Judicial Accomodation of Pro Se Parties

Michael Roundy

A fundamental facet of our criminal legal system is that every "litigant" (defendant) is entitled to be represented by an attorney.[1] What is equally fundamental, though less frequently invoked in the criminal context, is the right of an individual to represent him- or herself.[2] Self-representation is not merely the default consequence of an inability to afford an attorney, it is an affirmative right. In *Faretta v. California*, a criminal case, the court held that forcing the defendant against his will to accept a state-appointed public defender rather than allowing him to conduct his own defense violated rights "necessarily implied" in the Sixth Amendment and was "contrary to his basic right to defend himself if he truly wants to."[3]

As there is no underlying right to counsel in most civil circumstances, it is unsurprising that judges face an enormous number of pro se litigants in civil cases, and in particular in the family courts. (Pro se parties may also be referred to as self-represented, unrepresented, or pro per (*in propria persona*) parties.) A growing number of litigants engage in the process without the benefit of counsel. As much as 80-90% of family cases in one study involved at least one party—and in many cases, both parties—who were not represented by counsel.[4]

While an inability to afford counsel is typically the primary factor underlying an individual's decision to represent themself, a fair number of people who in theory may be able to afford an attorney also choose not to engage one, as an affirmative cost-avoidance choice.[5] Another motivating factor for litigants opting to represent themselves is the degree of complexity of the case. Matters perceived to be simple or with not much at stake may tend to leave litigants confident that they can handle the matter on their own.[6] Other factors may also contribute to a person's decision to represent themselves, such as prior experience and familiarity with the courts, or a level of education or professional experience that gives them the confidence to wade through the paperwork involved and figure out the process.[7] In some cases, the pro se party simply has an unreasonable view of the strength of their own case. They may have had counsel in the past, who withdrew. Having shopped the case around, they have been unable to find an attorney willing to represent them, so they proceed on their own.[8]

While an individual has the right to represent themself in matters before the courts, this right does not normally extend to corporations.[9] A corporation is usually required to retain counsel and cannot represent "itself" through the company's CEO or other officer who is not an attorney.[10] This becomes a particular issue when a small incorporated business or LLC becomes a litigant. Such businesses are often in practice, if not in legal terms, the alter ego of one individual, and it can at times be difficult for that individual to grasp why he or she cannot represent the company. Nevertheless, courts will often strictly enforce the requirement that a company must retain counsel to proceed in court. In *Varney Enterprises*, for example, the Massachusetts Supreme Judicial Court held that the CEO of a closely held corporation, who was not a licensed attorney, could not represent the company in connection with claims or defenses exceeding the small claims threshold amount.[11] The Court noted that although a state statute permitted "parties" to manage and prosecute or defend their own cases, courts in other jurisdictions had consistently construed such statutes to apply only to natural persons, not corporations.[12]

Civil litigators who have not yet faced off against a pro se litigant may think they are missing out on the proverbial easy win.[13] The reality is that litigating against a pro se party can be among the more difficult cases to handle, presenting unexpected and frustrating challenges that one does not normally face when the opposing party is represented by another attorney. Unrepresented parties often lack a familiarity with the judicial process, the litigation process, court rules, common practices, or just an understanding of the pragmatic benefits of working coopera-

Footnotes

1. See Gideon v. Wainwright, 372 U.S. 335 (1963) (relying upon principles grounded in the Sixth Amendment to the U.S. Constitution).
2. McKaskel v. Wiggins, 465 U.S. 168, 174 (1984) (noting that the right to have the assistance of counsel also implies a right to conduct one's own defense).
3. Faretta v. California, 422 U.S. 806, 817-19 (1975).
4. Natalie A. Knowlton, Logan Cornett, Corina D. Gerety & Janet Drobinske, Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court, Institute for the Advancement of the American Legal System, May 2016, https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf.
5. Knowlton et al., *supra* note 4, at 15.
6. *Id.* at 16; Alice Sherren & Donald Patrick Eckler, *What the Ethics Pros Say About Pro Se Litigants*, 11 Prof. Liability Def. Q., (2017), https://www.pretzel-stouffer.com/wp-content/uploads/2019/08/11.1.17_Legal.pdf.
7. Knowlton et al., *supra* note 4, at 17.
8. Sherren & Eckler, *supra* note 6.
9. See, e.g., 28 U.S.C. § 1654 ("In all the courts of the United States the parties may plead and conduct their own cases personally").
10. See, e.g., Varney Enterprises, Inc. v. WMF, Inc., 402 Mass. 79 (1988).
11. *Id.* at 81. Small claims procedures may permit a company officer to represent the company, but most other venues will not.
12. *Id.* at 82 (citing In re Las Colinas Dev. Corp., 585 F.2d 7, 12 (1st Cir. 1978), *cert. denied sub nom.* Schreibman v. Walter E. Heller & Co., 440 U.S. 931 (1979), and Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc., 60 Hawaii 372, 376 (1979)).
13. John M. Burman, Dealing with an Opposing Party Who is Proceeding Pro Se, 31 Wyoming Law., 1 (June 2008).

tively with the opposing party or counsel to help move the case through the process more quickly and with a minimum of disruptions that ultimately have no material impact on the outcome. Pro se parties may take die-on-the-hill stands on ultimately trivial issues, fail to understand or follow procedural requirements, or unexpectedly engage in ex parte communications with the court. Just as these issues may cause difficulties for opposing counsel, they pose unique challenges for judges and court personnel as well. While courts may want to show a certain amount of deference to inexperienced pro se litigators, they must also keep an eye on the efficient administration of justice, and on the overall fairness of the process to all parties.

GUIDANCE FOR JUDICIAL OFFICERS

Case law, rules of procedure, codes and rules of judicial conduct, advisory ethics opinions, and other resources provide a framework of guidance to judges and other court personnel on how to handle issues that commonly arise in cases involving pro se litigants. These starting points for judicial conduct may be further informed by consideration of a number of common scenarios and issues that courts have encountered.

Pro se litigants are "presumed to have knowledge of the law and of correct legal procedures and [are] held to the same standard as all other litigants."[14] And while most courts try to apply that same standard evenly and fairly, the impulse to give deference to a litigant who is inexperienced in the ways of litigation can at times lead a judge to defer too much.

One of the most immediate and basic barriers a pro se party faces in advancing their case through the judicial process is a lack of understanding of the process itself or of the stages of a case. Not understanding what they should do next, they allow their case to languish on the docket until enough time goes by for opposing counsel to move to dismiss the case for lack of prosecution. Some courts, whether by rule or by established procedure, will automatically schedule the next step in the process on the court's calendar, so that each appearance of the parties in court automatically leads to the scheduling of the next appearance, often providing the litigants with detailed instructions concerning the next step.[15] Yet, judges need not rely only upon such established rules or procedures to take control of the cases assigned to them. It is certainly within the scope of judicial discretion to set a clear "next event" deadline or status conference that will help keep pro se (and represented) litigants moving the case forward, even if no rule or procedure requires it. Explaining the next steps and emphasizing the date that the parties must next appear in court may go a long way toward avoiding no-show litigants who may not fully appreciate the significance or importance of a written hearing notice received in the mail.

CODES OF JUDICIAL CONDUCT

"There can be a fine line between accommodating a... pro se litigant and affirmatively helping them..."

There can be a fine line between accommodating an inexperienced pro se litigant and affirmatively helping them with their case. Rules of Judicial conduct can be of assistance in guiding the judge's thinking and understanding of the boundaries necessary to ensure that all litigants, represented and unrepresented, receive a fair day in court.

ABA Model Code of Judicial Conduct, Rule 2.2, requires that "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Indeed, all of Canon 2 of the Model Code is concerned with the performance of judicial duties in an impartial, competent, and diligent manner. Rule 2.2 is often discussed in connection with interactions with pro se parties. Comment 4 to Rule 2.2, added in 2007, notes that "[i]t is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." This comment, although passively worded, has often been interpreted broadly as encouraging judges to exercise a fair amount of their discretion in determining what kind of accommodations fall within the scope of the rule. As the reporter's comments to the rule indicate, comment 4 makes clear that a judge does not compromise his or her impartiality by merely providing accommodations to pro se litigants unfamiliar with the legal system.[16] On the other hand, judges should reject "unreasonable" demands for help that would give the pro se party an unfair advantage.[17] As with many legal issues, this raises the ever-present question of what constitutes a "reasonable" accommodation?

The underlying ethos of Rule 2.2 and comment 4 have found expression in decisional law as well. In *Blair v. Maynard*, the West Virginia Supreme Court stated affirmatively that the goal of achieving substantial justice "commands that judges painstakingly strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules."[18] Because justice is served by making reasonable accommodations, judges are encouraged to avoid rigidity and excessively technical or formal requirements, where accommodations may help provide inexperienced parties with meaningful access to the courts.[19]

Comment 4 to Rule 2.2 has been adopted verbatim in at least a dozen states.[20] At least 14 others have adopted an expanded version of comment 4, some even incorporating the language into the Rule itself.[21] The Maryland Code of Judicial Conduct, Rule 2.2 cross-references an explanatory comment to its Rule 2.6

14. Kilroy v. B.H. Lakeshore Co., 111 Ohio App. 3d 357, 363 (1996).
15. Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 Ct. Rev., 14-15 (2003), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1124&context=ajacourtreview.
16. Jona Goldschmidt, *Judicial Ethics and Assistance to Self-Represented Litigants*, 23 Just. Sys. J., 327 (quoting reporter's comments) (2007).
17. *Id.*
18. Blair v. Maynard, 324 S.E.2d 391, 396 (W. Va. 1984).
19. Cynthia Gray, *Pro se Litigants in the Code of Judicial Conduct*, 36 Judicial Conduct Reporter, 1, 6 (2014), https://www.ncsc.org/__data/assets/pdf_file/0013/15250/jcr-fall-2014.pdf (discussing and quoting White v. Lewis, 804 P.2d 805 (Ariz. Ct. App. 1990) and In reEriksson, 36 So. 3d 580 (Fla. 2010)).
20. Gray, *supra* note 19, at 6.
21. *Id.*

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(Ensuring the Right to Be Heard), which gives voice to the underlying rationale for making reasonable accommodations: "Increasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively."[22] Such glosses on and expansions of the ABA language seek to affirmatively state a judge's discretion to afford accommodations, rather than relying on the passive "not a violation" language.[23] Yet, some states have pulled the language in the other direction as well, reminding judges that accommodations should not give pro se litigants "an unfair advantage."[24] This is the tension of which judges must be mindful when accommodating a self-represented party's lack of familiarity with the court or litigation processes.

While those principles may guide a judge's thinking and actions, they do not directly help the judge determine what will be considered "reasonable" under the circumstances. As an aid to this process, several states have provided some additional guidance, including examples.[25] Many of these common-sense examples are not only "reasonable accommodations" to the self-represented, they constitute good or best practices in managing the court's dockets, generally. The Colorado Code of Judicial Conduct provides this list of examples:[26]

- Liberally construing pleadings;
- Providing brief information about the proceeding and evidentiary and foundational requirements;
- Modifying the traditional order of taking evidence;
- Attempting to make legal concepts understandable;
- Explaining the basis for a ruling; and
- Making referrals to any resources available to assist the litigant in preparation of the case.

Despite such accommodations, the Code is clear that self-represented parties must still "comply with the same substantive law and procedural requirements" as any represented party.[27]

Some additional examples from other jurisdictions may provide additional guidance to judges in all jurisdictions:[28]

- Informing litigants what will be happening next in the case and what is expected of them;
- Refraining from the use of legal jargon;
- Explaining legal concepts in everyday language;
- Asking neutral questions to elicit or clarify information;
- Permitting narrative testimony; and
- Allowing litigants to adopt their pleadings as their sworn testimony.

As these accommodations do not inherently favor one litigant over another, they are likely to be regarded as "reasonable" in most jurisdictions.

OTHER RESOURCES

Some states have gone a step further, anticipating the pro se party's need for assistance, and have published guidelines addressed directly to the unrepresented litigant. For example, in Massachusetts, the state publishes an online guide called "Representing Yourself in a Civil Case" on the state website.[29] The page provides links to discrete topics that describe the process of representing oneself, from the filing of the case, to what "service" is and how to accomplish it, to what "discovery" is and how to conduct it, through going to trial, how to present evidence, and what happens next after a decision is made by the court.[30] The Federal Bar Association's Access to Justice Task Force publishes a 60-page guide for self-represented parties, offering a variety of tips, pre-suit considerations, advice on finding an attorney, procedural guidance, sample forms, an overview of case management procedures, a glossary of terms, discovery, ADR, dispositive motions, trials and appeals.[31] The Minnesota Judicial Branch provides an online page of resources for parties representing themselves, including answers to frequently asked questions, tips, and a page of tools and other resources.[32] In addition to providing a wealth of information for the self-represented, these kinds of guides are also a useful resource for judges trying to understand the kinds of basic access issues that pro se litigants who appear before them are likely to be struggling with.

Massachusetts also provides an extensive set of Judicial Guidelines, with commentary, to assist judges in managing civil hearings involving self-represented parties.[33] Much of the commentary includes additional suggestions for the exercise of judicial discretion. Some of these suggestions fall within the scope of those already addressed above. Others provide further

22. Model. Code of Jud. Conduct r. 2.6 cmt. 2 (Am. Bar Ass'n 2010), https://www.courts.state.md.us/sites/default/files/import/rules/reports/codeofjudicialconduct2010.pdf.
23. Gray, *supra* note 19, at 6 (discussing and quoting California's code, stating affirmatively that "a judge has discretion to take reasonable steps … to enable the litigant to be heard.")
24. *Id.* at 7 (discussing District of Columbia, Louisiana, Maryland, and Nebraska codes of judicial conduct).
25. *Id.*
26. Colo. Code of Jud. Conduct r. 2.6 cmt. 2 (July 1, 2010) (https://www.courts.state.co.us/userfiles/file/Code_of_Judicial_Conduct.pdf).
27. *Id.*
28. Gray, *supra* note 19 at 7 (citing Colorado, District of Columbia, Iowa, Louisiana, Ohio, and Wisconsin Codes of Judicial Conduct).
29. Representing Yourself in a Civil Case, https://www.mass.gov/representing-yourself-in-a-civil-case (last visited March 3, 2022).
30. *Id.*
31. Representing Yourself in Federal District Court: A Handbook for Pro Se Litigants, Fed. Bar Ass'n (2019), https://www.fedbar.org/wp-content/uploads/2019/12/Pro-Se-Handbook-APPROVED-v2019-2.pdf.
32. Representing Yourself in Court, https://www.mncourts.gov/Help-Topics/Representing-Yourself-in-Court.aspx (last visited March 3, 2022).
33. Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, https://www.mass.gov/guides/judicial-guidelines-for-civil-hearings-involving-self-represented-litigants-with-commentary [hereinafter "Judicial Guidelines"].

insight into what is considered an appropriate practice or accommodation.

For example, Guideline 1.1 ("Plain English") recommends that judges minimize the use of complex legal terms in conducting court proceedings. The commentary to Guideline 1.1 notes that most self-represented parties are unfamiliar with such terms and notes that the use of such terms may delay proceedings and lead to the need for lengthy explanations of legal concepts that might better be avoided by simply using plain English.

The Judicial Guidelines also contain clear instructions as to where the *limits* of court accommodation of a pro se litigant reside. For example, commentary to Guideline 1.4 ("Application of the Law") notes that whatever accommodations may be made, pro se litigants are not excused from compliance with relevant rules and law, and refers judges to various pertinent cases, such as *Mmoe v. Commonwealth*.

In *Mmoe*, the state's Supreme Judicial Court noted that the trial court should not advance legal theories not presented in the pleadings of the pro se party.[34] The pro se plaintiff had asserted 30 counts in a 35-page amended complaint consisting of 174 separately numbered paragraphs, which the defendants found too confusing to respond to.[35] When the defendants moved to dismiss, based upon a failure to comply with the procedural rules' requirements to provide short, plain, clear, and organized statements of the claims, the trial court held a lengthy hearing over three days.[36] At the hearing, the plaintiff presented oral statements and documentation to explain what her claims were.[37] The judge denied the motions to dismiss, explaining that he had "allowed the pro se plaintiff to articulate her claims orally as an alternative method for providing the defendants with adequate notice" of the claims.[38] From his analysis of the written complaint, oral statements, and documentary support, the judge concluded that the plaintiff's allegations supported ten different theories of recovery, and allowed the plaintiff to proceed with the case.[39]

The Supreme Judicial Court reversed the order denying the defendants' motion to dismiss, and remanded. Although recognizing that "the judge was sensitive to the difficulties of the pro se plaintiff, and that he obviously was motivated by a desire" to employ a procedure that would allow justice to be done, the Court held that whatever leniency might be employed, "the rules bind a pro se litigant as they bind other litigants."[40] Oral statements and other materials outside the actual, written complaint should not have been considered in denying the motion to dismiss.[41] "Pleadings must stand or fall on their own."[42] And as direct guidance to judges, the Court plainly stated: "nothing in the rules of civil procedure authorizes a judge to recast a complaint in a form that corresponds to the judge's view of what claims the plaintiff intended but failed adequately to set forth. The judge should not have gone beyond the complaint when he ruled on the defendants' motion."[43] The decision also provides some guidance to pro se litigants, in crafting effective pleadings: "The judge's decision that the amended complaint states several claims upon which relief could be granted does not respond to the defendants' argument that the document is so verbose, repetitive, argumentative, and confusing, that they cannot fairly be expected to respond to it."[44]

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Other comments and references contained in the Judicial Guidelines that Massachusetts provides for judges include encouraging judges to refer litigants to informational handouts and other sources of information and services that may be helpful. These may include the clerk's office, local bar associations, law schools, legal assistance programs and organizations, and lawyer-for-a-day programs.[45] Other guidelines encourage judges to explain essential legal and procedural requirements to untrained litigants, such as the avoidance of ex parte communications; who has the burden of proof, and what that is; the differing roles of judges and juries; the availability of alternative means of dispute resolution; and the manner in which all parties are expected to conduct themselves in the courtroom.[46]

The Judicial Guidelines also provide direct guidance to the judges themselves in how to proactively avoid inappropriate favoritism or the appearance of favoritism towards pro se parties. In accordance with Guideline 3.1 ("Courtroom decorum"), the commentary notes that judges are responsible for providing a positive environment for pro se parties. This includes addressing them with titles of respect equal to that afforded opposing counsel, and conducting proceedings in a manner that will not be perceived as improper or unfair.[47]

Where all parties are licensed attorneys, familiar with courtroom and procedural niceties, a less formal approach may be appropriate. But with pro se parties, unfamiliar with such things as proper grounds for objecting, it may be appropriate to require opposing counsel to more thoroughly state the basis of the objection, or for the judge to explain the rationale for evidentiary rulings.[48]

When a pro se party presents their case to a jury, it may also be appropriate to provide an instruction to the jury, to explain the party's right to do so. The Massachusetts Continuing Legal Education, Inc. and others publish model jury instructions that judges may deliver to juries under such circumstances. The instructions explain that a person has the perfect right to repre-

34. 393 Mass. 617, 619-20 (1985).
35. *Id.* at 618.
36. *Id.*
37. *Id.*
38. *Id.* at 619.
39. *Id.*
40. *Id.* at 619-20.
41. *Id.*
42. *Id.* at 620.
43. *Id.*
44. *Id.*
45. Mass. Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, commentary to Guideline 1.5.
46. *Id.*, commentary to Guidelines 2.1 and 2.3.
47. *Id.*, commentary to Guideline 3.1 (citing case law examples).
48. *Id.*, Guideline 3.2 and commentary thereto.

"How the judge handles the occurrence of such communications may be misconstrued..."

sent themselves, without an attorney, and that a decision to do so has no bearing on the merits of the case, and should not affect the jury's deliberations.[49]

PROVIDING ASSISTANCE TO PRO SE PARTIES

Whether and how much to assist or advise a pro se party is one of the crucial questions judges face. A decision in the California Appeals Court provides some insight into this issue in the trial context, on the question of whether a judge can or should advise an unrepresented litigant about what kind of evidence can be presented, and about whether to permit a non-lawyer support person to sit with the unrepresented party at the counsel table. In *Ross v. Figueroa*, both parties appeared at a hearing on a permanent restraining order in a domestic abuse matter without counsel.[50] The Appeals Court noted that although such hearings are often conducted informally, in this case errors affecting the parties' due process rights had been made.

The woman seeking the restraining order, Ross, appeared at the hearing with her mother for support, which is expressly permitted by the California Family Code. Although initially permitted to sit next to Ross at the counsel table, the hearing referee later ordered the mother to return to the gallery, saying that only a party and his or her counsel could sit at the table. The Appeals Court found that this was error as it was directly contrary to the statutory provision for a "support person" accompanying an unrepresented party.

Even more alarming, the responding party, Figueroa, had prepared—but not served—a written response to Ross's domestic violence petition. When he asked if he could present that evidence at the hearing, the hearing referee merely replied "no" and ruled against him, imposing a three-year injunction. In reversing, the Appeals Court noted that the referee should have advised Figueroa that he could present oral testimony, even if the written response had not been properly filed and served. The court noted that while it may be appropriate with adversarial, represented parties for the judicial officer to quietly permit a party to forfeit procedural rights, where, as here, the parties are unrepresented, "it was incumbent upon the referee to apprise Figueroa it was his right to present oral testimony" when the written evidence was excluded. Cases like *Ross* demonstrate how procedural rigidity with pro se parties can be taken too far and actually deprive the parties of substantive rights.

In another example, a New York judge had entered a judgment against a pro se defendant (a tenant in a rent dispute) without holding a hearing on contested issues concerning the unpaid rent. The NY Commission on Judicial Conduct admonished the judge in a formal determination, noting, "Every judge—lawyer or non-lawyer—is required to be competent in the law and to insure that all those with a legal interest in a proceeding have a full opportunity to be heard according to law."[51]

EX PARTE COMMUNICATIONS

A frequent problem encountered with pro se parties is their tendency to engage in or attempt to engage in ex parte communications with the judge, often unaware of the impropriety. As with most issues presented by pro se parties, it is not that the party intends to violate norms or ethical rules; rather, it is just an unfamiliarity with the guardrails that are put in place to help ensure judicial impartiality and the overall fairness of the litigation process to all parties. The basic guiding principle for judges is:

> 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 or their lawyers, concerning a pending or impending matter [with certain, enumerated exceptions].
>
> ABA Model Code of Judicial Conduct, Rule 2.9(a).

This guiding principle implicates three distinct scenarios and issues. The judge shall not "initiate, permit, or consider" such ex parte communications. Perhaps the scenario most commonly encountered is the filing or mailing of letters to the court or judge, where there is no indication that the pro se party has served a copy of the communication on the opposing party or counsel. Pro se individuals may feel they are trying to appeal to the judge's sense of fairness or reason in attempting such communications, without realizing that their failure to know or comply with the service requirements may undermine their ultimate goal.

How the judge handles the occurrence of such communications may be misconstrued as actually considering the substance of the communication, though it is an improper ex parte communication. Even in the absence of any action or inaction that might be construed as "considering" the substance of the communication, if the judge or court does nothing to curtail the occurrence of such ex parte communications, they may be open to criticism for "permitting" such communications to occur. Finally, if a judge reaches out to offer unilateral assistance with the legal process, even assistance that is not itself improper, the failure to include or copy the other party or counsel with the communication would violate the rule not to initiate ex parte communications.

How a judge reacts and responds to ex parte communications may also affect the perception of fairness and neutrality that the parties take away from the incident. A harsh admonishment may do more damage to the pro se party's perception of fairness than the ex parte communication itself did to the actual fairness of the process. On the other hand, a response which tacitly permits the ex parte communication without any warnings or penalties may lead opposing parties or counsel to view the judge as bending too far backwards to help the pro se party along. A neutral, even-handed response which clearly applies the same procedural requirements to all parties is least likely to give offense to either party and least likely to impede the court's progress toward an outcome that all parties can respect as fairly met.

49. *Id.,* Guideline 3.3 and commentary thereto.
50. 139 Cal.App.4th 856 (2006).
51. In re Williams, State of New York, Commission on Judicial Conduct, Nov. 19, 2001, https://cjc.ny.gov/Determinations/W/Williams.Edward.J.2001.11.19.pdf

Judges have followed different approaches to responding to a first instance of ex parte communication. Some may be constrained by local variations on the rules of conduct, while others are a matter of personal preference. One common response to a letter written to a judge and not apparently copied to the other party is to have the clerk docket the letter and send a notice to both parties that the court is construing the letter as a motion for some form of relief. By doing so, the court puts the other party on notice and permits them time to file a response, if appropriate.

However, in some jurisdictions the rules of procedure might prohibit a judge from even considering such a letter if it is not accompanied by a proper proof of service. For example, Ohio Rule of Civil Procedure 5(B)(4) details how proof of service is to be submitted and expressly states that documents filed with the court "shall not be considered until proof of service is endorsed thereon or separately filed."[52] In contrast, Massachusetts rules require a certificate of service be included with any document filed with the court, but lack any express prohibition on consideration of a filing that lacks such a certificate.[53] Thus, on their face, the Massachusetts rules may provide a judge with more leeway in how to handle an ex parte filing than the Ohio rules.

A more cautious approach may be to send a notice of the communication to all parties. Rather than substantively considering such a filing, the court may choose to docket a "Notice of Filing" sent to all parties which merely indicates that a document was filed that lacks a proof of service, and granting the party who filed it a specified amount of time to file the document *with* an appropriate proof of service.[54] Such a notice may also include a more generic instruction, for the benefit of the pro se party, that all filings must contain such a certificate or proof of service and identifying the specific applicable rule. This may be an opportunity for the judge to explain the process of motion practice in simple, plain English terms, with appropriate reference to specific rules as applicable. By educating a pro se party who makes the mistake of attempting ex parte communication, rather than punishing them, their filings as the case moves forward may more readily be seen to conform to the court's expectations and requirements.

The most cautious approach is to simply instruct the clerk not to accept filings that lack an appropriate certificate of service. The clerk will return the attempted filing to the pro se litigant either with an explanation of the service and proof of service requirements or with no explanation at all.[55] While this approach most stringently complies with the Code of Conduct's prohibition on "permitting" or considering ex parte communications, it also does nothing to advance the right of an unrepresented party to be heard without facing what to them may be a fundamental lack of understanding of the process. "[J]udges are understandably reluctant to see injustice or unfairness happen to anyone, and yet judges cannot intervene too much."[56]

There are, of course, some circumstances in which ex parte communications are either appropriate or expected, or both. The ABA's Model Code anticipates at least five scenarios when ex parte communications may be permitted. These include where the circumstances require it for administrative and non-substantive matters; consultations with court staff and personnel whose functions are to aid the judge in carrying out their duties; when expressly authorized by law to do so; or where the parties have been consulted and consent to the judge conferring separately with the parties in connection with settlement efforts.[57] The Model Rule also makes clear that the proscription against communicating about a proceeding includes communications with persons who are not parties or participants in the proceeding, such as other lawyers or law professors, unless expressly permitted by the Rule.[58]

Finding the right balance is what each judge must strive for. To find that balance, judges are often advised to exercise their discretion, try to understand the difficulties that self-represented parties face, and avoid applying procedural rules so stringently as to defeat the goal of fundamental justice.[59]

CONCLUSION

Managing cases involving pro se parties presents judges with challenges they may not face when parties are represented by attorneys familiar with court and procedural processes. However, with more and more parties appearing without representation, these challenges can hardly be characterized as unique or even unanticipated. Indeed, a lack of familiarity with procedures, attempts at ex parte communication, and difficulty understanding the basis for rulings are common with pro se parties. It is incumbent upon judges, in the interests of both impartial justice and efficient proceedings, to assist pro se parties in neutral and unbiased ways so that all litigants leave the courthouse, regardless of outcome, believing that at least the process was conducted fairly.

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52. Ohio R. Civ. P. 5(B)(4).
53. Mass. R. Civ. P. 5(a); Mass. R. Sup. Ct. 9B.
54. Judge Thomas A. Januzzi, *Ex Parte Communications*, FOR THE RECORD (Ohio Judicial Conference 2013),. 5 (quoting an example of such a Notice of Filing), http://ohiojudges.org/Document.ashx?DocGuid=e30fe367-0ea2-4b73-99a4-e6f1106a9e80.
55. *Id.* at 7.
56. Burman, *supra* note 13, at 7.
57. Model Code of Jud. Conduct r. 2.9(A)(1) – (5) (Am. Bar Ass'n 2010).
58. Model Code of Jud. Conduct r. 2.9, cmt.3.
59. Cynthia Gray, *Balls, Strikes, and Self-Represented Litigants*, JUDICIAL ETHICS AND DISCIPLINE (blog), https://ncscjudicialethicsblog.org/2019/03/, posted March 19, 2019.