# Access, Flexibility, and Patience

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Judges are not required to be bumps on a log in their own courtrooms, just spectators as proceedings bog down and hapless self-represented litigants flounder in confusion or attorneys use court procedures to trip up the attorneyless. Judges can use the authority they have and employ in every case, if not to level the playing field for the unrepresented (probably impossible), to at least correct the tilt a little and smooth out some of the hazards, reducing the potential for miscarriages of justice.

Over 35 jurisdictions have adopted a provision in their code of judicial conduct to encourage judicial flexibility in cases involving self-represented litigants, acknowledging that exercise of that discretion is consistent with the requirement of judicial impartiality.[1] Many have adopted comment 4 to Rule 2.2 of the 2007 American Bar Association *Model Code of Judicial Conduct:* "It is not a violation of this Rule"—which requires a judge to be fair and impartial—"for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[2]

Other states have added to the text of the code: "A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard." That language was proposed by the Conference of Chief Justices and the Conference of State Court Administrators.[3] By placing that permission in the rule itself, not just a comment, this version emphasizes the importance of the principle, and its active voice is stronger and the wording more straightforward than the ABA model.

Some of the states have elaborated on the purpose of the provision. For example, the Arkansas code explains: "The growth in litigation involving self-represented litigants and the responsibility of courts to promote access to justice warrant reasonable flexibility by judges, consistent with the law and court rules, to ensure that all litigants are fairly heard."[4]

Several of the states explain what the provision does not mean. For example, the Colorado code notes that "self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants."[5] The Indiana comment states:

> A judge's ability to make reasonable accommodations for self-represented litigants does not oblige a judge to overlook a self-represented litigant's violation of a clear order, to repeatedly excuse a self-represented litigant's failure to comply with deadlines, or to allow a self-represented litigant to use the process to harass the other side.[6]

Many state versions include examples of the types of judicial engagement encouraged in cases involving self-represented litigants. For example, the D.C. code comments:

> Steps judges may consider in facilitating the right to be heard include, but are not limited to, (1) providing brief information about the proceeding and evidentiary and foundational requirements, (2) asking neutral questions to elicit or clarify information, (3) modifying the traditional order of taking evidence, (4) refraining from using legal jargon, (5) explaining the basis for a ruling, and (6) making referrals to any resources available to assist the litigant in the preparation of the case.[7]

As the Ohio code notes, these are "affirmative, nonprejudicial steps" that "individual judges have found helpful."[8]

These measures are not extraordinary departures from business as usual but reflect what many judges already do to facilitate proceedings and not just in cases involving pro se litigants. (These "accommodations" would also be helpful to inexperienced attorneys, litigants who may be poorly represented, witnesses, and the press and public who may be observing.) Judges should be explaining their rulings and avoiding legalese in every case. Judges often ask questions to clarify testimony even when

**Footnotes**

1. *See* Nat'l Ctr. for State Cts., Self-Represented Litigants and the Code of Judicial Conduct (May 2019), https://www.ncsc.org/__data/assets/pdf_file/0030/15798/proselitigantsjan2016.pdf.
2. Model Code of Jud. Conduct r. 2.2 cmt. 4 (Am. Bar Ass'n, 2007), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/commentonrule2_2/.
3. Nat'l Ctr. for State Cts., Resolution 2, In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Representing Litigants (CCJ/COSCA, 2012), https://www.ncsc.org/__data/assets/pdf_file/0023/23747/07252012-support-expanding-rule-aba-model-code-judicial-conduct-self-representing-litigants.pdf (The resolution also suggested that "states modify the comments to Rule 2.2 to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants").
4. Ark. Code of Jud. Conduct r. 2.2 cmt. 4 (effective Dec. 15, 2016), https://opinions.arcourts.gov/ark/cr/en/1874/1/document.do?null&failedCaptcha=true.
5. Colo. Code of Jud. Conduct r. 2.6 cmt. 2 (2010), http://www.coloradojudicialdiscipline.com/PDF/Code_of_Judicial_Conduct%20-%20July%2031%202010.pdf.
6. Ind. Code of Jud. Conduct r. 2.2 cmt. (2019), https://www.in.gov/courts/rules/jud_conduct/index.html#_Toc8987510.
7. D.C. Code of Jud. Conduct r. 2.6 cmt. 1A (2012), https://cjdt.dc.gov/sites/default/files/dc/sites/cjdt/publication/attachments/code_of_conduct.pdf.
8. Ohio Code of Jud. Conduct r. 2.6 cmt. 1A (2009), https://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf.

the interrogator is an attorney and the witness has been prepped by counsel. Judicial impartiality cannot reasonably be construed as prohibiting judges from demystifying proceedings or requiring judges to be "unduly rigid," "formulaic," and "overly technical" in any case, much less one involving self-represented litigants.[9]

These efforts cannot be considered an unfair advantage for self-represented litigants in any specific case, particularly if they become routine whenever a case needs an engaged judge. To further mitigate any suggestion of judicial bias, many court systems have developed informative self-help webpages, FAQs, pamphlets, plain language forms, and other resources that are regularly made available to self-represented litigants even before the case goes near a judge so that there is less occasion for the judge to intervene.

In addition to the flexibility authorized by comment 4, providing pro se litigants "the opportunity to have their matters fairly heard" requires an emphasis on a fundamental rule in the code:

> A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.[10]

A disrespectful courtroom atmosphere created by the judge is a substantial impediment to a fair and impartial hearing for all involved. Thus, in cases involving self-represented litigants, a judge must not be intimidating, mocking, threatening, sarcastic, belittling, discouraging, hostile, or condescending. That is true in every case, of course, but appropriate judicial temperament takes on special significance in cases without adequate representation on all sides.

Unrepresented litigants seem to bring out the bully in some judges,[11] but even the most well-meaning may feel their judicial temperament start to buckle under the frustration of proceedings with self-represented litigants. (Not that attorneys are always as prepared, competent, and professional as judges wish.) As the Louisiana Supreme Court explained:

> Judges are called upon to render difficult decisions in sensitive and emotional matters. Being in court is a common occurrence for judges, but for litigants, especially pro se litigants, a courtroom appearance can be an immensely difficult experience. Litigants appear before judges to have their disputes resolved. Judges serve the public, in part, by setting an example in how to resolve these disputes in a patient, dignified, and courteous manner. If a judge acts belligerently, those before the judge believe belligerence is

9. *See* In re Eriksson, 36 So. 3d 580 (Fla. 2010). One day while presiding over a series of domestic violence injunction hearings, the judge provided no assistance to the pro se petitioners and consistently referred to his duty to remain neutral. Instead of asking the petitioners whether they wanted to testify, the judge asked, "Who is your first witness?" and dismissed petitions if petitioners failed to produce independent witnesses because petitioners did not know they were allowed to testify in their own cases. The judge refused to admit police reports and the petitioners' own sworn statements because he considered them hearsay. The judge dismissed petitions that alleged repeat violence if the petitioner was only able to establish one act of violence. The judge also questioned petitioners about who instructed them to come to court, asking, for example, "Who sent you here?" and "Who told you to file this?" As the calendar proceeded, the judge started to attempt to address the substance of the petitions pending before him. In some cases, he asked petitioner to "look in the mirror" to identify their first witness. The Court concluded that the judge's process and approach impeded the petitioners' ability to obtain the relief and protection they sought, "penalized pro se petitioners for being unfamiliar with the judicial system," and "discouraged vulnerable individuals from exercising their access to justice."
10. Model Code of Jud. Conduct r. 2.8(B) (Am. Bar Ass'n, 2007), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_8decorumdemeanorandcommunicationwithjurors/.
11. *See, e.g.,* Holt, Case No. 2013-035 (Ariz. Comm'n on Jud. Conduct May 31, 2013) (Pub. Reprimand), https://www.azcourts.gov/portals/137/reports/2013/13-035.pdf (judge described pro se criminal defendant's legal arguments as "stupid" and "screwy" and stated to him "If you don't like it, move to Mexico"); Madanick, Case No. 2013-085 (Ariz. Comm'n on Jud. Conduct June 27, 2013) (Pub. Reprimand), https://www.azcourts.gov/portals/137/reports/2013/13-085.pdf, (judge berated pro se litigant for attempting to cite Arizona law in small claims proceeding, advised parties against "quoting any of the rules or regulations of Arizona law," and displayed a "bullying tone and demeanor"); Fletcher, Case No. 2015-125 (Ariz. Comm'n on Jud. Conduct August 14, 2015) (Pub. Reprimand), https://www.azcourts.gov/portals/137/reports/2015/15-125.pdf, (after a pro se plaintiff briefly described the relief she was requesting, judge asked sarcastically, "You're done. Really?", stated that she had not meet her burden of proof, and entered judgment for the defendant, but then dismissed the case without prejudice); McMurry, Case No. 2019-176 (Ariz. Comm'n on Jud. Conduct November 8, 2019) (Pub. Reprimand), https://www.azcourts.gov/portals/137/reports/2019/19-176.pdf (judge spoke to pro se plaintiff in a condescending and mocking tone and adamantly attempted to dissuade her from exercising her right to a jury trial); Comparet-Cassani (Cal. Comm'n on Jud. Performance Aug. 16, 2011) (Pub. Admonishment), https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Comparet-Cassani_Pub_Adm_8-16-11.pdf (judge revoked a criminal defendant's pro per status and spoke harshly to him, repeatedly stating that she did not believe him, grilling him on cases he had cited in his motion, and stating three times that he was lying to the court); McDonald (Ky. Jud. Conduct Comm'n August 12, 2013) (Pub. Reprimand), https://kycourts.gov/Courts/JCC%20Actions%20Documents/2013FindingsFactsMcDonald.pdf, (judge refused to allow a pro se defendant in a civil case to present any argument because he was not a lawyer, summarily entered an injunction against the defendant, and awarded attorney's fees of $11,579.20); *In re* Newberry Cty. Magistrate English, 625 S.E.2d 919 (S.C. 2006) (judge found pro se defendants guilty based solely on police incident reports); *In re* Walsh, 587 S.E.2d 356 (S.C. 2003) (judge required pro se defendants who requested jury trials to appear in court once a week and answer a "jury trial roll call" and to attend pretrial conferences and enter into discussions with the prosecutor); *In re* Eiler, 236 P.3d 873 (Wash. 2010) (judge engaged in a pattern of deriding the intelligence of pro se litigants who appeared before her and rudely and impatiently interrupting them).

acceptable. Judges have an opportunity to teach by example and demonstrate those attributes which all should strive to possess.

> Judges are tasked with balancing often competing considerations on the scales of justice. The obligation of a judge to be patient, dignified, and courteous is not inconsistent with affording a judge discretion to be appropriately decisive, forceful, and stern so as to maintain order and decorum in the courtroom. Often a judge's patience is tested when simultaneously confronted with crowded dockets to be managed and countless difficult decisions to be made. Litigants occasionally lash out at the judge if their side does not prevail, inappropriately casting aspersions on the judge. However, judges must strive to be patient in the face of these challenges.[12]
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> Thus, judges need to be alert to signs that they are losing control of their temper and, therefore, the proceedings in cases involving pro se litigants.

Moreover, there are particular lapses of judicial civility only likely in cases involving self-represented litigants.

Judges must not disparage a litigant's self-represented status. While a judge may point out available alternatives, failure to respect a litigant's decision to represent themselves (which may, after all, be compelled by economics) and commenting on the perceived foolishness of that choice inevitably creates the perception that the judge cannot see past the absence of an attorney and will only listen when a party is represented.

Further, a judge must address unrepresented litigants with the same formality — "Mr.," "Ms.," or "Mrs."— as attorneys, not by their first name. On the other hand, judges must not treat attorneys appearing against pro se litigants with familiarity. Even assuming first names, jokes, personal references, and casual conversations about other cases, bar events, and professional history are appropriate at any time in a courtroom, a judge must be careful in cases involving self-represented litigants not to create the impression that they and any attorneys in the case belong to a professional fraternity from which non-attorneys are excluded or create the appearance that an attorney has special access to the judge that will benefit the attorney's client. If a self-represented litigant sees a judge chatting with an attorney just before or after a hearing, the litigant could reasonably wonder if they are talking about the case even if they are not and will reasonably question the judge's impartiality.

In addition, the judicial duty imposed by the code to require appropriate demeanor from court staff is particularly important in cases involving self-represented litigants as staff probably have more contact with self-represented litigants than they do with attorneys and than the judge does. Finally, judges also have an affirmative duty under Rule 2.8(B) to require attorneys to be patient, dignified, and courteous, meaning judges should not allow an attorney to bully or try to take unfair advantage of a litigant unprotected by counsel.

As a justice of the Arizona Court of Appeals argued, albeit in dissent:

> The courts do not treat a litigant fairly when they insist that the litigant — unaided and unable to obtain the services of a lawyer — negotiate a thicket of legal formalities at peril of losing his or her right to be heard. Such a practice manifestly excludes the poor and the unpopular, who may be unable to obtain counsel, from access to justice.
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> Meaningful access requires some tolerance by courts toward litigants unrepresented by counsel. *Pro per* litigants are by no means exempt from the governing rules of procedure. But neither should courts allow those rules to operate as hidden, lethal traps for those unversed in law. This may require some degree of extra care and effort on the part of trial judges who already labor long and hard at a mushrooming caseload. But the alternative slams the courthouse door in the face of those who may be in greatest need of judicial relief, all for the sake of ease of administration.[13]

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12. *In re* Ellender, 16 So. 3d 351 (La. 2009) (30-day suspension without pay for judge who suggested that a petition for protection from abuse was inconsequential, suggested approval of severe corporal punishment of a child, and treated the petitioner in a condescending, demeaning, and impatient manner).
13. White v. Lewis, 804 P.2d 805, 815-816 (Ariz. Ct. App. 1990) (Lankford, J., dissenting).