a specific action that was requested and denied at the trial level, and therefore the subject of appeal, or, more rarely, a judicial action that was objected to and challenged on appeal. The actions are therefore described here as specific "interventions," rather than the broader judicial structuring of the process encouraged in the remainder of this Article.

55. *Cf.* Gamet v. Blanchard, 111 Cal. Rptr. 2d 439, 446 (Cal. Ct. App. 2001) (citing a failure to avoid careless and harmful use of jargon and stating that "[t]he ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system").

56. Lombardi v. Citizens Nat'l Trust & Sav. Bank of L.A. 289 P.2d 823, 825 (Cal. Dist. Ct. App. 1956) (noting that due to the complexity of the dead-man's statute, to grant a pro se litigant's request for advice and assistance in presenting evidence might have brought the impartiality of the judge into question).

B. WHETHER THE REQUESTED BEHAVIOR WOULD THREATEN NEUTRALITY OR THE APPEARANCE OF NEUTRALITY

Courts will also look at whether the requested behavior would make it harder for the judge to continue to act in the required neutral role, or would make it more likely that he or she would not longer be viewed as neutral. Such a specific finding offers a powerful reason against error in the denial of the litigant's assistance request, and indeed, upon review, would show error and harm in the granting of the request.[57]

C. THE EXTENT OF CONSIDERATION OF ALTERNATIVE WAYS OF OBTAINING ACCESS TO JUSTICE

To the extent that the judge has considered alternative ways of facilitating access to justice for the party seeking help, that would militate in support of whatever decision the judge finally makes, whether that there is no alternative to the intervention sought, or that the intervention is not needed.[58]

D. THE EXTENT OF PRIOR EFFORTS BY THE JUDGE

Similarly, prior efforts by the judge to assist a litigant or make sure that he or she has access will tend to support appellate deference to the trial judge's decision about the appropriateness of continued and additional efforts on the trial judge's part, or indeed, the termination of such efforts.[59]

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57. Collins v. Arctic Builders, 957 P.2d 980, 982 (Alaska 1998) ("We are not concerned that specificity in pointing out technical defects in pro se pleadings will compromise the superior court's impartiality."); *Lombardi*, 289 P.2d at 825 (noting that the judge would have had a conflicted role if he had assisted the *pro se* litigant); *Oko*, 466 N.E.2d at 661.

> In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill, and understanding on the part of the trial judge with an overriding view of a fair trial for both sides.

Oko, 466 N.E.2d at 661; *see also* Plummer v. Reeves, 93 S.W.3d 930, 931 (Tex. Ct. App. 2003) (dismissing *pro se* appeal for lack of filing of brief with authorities and stating that "[o]ur being placed in the position of conducting research to find authority supporting legal positions uttered by a litigant . . . [would make us] no longer unbiased but rather [we would] become an advocate for the party."). The author of this Article accepts the validity of the *Plummer* court's general concern, but finds the argument here overblown and misplaced, given the extent of research performed by all competent appellate courts, their law clerks and staffs.

58. *Cf.* Nelson v. Gaunt, 178 Cal. Rptr. 167, 174-75 (Cal. Ct. App. 1981) (holding that where a judge gave time to an unrepresented defendant to make calls to obtain counsel before making him go to trial *pro se*, the judge did not unfairly coerce the defendant into representing himself at trial).

59. *See, e.g.*, Newsome v. Farer, 708 P.2d 327, 333 (N.M. 1985) (finding no error in dismissal for failure to attend requested document production meeting and noting that the trial judge had given special attention to discovery requests and had provided three hearings for the party to explain his failure).

E. THE GOOD FAITH OF THE PARTY SEEKING ASSISTANCE

Finally, inferences about the good faith of the party seeking assistance can be highly determinative. In particular, a trial judge's determination of bad faith of a party – even if only implicit – is very unlikely to be upset on appeal unless evidence in support of the finding is totally absent.[60] Similarly, both trial and appellate courts are likely to use evidence of good faith in support of intervention.[61]

F. UNFAIRNESS TO OPPOSING PARTY

Unfairness to an opposing party (as opposed to mere harm), provides a powerful reason in support of non-intervention, as the lack of unfairness indeed provides such support for intervention. While one with no counsel can not reap an advantage from that fact, nor should the party with counsel be able to reap benefit from that status.[62]

G. REASON FOR SELF-REPRESENTATION STATUS

This final issue is the elephant in the room, and our response to it offers great danger. As the data gathered so far confirms,[63] the vast majority of those who go to court without a lawyer do so because they cannot afford one. There is some support in the cases for the initially appealing idea that the judicial response to one who is in court trying in good faith to navigate a system built for lawyers

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60. *See, e.g., Lombardi*, 289 P.2d. at 824-25.

61. Among the cases demonstrating this use of good faith is Traguth v. Zuck, 710 F.2d 90, 95 (2nd Cir. 1983) (reversal for refusal to vacate default judgment for failure to answer; "[self-represented litigant] searched in good faith for a lawyer to represent her, and failing in that, she responded within that period diligently, if unskillfully, to every pronouncement of the Court.").

62. *See* Kasson State Bank v. Haugen, 410 N.W.2d 392, 395 (Minn. Ct. App. 1987) ("A trial court has duty to ensure fairness to a pro se litigant by allowing reasonable accommodation [to obtain attorney] so long as there is no prejudice to an adverse party.").

63. The data showing the extent to which it is poverty that is driving self-representation are collected at Greacen, *Self-Represented Litigants*, *supra* note 1. This data includes (1) an Idaho Court Assistance Program finding that 43 percent of its clients had incomes no more than $15,000 a year, *id.* at 3-4 (citing GINGER M. KYLE ET AL., HELPING SELF-REPRESENTED LITIGANTS IN IDAHO: AN EVALUATION REPORT ON THE IDAHO COURT ASSISTANCE PROGRAM (2000); (2) a 1991 Phoenix, Arizona study finding that more than 50 percent had incomes of $30,000 or less, *id.* at 3 (citing Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 561-62 (1993)); (3) the Van Nuys, California Legal Self Help Center finding that 56 percent of its clients were at or below the poverty line, *id* at 5 (citing EMPIRICAL RESEARCH GROUP OF THE UNIVERSITY OF CALIFORNIA SCHOOL OF LAW, EVALUATION OF THE VAN NUYS SELF HELP CENTER: FINAL REPORT (2001)); (4) Hennepin County, Minnesota's Legal Access Program finding that 76 percent of clients have incomes below 187 percent of the poverty line, *id.*, at 5 (citing SUSAN LEDRAY ET AL., HENNEPIN COUNTY DISTRICT COURT PRO SE PROGRAMS: INFORMATION AND AN EVALUATION OF EFFECTIVENESS (2002)); (5) a 1996 Maryland study finding that only 12 percent of those interviewed by the Family Law Assisted *Pro Se* Project had incomes over $50,000 a year, *id.* at 5 (citing Michael Milliman et al., *Rethinking the Full Service Legal Representation Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178, 1187 n. 28 (1997)).

without the help of one, just because the alternative is not eating, should surely be very different from the response to one who is taking extra time in court, and making demands for special treatment for whatever personal reasons that lead them to reject obtaining help they can afford.[64]

However, as judges have commented, the creation of a culture at the trial level in which judges feel empowered to ignore the access to justice needs of litigants whenever they feel that those litigants have resources or are "pains in the butt," would serve as a real brake on needed changes in judicial behavior. (This is particularly likely because many judges pre-judicial litigation experience is in the criminal area, and they therefore come with an experience-based pre-disposition to believe that those without lawyers not only appear *pro se* by choice, but are manipulative and attempting to game the system.)

The strong presumption – clearly supported by the data cited previously[65] – therefore should be that litigants who appear without lawyers do not do so out of choice, but rather because of financial barriers, and that courts should always structure themselves to meet the needs of those who end up without lawyers. To the extent that some litigants with resources are taking advantage of this judicial openness, that will soon become clear from their obstructive or manipulative behavior itself, and that behavior can be dealt with under the factors above, rather than as an economic factor. Occasional language in court opinions about financial status should be read merely as additional support for the access-fairness of measures taken by the judge to deal with such obstruction.

It is significant that most of the above factors focus less on the specifics of the intervention, and more on the overall context of the case. Typical components of this context include the judge's other actions, the need for the intervention in context, and the overall impact on the neutrality of the proceeding. In other words, they support the general approach urged in this Article, that is, the creation of an access friendly environment in the courtroom, in which appropriate actions ensuring the right to be heard can be taken whenever needed.

V. SOME EARLY DIRECTIONS FOR EMPIRICAL RESEARCH

A. EXPERIMENTS WITH CHANGES IN COURTROOM PROCESSES

There is need for conscious and rigorous experimentation with changes in courtroom procedure. The creation of one or more court laboratories would make

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64. Cases in which the reason for lack of counsel are cited in the analysis include: *Traguth*, 710 F.2d at 94-95 (reversal for refusal to vacate default judgment for failure to answer; "[self-represented litigant] searched in good faith for a lawyer to represent her"); Gamet v. Blanchard, 111 Cal. Rptr. 2d 439, 442 (Cal. Ct. App. 2001) (citing plaintiff's involuntary self-represented status); *Lombardi*, 289 P.2d at 825 ("If plaintiff had a legitimate claim against this estate for $25,000 it would have been an easy matter to employ competent counsel to represent him in the trial court as he has now done at this late date on appeal.").

65. *See* Greacen, *supra* note 1.

possible systematic testing of impact on access, on outcomes and on the perceptions of litigants and the parties of changes like those suggested in this paper.[66]

B. DEVELOPMENT OF OUTCOME MEASURES AND OUTCOME MEASUREMENT METHODOLOGIES

This research will require extensive work on the development of ways to measure both court processes and outcomes. Astonishingly, there is little agreement in the field on how this should be done, and indeed little agreement that it is appropriate to measure and compare courtroom outcomes.

C. EXPERIMENTS WITH PERCEPTIONS OF JUDICIAL ENGAGEMENT AND NEUTRALITY

We also need to find out more about how the public views judicial behavior, and in particular how they view courtroom interventions and engagement in the interest of neutrality. Such information could be obtained by interviewing observers in such a court laboratory, by setting up dummy hearing scripts, with focus groups observing innovations, or by more general surveys of how people react to what happens in courtrooms.

D. STUDIES OF THE EXTENT TO WHICH NORMS, SKILLS, AND EXPERIENCES FROM THE MEDIATION CONTEXT CAN BE TRANSFERRED TO THE COURTROOM

Given the similarity of the challenge a mediator faces in maintaining neutrality, while aiming for a just result (notwithstanding differences in power, skill, and resources between the parties) it would be well worth a sustained study of the possible uses of the learnings from that context into the courtroom.[67]

E. LONG-TERM RESEARCH CAPACITY

These and other related research tasks can only be completed if the justice system develops a sophisticated long-term research capacity.

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66. Such a concept is explored in more detail in ZORZA, *supra* note 4.

67. *See generally* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994), *reprinted in* AM. BAR ASS'N, SECTION OF DISPUTE RESOLUTION, DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE app. A (Phyllis Bernard & Bryant Garth eds., 2002); James J. Alfini, *Mediation Ethics*, AM. BAR ASS'N, SECTION OF DISPUTE RESOLUTION, DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 65 (Phyllis Bernard & Bryant Garth eds., 2002).

CONCLUSION

We may well be on the verge of a fundamental revolution concerning the way courts deal with the self-represented. Such a revolution should be guided by an understanding of the complex pressures on judges, and by an understanding of how they can be transcended by changes in expectations, rules, and the conduct of the courtroom itself.