

# JUDICIAL ETHICS AND ASSISTANCE TO SELF-REPRESENTED LITIGANTS

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In the late 1990s, in response to rising rates of pro se litigation, courts first began to consider ways of improving the fairness of the legal process for self-represented litigants (SRLs). Programs were implemented to assist SRLs to secure pro bono counsel, and, if that was unsuccessful, to assist them to navigate the labyrinth of law and legal procedures in their quest for justice. Initially, the programs were modest ones, not requiring any or much funding for new personnel; they included replacement of traditional court forms with ones written in “plain English” and production of pamphlets and videos with simplified explanations of procedures.

Over time, these programs became more sophisticated and institutionalized. Many courts conducted instructional clinics tailored to specific actions, like domestic relations or landlord-tenant matters; set up kiosks for computer-drafting of pleadings; and established Web-based information and forms. The movement by courts toward enhancing access to justice has made great strides. The growth in the SRL population in our courts continues unabated, with the same phenomenon being experienced both nationally and internationally, especially in the Commonwealth countries.

Efforts to improve access to justice for this group are unexpected, given the substance and tenor of Supreme Court decisions that preceded the beginning of the pro se assistance movement. In *Faretta v. California* (1975), which reaffirmed the constitutional right of self-representation, the Court noted:

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that “he knows what he is doing and his choice is made with eyes open” (at 835).

“The right of self-representation is not a license . . . not to comply with relevant rules of procedural and substantive law” (at 834, n. 46).” And in *McKaskle v. Wiggins* (1984), the Court found that the appointment of standby counsel for a pro se defendant did not deprive him of his right of self-representation. In so doing, the Court commented on the defendant’s need for assistance as follows: “A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course” (at 183-84).

At the time of these decisions, SRLs were primarily found in criminal cases. However, every court has had, and continues to have, a small number of SRLs who brought civil actions; were considered pests, nuts, or kooks; and were generally an annoyance to the court. The Supreme Court itself has had as much experience with pro se litigation as any other court, if not more, especially from self-represented prisoners, and has had its share of “frequent filers” seeking in *forma pauperis* status. Thus, it was not surprising that these two Supreme Court decisions established the general rule adopted by all courts thereafter to the effect that all litigants, represented or not, were required to comply with the same rules and procedures, and that the court had no obligation to instruct SRLs on law or procedure. For the most part, this has continued to be the fundamental tenet of Supreme Court and lower-court jurisprudence in pro se litigation for the last thirty years.

Nevertheless, a few court opinions—primarily from federal courts—have begrudgingly recognized SRLs’ need for information, assistance, and accommodation in the litigation process to ensure fairness. Several of these courts, reluctant to change their philosophy toward SRLs, raise the distinction between prisoners and nonprisoner SRLs to justify granting the former greater liberality on procedural issues than the latter. As to state appellate courts, only those of California and Alaska seem to be softening their stance on judicial assistance. However, even these courts’ opinions primarily affirm discretionary judicial explanations to SRLs regarding procedural issues such as pleading amendments, subpoenaing of witnesses, questioning of jurors in voir dire, exercising of peremptory challenges, the manner of introducing evidence, and cross-examination. They do not *mandate* any information, explanations, or assistance to SRLs. The handful of state judicial ethics opinions on the subject are conflicting and primarily rest upon interpretations of statutes relevant to the cases.

Rule changes to reflect the need for equal access to justice in a few procedural areas, such as summary judgment, have also come slowly, despite the perennial committees, conferences, and Internet activity on the subject. The courts’ general lethargy in failing to meet the challenge of the growing SRL population, who are ordinary citizens and not pests, nuts, or kooks, is, however, not only a product of these early Supreme Court decisions on the subject. It also stems from the views of many judges, who believe that they risk losing their impartiality in appearance or in fact by providing assistance to SRLs in so-called mixed cases, those in which one party is represented and the other is not. This belief is supported by the above-noted Supreme Court case law and by current judicial ethics rules.

Attorneys have historically used the issue of potential breach of the duty of impartiality to oppose anything other than the bare minimum of judicial assistance to SRLs, thereby maintaining their advantage in litigation. Their objections to judicial assistance have been successful, as reflected by appellate decisions. The cases resulting in these decisions were overwhelmingly brought by disgruntled SRLs who suffered

harsh results in their litigation as a result of their noncompliance or imperfect compliance with substantive, procedural, or evidentiary rules, and not by represented parties aggrieved by the judicial assistance given to their unrepresented adversary, which was claimed to have caused them prejudice.

For those progressive trial judges “in the trenches” who often see possible harsh and unfair results if SRLs flounder in their courts without assistance, and who have increasingly provided that assistance in various forms to ensure fairness, the difficulty has been to strike the proper balance between the need to remain impartial and the duty to provide a fair and meaningful hearing. The issue has been framed in terms of the question, “How much assistance is too much?” When does reasonable assistance to ensure fairness become an improper “appearance” of impartiality?

The law of judicial disqualification is instructive on this question. It teaches that judges must recuse themselves whenever they have an actual conflict of interest, or a bias or prejudice against a party, their attorney, or their case. The second well-known basis for recusal is where a reasonable person with knowledge of the circumstances would question the judge’s impartiality. When considering this question, it must be remembered that the standard for recusal is that of the reasonable person, not the reasonable attorney or judge.

Thus, what forms of assistance would the reasonable person expect a judge to provide an SRL while retaining judicial impartiality? Presumably, a reasonable person—with common knowledge of the complexity of the legal process, and the many reasons why people appear without counsel—would conclude that certain forms of assistance are necessary to ensure a fair trial. If asked whether a judge has “crossed the line” in rendering judicial assistance to an SRL, the reasonable person would probably put him- or herself in the position of the SRL. It would not be unexpected to find that lawyers and judges have a much more restrictive view than do nonlawyers of the kinds of reasonable judicial assistance that would or would not threaten judicial impartiality. Future empirical and comparative research in which the perspectives of lawyers, nonlawyers, and judges on questions about the propriety of different forms of judicial assistance will be useful in answering the question of “How far is too far?”

In the meantime, we have much to learn from the experience of other countries, such as Canada, where judges already have an obligation to provide reasonable assistance to SRLs in civil and criminal cases. The duty is considered a corollary of the judicial duty to ensure fairness. Given the historically negative view of SRLs extant in U.S. federal and state appellate case law, and the pervasive power of the bar, judicial leadership at the highest levels will be necessary for this duty to be established in American courts.

Until recently, the best that could be done in light of these circumstances was for some trial courts to develop protocols for handling SRLs in certain types of cases, such as those involving domestic violence. However, trial judges need greater guidance; they need general principles to guide them, as well as specific examples of what assistance is required, permissible, and impermissible under current judicial ethics limitations.

The ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct recently responded to calls for reform in this area. It proposed language for the commentary following the revised canon<sup>1</sup> and rule<sup>2</sup> establishing the judicial duty of impartiality. Commentary 4 to proposed Rule 2.2 (the commentary and rule were approved by the ABA at its midyear meeting in February 2007) states: "It 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." The reporter's comments, which are not part of the official code, reflect the controversial nature of the issue:

Throughout the life of the Commission, some witnesses urged the Commission to create special rules enabling judges to assist pro se litigants, while others urged the Commission to disregard calls for such rules. This Comment makes clear that judges do not compromise their impartiality when they make reasonable accommodations to pro se litigants who may be completely unfamiliar with the legal system and the litigation process. To the contrary, by leveling the playing field, such judges ensure that pro se litigants receive the fair hearing to which they are entitled. On the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage.

Commentary 4 is a major breakthrough in the movement toward access to justice for SRLs. It is hoped that, in mixed cases, judges will no longer readily succumb to the pressures of objections from trial counsel to assistance given to SRLs, and that judges will also not feel restrained by the impartiality rule from assisting parties when both appear pro se. The question, however, now becomes: What are "reasonable accommodations"? And what about all of the appellate case law on the subject, which lags behind events "on the ground," and which steadfastly restates the traditional no-assistance principle?

As to reasonable accommodations, the ABA reporter's comment explains that the purpose of the change is to "level the playing field," but concludes with a caution against "unreasonable demands" that might give an SRL an "unfair advantage." There are many things that can be done to assist those unschooled in law to level the playing field before the scales tip and the assistance reaches the point of being an "unfair advantage" to the represented party in the eyes of a reasonable person. The experience of individual judges here and in Commonwealth countries, which operate under the same principles of fairness and impartiality, disseminated through judicial education programs and publications, will foster an emerging body of law and practice that will eventually be recognized by appellate courts and erode the no-assistance rule.

<sup>1</sup> "A judge shall perform the duties of judicial office impartially, competently, and diligently." *Report of ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Canon 2, Model Code of Judicial Conduct (Proposed)* 40, at [http://www.abanet.org/judicialethics/house\\_report.pdf](http://www.abanet.org/judicialethics/house_report.pdf).

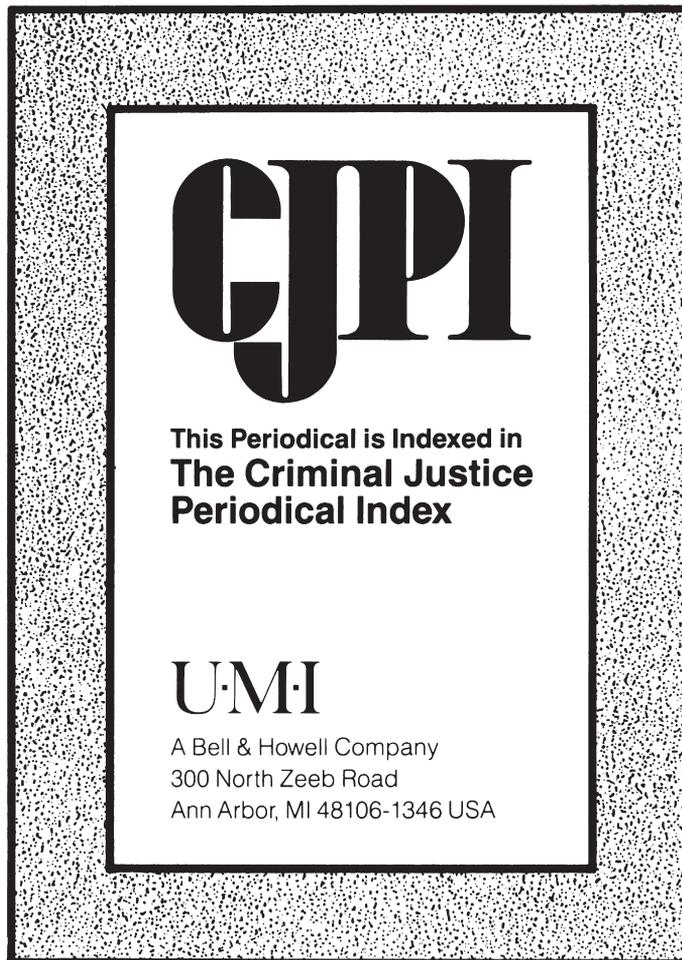
<sup>2</sup> "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Rule 2.2, *Id.*, at 45.

Court administrators and staff should continue to refine their assistance programs, creating increasingly novel and sophisticated SRL information-delivery systems and comprehensive self-help centers. Guided by the commentary in the revised Model Code, the judiciary at both trial and appellate levels now has an opportunity to catch up with their court administrators in enhancing SRLs' rights to due process and access to justice. The only disappointing aspect of this change in judicial ethics is that the new Model Code leaves reasonable judicial assistance to ensure fairness permissive, rather than mandatory as it is under Canadian law. Making reasonable judicial assistance to SRLs mandatory rather than permissive is, therefore, the next frontier and challenge facing the American justice system. jsj

#### CASES CITED

*Faretta v. California*, 422 U.S. 806 (1975).

*McKaskle v. Wiggins*, 465 U.S. 168 (1984).



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