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Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role

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ETHICS IN TRANSITION: UNREPRESENTED LITIGANTS AND THE CHANGING JUDICIAL ROLE

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INTRODUCTION

The flood of unrepresented litigants in civil cases over the past decade has caused a fundamental reexamination of the operation of many of our courts.[1] The phenomenon has inspired conferences,[2] publications,[3] and websites[4] replete with informa-

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1. *See, e.g.*, JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998) (providing information on the challenges, legal and ethical issues, resources for management, and policy recommendations regarding pro se litigation); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999) (examining the roles of various actors of the legal system in working with unrepresented litigants).

2. Conferences addressing the issue of unrepresented litigants included the Eastern Regional Conference on Access to Justice for the Self-Represented Litigant (White Plains, NY, 2006); the New York State Unified Court System Access to Justice Conference (Albany, NY, 2001); the Massachusetts Statewide Conference on Unrepresented Litigants (Worcester, MA, 2001); The Changing Face of Legal Practice: A National Conference on Unbundled Legal Services (Baltimore, MD, 2000); and the National Conference on Self-Represented Litigants Appearing in Court (Scottsdale, AZ, 1999).

3. Publications include those by the American Judicature Society and State Justice Institute, such as JONA GOLDSCHMIDT & LISA MILORD, JUDICIAL SETTLEMENT ETHICS JUDGES' GUIDE (1996); GOLDSCHMIDT ET AL., *supra* note 1; CYNTHIA GRAY, REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS (2005), *available at* http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf; BETH M. HENSCHEN, LESSONS FROM THE COUNTRY (2002), *available at* http://www.ajs.org/prose/pdfs/Lessons_1.pdf; *see also* RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT (2002), *available at* http://www.lri.lsc.gov/pdf/03/030111_selfhelpct.pdf.

4. For information on the web, see the "Pro Se Resources" page of the American Judicature Society's website, at http://www.ajs.org/prose/pro_resources.asp (last visited Mar. 15, 2008); the website funded by the State Justice Institute, serving as a network for practitioners of self-help programs, at

tion, analysis, and guidance. The discussions occur amidst the backdrop of reports demonstrating the high incidence of unmet legal needs among the poor and working poor, as well as a desperate shortage of lawyers available to represent the poor.[5]

The focus on unrepresented litigants has forced a reexamination of the roles of the players who encounter large numbers of such litigants each day in the legal system. Unrepresented litigants raise difficult issues for court clerks and court-connected mediators, for lay advocates and lawyers participating in assistance programs, and for lawyers dealing with unrepresented adverse parties.[6] The court system's response to the problems includes a reexamination of how these players perform their roles.[7]

Nowhere are the issues more challenging than for judges presiding over their cases involving unrepresented litigants. It is the judges, ultimately, who are responsible for the fairness of the proceedings before them and the court orders that emerge from their courtrooms. Judges preside over trials involving unrepresented litigants—a scenario that receives the most attention in the literature[8] but involves a small percentage of the dispositions. A more common disposition is a settlement negotiated by the parties, often in an unmonitored hallway setting, that is subsequently given the court's imprimatur.[9] Despite the difficulty of

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http://www.SelfHelpSupport.org (last visited Mar. 15, 2008); and the website of the Network of Self-Represented Litigation, at http://www.srln.org (last visited Mar. 15, 2008).

5. Legal needs studies have consistently shown that anywhere from seventy to ninety percent of legal needs of the poor go unaddressed in America. *See* LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 12 (2005), *available at* http://www.lsc.gov/justicegap.pdf (comparing the level of legal needs reported by low-income households to the percentage of those needs for which legal help was received or sought). The Legal Services Report relies on recent legal needs studies from Montana (2005), Illinois (2005), Tennessee (2004), Connecticut (2003), Massachusetts (2003), Washington (2003), New Jersey (2002), Vermont (2001), and Oregon (2000). *Id.* at 9. Virtually "all of the recent state studies found a level of need substantially *higher* than the level" found in a 1994 study conducted by the American Bar Association. *Id.* at 13.

6. *See, e.g.*, Engler, *supra* note 1, *passim*.

7. *See, e.g., id.*; John M. Greacen, *Legal Information vs. Legal Advice—Developments During the Last Five Years*, 84 JUDICATURE 198 *passim* (2001), *available at* http://www.ajs.org/prose/pro_greacen.asp.

8. *See, e.g.*, Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 107 n.121, 116 n.163 (1997) (citing various sources that provide data on percentages of litigants that proceed pro se at trial).

9. *Id.* at 80 n.3; *see also* JUDITH S. KAYE & JONATHAN LIPPMAN, N.Y. STATE UNIFIED COURT SYS., HOUSING COURT PROGRAM: BREAKING NEW GROUND 8–9

the questions raised by these scenarios, and the frequency with which they arise, there has been relatively little scholarly attention to the topic.[10]

This Article analyzes the shift over the past decade in attitudes concerning the proper role of judges in handling cases involving unrepresented litigants. It begins with a brief examination of the traditional role of judges, as evidenced by the Canons of Judicial Ethics and the cases addressing the proper judicial role. The Article next discusses evidence indicating that the actual practice of some judges has varied far more than the texts of the decisions might reveal. The evidence also shows that our understanding of, and attitudes toward, the role of the judge have changed considerably. Given the fluidity of the judicial role, and the need for the courts to respond to the crisis they face with unrepresented litigants, the Article ends with a discussion of why the active role is both necessary and permissible in certain contexts and the price of the failure to support such a shift.

I. THE TRADITIONAL ROLE OF THE JUDGE—ON PAPER

The guidance in the Model Code of Judicial Conduct comes from general language applicable to judges in all cases. Judges are required to "uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[11] The concepts are intertwined with the obligation that judges act at all times in a manner that promotes public confidence in the "independence, integrity, and impartiality" of the judiciary.[12] Judges must perform their duties "impartially, competently, and diligently,"[13] requiring judges to perform their duties fairly, "without bias or

(1997) (on file with author); N.Y. COUNTY LAWYERS ASS'N, THE NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY 11–19 (2005) (on file with author).

10. *See, e.g.*, Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 423 (2004).

> Notwithstanding the numerical evidence of the importance of this phenomenon, and the obviousness of its impact on 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.

Id. For a discussion of recent articles on the subject, see *infra* Part II.

11. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

12. *Id.* at R. 1.2.

13. *Id.* at Canon 2.

prejudice,"[14] while remaining "patient, dignified, and courteous."[15]

The text of the Canons and Commentary provides little direct guidance as to how active or passive a judge should be in handling cases involving unrepresented litigants. In the words of one set of authors trying to provide guidance as to appropriate judicial techniques: "In sum, the Canons of Judicial Ethics require judges to remain fair and impartial and to maintain the appearance of fairness and impartiality, but give no further guidance about the meaning of those terms when unrepresented persons appear in court."[16]

In an effort to provide some guidance when unrepresented litigants are involved, the ABA House of Delegates added a new comment to Rule 2.2 in 2007, regarding impartiality and fairness: "It is not a violation of this Rule, however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[17] As explained below, the language continues a consistent trend of encouraging judges to make reasonable accommodations to unrepresented litigants as a matter of fairness.[18] The new language, however, hardly resolves the difficult questions facing judges daily.

Cases interpreting the judicial role when unrepresented litigants are involved draw from the basic principles in the Canons, requiring that judges remain impartial and neutral, while being fair and providing justice. Some cases emphasize that unrepresented litigants must play by the same rules as represented parties and can expect no special treatment.[19] Some caution that the judge may not play the role of advocate or attorney for the unrepresented litigant.[20] Others suggest that judges must provide some measure of assistance to the unrepresented litigant to avoid a miscarriage of justice, and must do so in construing pro se pleadings.[21]

An effort to draw lessons from the cases is complicated by two problems in the analysis. First, although most cases settle, the

14. *Id.* at R. 2.3(A).

15. *Id.* at R. 2.8(B).

16. Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES' J. 16, 19 (2003).

17. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4.

18. *See infra* text accompanying notes 73–76.

19. *See, e.g.*, Engler, *supra* note 1, at 2013 n.122.

20. *See, e.g., id.* at 2013 n.123.

21. *See, e.g.*, Albrecht et al., *supra* note 16, at 20 ("All federal and virtually all state courts have precedents that papers submitted by persons representing themselves will be subject to a different standard of judicial review than filings submitted by lawyers."); Engler, *supra* note 1 at 2013–14 n.124.

published decisions tend to focus on the judge's role in either construing pleadings or conducting trials; they provide very little guidance to daily tasks that occupy the attention of judges in many civil cases. Second, the cases tend to recycle general language, without regard to the context of the case. As a result, language uttered in the context of a criminal proceeding, for which there is a constitutional right to appointed counsel, or in cases involving vexatious plaintiffs, is applied to other fact patterns without any analysis as to whether it is appropriate to do so.[22] The next section discusses the difficulties these realities cause for judges trying to discern the proper way to handle their more common civil cases in light of the language in the Code, the Commentary, and the cases.

II. THE TRANSITION: IN PRACTICE, IN TRAINING, AND IN THEORY

A. *The Challenges in Discerning Guidance from the General Principles*

The ease with which the general principles may be recited belies the complexities facing judges attempting to apply those principles to cases involving unrepresented litigants. One court, speaking in 1979, concluded that "'[t]he proper scope of the court's responsibility (to a pro se litigant) is necessarily an expression of careful exercise of judicial discretion and cannot be fully described by specific formula.'"[23] Almost two decades later, in response to a court managers' survey, eighty-four percent of the respondents wrote that the court has no written or unwritten statewide or local court policies/instructions, administrative orders, or rules governing the manner in which pro se litigants should be handled by the judges in the courtroom; eighty percent wrote that there were no such instructions in the litigation process generally.[24]

As the problems related to cases involving unrepresented litigants gained increased attention, the reality that judges employed a range of techniques emerged from the shadows. Instrumental in exposing this reality was the 1998 publication by the American Judicature Society (AJS) and State Justice Institute (SJI) of *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Managers.* The volume included ten pages of "judicial attitudes and strategies" informed by responses from

22. For a more detailed analysis of the case law, see Engler, *supra* note 1, at 2013–14 n.124; *see also* Albrecht et al., *supra* note 16, at 20.

23. Austin v. Ellis, 408 A.2d 784, 785 (N.H. 1979) (quoting COMM. ON STANDARDS OF JUDICIAL ADMIN., TRIAL COURTS § 2.23 at 46 (1976)).

24. GOLDSCHMIDT ET AL., *supra* note 1, at 124.

judges to survey questions.[25] The responses revealed a wide array of practices. Not surprisingly, the more judges distrusted unrepresented litigants, or felt the litigants were trying to take advantage of the legal system and pursue hidden agendas, the less likely the judges felt any obligation to help.[26] The more judges felt that the absence of counsel was depriving litigants of access to justice, the more likely the judges were to help.[27]

Even judges inclined to provide some assistance felt constrained by their understanding of impartiality. "Many judges equate impartiality with passivity."[28] While some judges felt that it was harder to maintain control over the proceeding where both parties were unrepresented, others felt those cases were easier because the parties were on equal footing.[29] Cases involving a represented party against an unrepresented one presented the greatest challenge to maintaining impartiality.

As the century drew to a close, a shift in attitudes and techniques became evident from publications, case law, conferences, and websites. The shift came amidst the backdrop of report after report documenting unmet legal needs in civil cases and a critical shortage of lawyers for the poor;[30] reality set in that unrepresented litigants were here to stay. Judicial bias against unrepresented litigants was increasingly attacked, and judges were urged to accommodate unrepresented litigants and facilitate their efforts to present their cases. For example, the Pro Se Implementation Committee of Minnesota's Conference of Chief Judges, in its 1997 "Final Report," issued its proposed protocol, emphasizing how judicial officers should set up different procedures "during hearings involving pro se litigants." The protocol includes explanations that should be provided to help pro se litigants understand the procedures.[31] Idaho later promulgated a proposed protocol modeled after the Minnesota version.[32]

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25. *Id.* at 52–61.

26. *See id.*

27. *See id.*; *see also* Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 18–19 (1998) ("In order to ensure a fair hearing for all parties, I assist pro se litigants with the presentation of their claim or defense, and 'protect' the pro se litigant who is being taken advantage of by an attorney.").

28. GOLDSCMIDT ET AL., *supra* note 1, at 53.

29. *Id.* at 54.

30. *See supra* note 5 and accompanying text.

31. Albrecht et al., *supra* note 16, at 18.

32. COMM. TO INCREASE ACCESS TO THE COURTS, PROPOSED PROTOCOL TO BE USED BY IDAHO JUDGES DURING HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS (2002), http://www.ajs.org/prose/pdfs/idaho_protocol.pdf.

In 1999, the California Commission on Judicial Performance publicly censured a judge for failing to respect the rights of pro se litigants, concluding that the judge's behavior violated the Canons related to impartiality and integrity.[33] In 2000, the Colorado Tenth Judicial District Commission on Judicial Performance issued a recommendation of "do not retain" for a judge in part based on a survey noting the judge's "demeaning and harsh treatment of individuals appearing in her court without legal counsel."[34] A 2001 AJS editorial acknowledged that, although the efforts to clarify the role of the judge are moving slowly, guidance is emerging; the editorial closed by asserting that "[a]long with litigants represented by counsel, litigants without lawyers deserve facilitated, meaningful access to the justice system."[35]

As the twentieth century gave way to the twenty-first, national and statewide conferences focused on the phenomenon of civil cases involving unrepresented litigants. Common themes for panels and speakers at the conferences included ethical issues raised for those encountering unrepresented litigants.[36] The discussions occurred against a backdrop of statements from court officials reflecting a growing consensus that it was essential for courts to provide meaningful access to unrepresented litigants in civil cases.

In 2000, the Conference of State Court Administrators (COSCA) addressed the general question of the obligation to assist unrepresented litigants as follows: "The threshold question in determining how to respond is whether the courts have an obligation to address the needs of self-represented litigants at all. The answer should be yes."[37] The following year, the Conference of Chief Justices (CCJ) promulgated Resolution 23, which resolved in part to "[r]emove impediments to access to the justice system, including physical, economic, psychological and language barriers . . . ."[38] In 2002, the CCJ and COSCA jointly issued Resolution 31, resolving that "courts have an affirmative obliga-

33. Kerry Hill, Meeting the Challenge of Pro Se Litigation: An Update of Legal and Ethical Issues (August 2000), http://www.ajs.org/prose/pro_legal_ethical.asp.

34. *Id.*

35. Editorial, *Courts and the Self-Represented—The Road Ahead*, 84 JUDICATURE 300, 300 (2001), *available at* http://www.ajs.org/prose/pro_editorial.asp.

36. *See supra* note 2.

37. CONFERENCE OF STATE COURT ADM'RS, POSITION PAPER ON SELF-REPRESENTED LITIGATION (2000), *available at* http://cosca.ncsc.dni.us/WhitePapers/selfreplitigation.pdf.

38. Conference of Chief Justices, Resolution 23: Leadership to Promote Equal Justice (2001), http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol23Leadership.html.

tion to ensure that all litigants have meaningful access to the courts, regardless of representation status."[39]

The 2001 AJS/SJI publication, *Meeting the Pro Se Challenge: An Update*, summarized the wide range of activities that occurred in the three years following the publication in 1998 of the original *Meeting the Challenge* report.[40] The author described the process of state action plans, initiated by the 1999 National Conference on Pro Se Litigation, held in Scottsdale, Arizona.[41] She summarized the progress reports submitted by the twenty-three state leaders responding to AJS's request for updates and described "other developments" triggered by "the recent focus on pro se litigation."[42]

The final section of the update for AJS is labeled "Looking Ahead." The author identified five trends, including the standardizing and simplifying of court forms, rethinking the use of technology to promote access, simplifying the procedural and ethical rules, and redefining the role of attorneys and the bar.[43] The fifth item, "defining the role of the judge in pro se litigation," captured the shifting attitudes described above and the challenges that lie ahead:

> As the authors found in their research for Meeting the Challenge of Pro Se Litigation, there is a lack of consensus among judges about their role in pro se litigation. Some guidance is emerging in case law and judicial discipline decisions, in protocols developed at the state level, and in scholarly comment. The evolution of the judge's role will take time and bears watching.[44]

B. *Interpreting the Change*

In the 2003 article *Judicial Techniques for Cases Involving Self-Represented Litigants*, the authors "attempt[ed] to stimulate a national dialogue about how judges can best structure and manage their courtrooms to accommodate the needs of self-repre-

39. Conference of State Court Administrators, Resolution II: In Support of a Leadership Role for CCJ and COSCA in the Development, Implementation and Coordination of Assistance Programs for Self-Represented Litigants (2002), http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/resolutionSelfRepresented Litigants.html. The joint resolution between COSCA and CCJ also endorsed COSCA's position paper on self-represented litigation. *Id.*

40. Kathleen M. Sampson, *Meeting the Pro Se Challenge: An Update*, 84 JUDICATURE 326 (2001), *available at* http://www.ajs.org/prose/pro_sampson.asp.

41. *Id.*

42. *Id.* at 326–27.

43. *Id.* at 327–28.

44. *Id.* at 327.

sented litigants."[45] After reviewing the judicial canons in the ABA's Code of Judicial Conduct, and the protocols developed in Minnesota, the authors summarized over twenty-five published decisions from around the country, attempting to organize the guidance emerging in case law. Their proposed synthesis of judicial techniques starts with general principles, followed by specific recommendations for the handling of cases involving two unrepresented parties, and then cases involving represented and unrepresented parties.[46]

The authors' synthesis shows how far the attitudes have changed from a world in which the formal rules suggested that unrepresented parties were not to be treated differently from represented ones. The principles gleaned from the synthesis counsel judges to prepare for cases involving unrepresented litigants, to provide guidelines, to conduct proceedings in a structured fashion, yet in an informal atmosphere, and to ask questions.[47] Where only unrepresented parties are involved, judges can swear both parties in at the outset, but otherwise avoid the distinction between argument and testimony, while maintaining strict control over the proceedings and remaining alert to power imbalances.[48] In cases involving both represented and unrepresented parties, the authors report that "[m]ost trial judges find cases with unequal resources most difficult."[49] The authors urge judges to: (1) convince the attorney of the benefits of proceeding informally; (2) overrule objections likely to be a waste of judicial resources; (3) set special ground rules for conducting the proceeding under the rules of evidence; and (4) use leading questions as prompts.[50] The authors also recommend that judges offer the unrepresented litigant a continuance, if necessary, to allow the unrepresented litigant to obtain assistance.[51]

The 2005 AJS/SJI publication, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, also offers a synthesis of the case law.[52] The author first acknowledges that "[u]ncertainty among trial judges about how to treat self-represented litigants is understandable given the mixed signals sent by

45. Albrecht et al., *supra* note 16, at 16.
46. *Id.*
47. *Id.* at 45–46.
48. *Id.* at 46–47.
49. *Id.* at 47.
50. *Id.* at 47–48.
51. *Id.* at 48.
52. GRAY, *supra* note 3.

appellate courts."[53] Case after case insists that "self-represented litigants are held to the same standard as attorneys," while case after case also "describes exceptions to that rule . . . ."[54] In a somewhat different synthesis from that proposed by the authors of *Judicial Techniques*, the AJS/SJI publication offers the following: "One way to reconcile these competing holdings affirms that attorneys and self-represented litigants are held to the same standard—courts should be lenient with both when appropriate to promote the goal of deciding cases on the merits."[55]

Although published only two years after *Judicial Techniques*, *Reaching Out or Overreaching* reflects that a far more active judicial role than might have been acceptable even a few years before is already taking hold. The document offers guidance at all stages of the proceeding, including explaining the process, instructing self-represented litigants regarding procedural actions, asking questions, and handling evidence. The underlying premises of the recommended "Proposed Best Practices" are: (1) the judge is more than a mere arbitrator, referee, or moderator; (2) the judge can control the orderly presentation of evidence; (3) cases should be decided on the merits; and (4) the rules of procedure should work to do substantial justice.[56] The document concludes: "Without raising reasonable questions about impartiality, judges *should* exercise discretion [t]o make equitable, procedural accommodations [and] [t]o provide self-represented litigants reasonable opportunity to have cases fully heard."[57]

Regarding settlement, the Proposed Best Practices advise judges to encourage, but not coerce, settlement or mediation.[58] Once a settlement is presented to the court for approval, judges should "engage in allocution to determine whether the self-represented litigant understands the agreement and entered into it voluntarily;" this process includes determining "that any waiver of substantive rights is knowing and voluntary."[59]

Regarding hearings, the Proposed Best Practices first advise pre-hearing practices that include explaining the process and ground rules, explaining the elements and the burden of proof, explaining the kinds of evidence that can and cannot be considered, and trying to get all parties to agree to relaxed rules of

53. *Id.* at 5.

54. *Id.* at 6. As Gray notes, often it is within the same case that both the rule and exception are announced. *Id.*

55. *Id.*

56. *See id.* at 51–57.

57. *Id.* at 89.

58. *Id.* at 54.

59. *Id.*

procedure so that the hearing can proceed informally.[60] At the hearing itself, the Proposed Best Practices advise judges to question witnesses when the facts are confused, undeveloped, or misleading; to follow the rules of evidence generally but use discretion and overrule objections on technical matters; not to allow counsel to bully or confuse self-represented litigants; and to take other steps necessary to prevent obvious injustice.[61]

C. *Recent Evidence of a Continuing Shift*

In 2006, Massachusetts promulgated its *Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants.*[62] The Massachusetts Guidelines constitute the first new set of state guidelines or protocols to appear in a decade and reflect the sea change that occurred in the intervening time. As noted above, Minnesota's proposed protocol was promulgated a decade before and focuses on the hearing process.[63]

The Massachusetts Guidelines apply to all phases of the court's operation. While the Guidelines, which are advisory, apply to all the courts in the state, the drafters recognize that the "issues and challenges presented by self-represented litigants may vary in different court departments" and judges, therefore, "are encouraged to use the Guidelines in a way that best suits the needs of their court and the litigants before them."[64] Regarding pre-hearing interaction, the Guidelines encourage judges to make reasonable efforts to insure litigants understand the trial process, and authorize judges to explain the elements of claims and defenses as they would to a jury.[65] At trial, judges may provide self-represented litigants with the opportunity to present their cases meaningfully, and may ask questions to elicit general information and obtain clarification; where all parties are self-

60. *Id.* at 55.

61. *Id.* at 55–56.

62. SUBCOMM. ON JUDICIAL GUIDELINES, SUPREME JUDICIAL COURT STEERING COMM. ON SELF-REPRESENTED LITIGANTS, JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS WITH COMMENTARY (2006) [hereinafter MASSACHUSETTS GUIDELINES], *available at* http://www.mass.gov/courts/judguidelinescivhearingstoc.html.

63. *See supra* text accompanying note 31. The protocols provide ten procedures for hearing officers to follow, including explaining the process, explaining the elements, explaining the burden of proof and the kinds of evidence that can and cannot be presented, and asking questions to obtain general information. For the text of the Minnesota Guidelines, see Albrecht et al., *supra* note 16, at 18.

64. MASSACHUSETTS GUIDELINES, *supra* note 62, introductory cmt.

65. *Id.* § 2.1 & cmt.

represented, judges may have the parties stipulate to proceed informally.[66] Finally, in approving settlements:

> Judges should review the terms of settlement agreements, even those resulting from ADR, with the parties. Judges should determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent possible, whether the waiver is knowing and voluntary.[67]

The commentary provides that, when assessing whether a waiver of substantive rights is "knowing and voluntary," the judge may consider how the phrase is used "in the context of informed consent, i.e., the agreement by a person to a proposed course of conduct after receiving adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct."[68]

Activity in other states reflects increasing attention to the issues involving unrepresented litigants and the judicial role. In 2007, California promulgated its comprehensive guide, *Handling Cases Involving Self-Represented Litigants: A Benchguide for Judicial Officers.*[69] The New York County Lawyers Association developed protocols specifically applicable to the New York City Housing Court, and the extreme problems facing judges and unrepresented litigants in that context.[70]

As encouraging as many of the developments regarding the role of the judge may be, it is worth noting that the changes occurred without any related modification of the Model Code of Judicial Conduct. Far from prohibiting a range of behavior and a shift in attitudes over time, the general nature of the language in

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66. *Id.* § 3.2 & cmt.

67. *Id.* § 3.4.

68. *Id.* § 3.4 & cmt. (citing the MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2003)).

69. STATE JUSTICE INST. AND JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS (2007). Various chapters of the Guide are included in the materials for the California Conference on Self-Represented Litigants, held in San Francisco from May 14–18, 2007, which are available at http://www.courtinfo.ca.gov/programs/equalaccess/2007Materials.html (last visited Mar. 16, 2008). Chapter 3, which covers the law applicable to a judge's ethical duties, is available at http://www.courtinfo.ca.gov/programs/equalaccess/documents/selfrep07/Ethical/Chapter3.pdf (last visited Mar. 16, 2008).

70. A description of the protocols is available at http://www.nycla.org/siteFiles/News/News59_2.pdf. For a more detailed discussion of the relevance of context generally, and the New York City Housing Court in particular, see *infra* Part IV.C.

the Model Code inevitably permits and encourages the variation among judges and courts, both at any given moment and over time. Moreover, the Code language not only permits the shift, but the current efforts to modify the Model Code provide further evidence of the shift.

The most recent revision of the Model Code, formally triggered by the 2003 appointment of the Joint Commission to Evaluate the Model Code of Judicial Conduct, was approved by the ABA House of Delegates in February, 2007. The issue of cases involving unrepresented litigants was only one of many topics under consideration, with other provisions of the Code garnering far more attention and controversy.[71] The provision regarding unrepresented litigants nonetheless was the subject of an array of comments reflecting many of the tensions discussed in this Article. Consistent with the trend favoring increased assistance to unrepresented litigants, the language adopted makes clear 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."[72]

Perhaps it is inevitable that the language reflects a compromise. In a code of general applicability, official acknowledgment of change will be slower and more cautious than a number of commentators urged.[73] At the same time, even the cautious language is consistent with a transition that is moving steadily in a single direction: the provision of increasing assistance by the judiciary to unrepresented litigants. As with the official resolutions from COSCA and the CCJ, the ABA's language is in the direction of more help than in the past.[74] Disciplinary decisions over the past decade show discipline imposed against judges for bias and hostility toward unrepresented litigants, with not a sin-

71. *See, e.g.*, Editorial, *The A.B.A.'s Judicial Ethics Mess*, N.Y. TIMES, Feb. 9, 2007, at A18; Press Release, Am. Bar Ass'n, ABA Adopts Policies Revising Model Code of Judicial Conduct (Feb. 13, 2007), *available at* http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=80.

72. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2007).

73. *See, e.g.*, Richard Zorza, The Implications of the Growth of Pro Se Litigation for the Model Code of Judicial Conduct, Testimony Before the A.B.A. Joint Commission on the Evaluation on the Model Code of Judicial Conduct (Dec. 5, 2003), *available at* http://www.abanet.org/judicialethics/resources/comm_code_zorza_120503.pdf (urging the use of bolder language in the Code); *see also* JENNIFER JUHLER & MARK CADY, IOWA SUPREME COURT & IOWA STATE COURT ADMINISTRATOR'S OFFICE, MORALITY, DECISION-MAKING AND JUDICIAL ETHICS, *available at* http://www.abanet.org/judicialethics/resources/comm_code_cady_undated.pdf (last visited Jan. 28, 2008) (urging significant judicial involvement in domestic violence cases).

74. *See supra* notes 38–40 and accompanying text.

gle reported case of discipline imposed against a judge trying to provide more help.[75] Even the vigorous debate in the commentary, captured above, is a debate over how far to go, and not in what direction to move.[76] At every turn, the evidence from the past decade confirms the continuing shift.

III. UNDERSTANDING ETHICS AS DYNAMIC

The dialogue underscores the accuracy of the observation in *Meeting the Challenge: An Update* that guidance is emerging and that the evolution of the judge's role will take time and bears watching. At the same time, the more recent guidance reflects the dramatic shift that has occurred over the past decade and remains in progress. The Proposed Best Practices from *Reaching Out or Overreaching* go far beyond the predominantly procedural steps captured in the proposed protocol from Minnesota. The Proposed Best Practices also differ dramatically from the more tentative recommendations captured in 1998 in *Meeting the Challenge*, and even go further than the recommendations published in *Judicial Techniques* in 2003. The Massachusetts Guidelines are different still, reinforcing the notion that context matters: "[t]he issues and challenges presented by self-represented litigants may vary in different court departments."[77] Not surprisingly, when the ABA announced in 2003 the appointment of a joint commission to evaluate the Model Code of Judicial Conduct, the ABA President observed: "Judicial ethics are not static. . . . It has been twelve years since the ABA took a good, hard look at the code . . . ."[78]

It is hardly surprising that our notion of judicial ethics in cases involving unrepresented litigants is both context-based and in flux, given the nature of the evolution of ethical norms generally. Discussing the importance of context in analyzing professional regulation and ethics, Professor David Wilkins contends that "the traditional claim that a uniform set of ethical rules and enforcement practices governs all lawyers in all contexts is both descriptively false and normatively unattractive."[79] Regarding the evolution of ethics, the Professional Responsibility Section of the

75. *See supra* notes 33–35 and accompanying text.

76. *See supra* note 72 and accompanying text.

77. MASSACHUSETTS GUIDELINES, *supra* note 62, introductory cmt.

78. Dennis W. Archer Jr., Am. Bar Ass'n President, Remarks Made at Announcement of the Joint Commission, *available at* http://www.abanet.org/judicialethics/about.html (last visited Jan. 28, 2008).

79. David B. Wilkins, *Afterword: How Should We Determine Who Should Regulate Lawyers?—Managing Conflict and Context in Professional Regulation*, 65 FORDHAM L. REV. 465, 482 (1996).

Association of American Law Schools (AALS) recently held an essay contest in which contestants were to envision ethics in the year 2050, recognizing that change inevitably will occur.[80] As Professor Failinger observes in her introduction to the symposium issue: "So long as ethics problems are human problems, technological advances and institutional restructuring will add some new ethical complexity for every problem that they eliminate."[81] Professors Gary Bellow and Bea Moulton captured the point even more broadly in the opening chapter of their landmark *Lawyering Process* textbook, where they addressed pressures of conformity as new lawyers enter the legal profession: "We often forget that much of what is accepted as true and unalterable in the legal or any social system is, in fact, provisional and contingent—a product of chance and particular social, economic and historical circumstances rather than immutable laws."[82]

Beyond the rules of judicial ethics, the evolution of the ethical rules governing lawyers, from the old Canons, to the Model Code, to the Model Rules, provides one example of how the ethical rules have changed in light of our changing experience and changing times. Although beyond the scope of this article, an analysis of the controversies surrounding the adoption of the Model Rules of Professional Conduct is instructive for any effort to achieve formal changes of ethical rules; according to critics of the process, what began as an attempt to provide meaningful guidance in the face of changing times and attitudes triggered backlash by self-interested members of the organized bar, producing a disappointingly "parochial" set of rules.[83] The stated reasons for recent changes to the Model Rules of Professional Conduct included the growing disparity in state ethics rules, the changing

80. Symposium, *Professional Responsibility Section Essay Contest: Ethics in the Year 2050*, 15 WIDENER L. J. 235 (2006). Judge Jack Weinstein observed years ago in his discussion of the teaching of legal ethics: "In a number of instances, changes in the practice of law have created new ethical problems, demanding new approaches and requiring substantial rethinking." Jack Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452, 463 (1972).

81. Marie A. Failinger, *Introduction*, 15 WIDENER L.J. 235, 238 (2006).

82. GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: ETHICS AND PROFESSIONAL RESPONSIBILITY 11 (1978).

83. *See, e.g.*, Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEXAS L. REV. 639 (1981); Gerald J. Clark, *New Rule of Professional Conduct for Massachusetts: A Dissent*, 27 THE ADVOCATE 39 (1997); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985).

organization and structure of modern law practice, and the increased public scrutiny of lawyers.[84]

Some changes in ethical rules have been necessitated by a changing world, with the ethical rules often the last place that the change is reflected. The dramatic changes in technology have created a host of problems for the formal rules, which were drafted long before the world was familiar with personal computers, electronic mail, and the internet. Our norms and expectations regarding issues such as client confidentiality and the development of an attorney-client relationship are in flux as attorneys now are able to consult with clients in other states over the internet. The Ethics 2000 Commission made some rule changes in light of the "[n]ew issues and questions raised by the influence that technological developments are having on the delivery of legal services."[85]

With the issue of unrepresented litigants, the traditional roles of court-connected mediators and courts clerks are challenged in a manner similar to the challenges facing judges. With court personnel generally, the formal rule that prohibits the giving of "legal advice" is often found to be unworkable. Court personnel struggle to understand the distinction between legal information and legal advice, while attempting to provide assistance specific enough to be of help to unrepresented litigants in handling their cases. Not surprisingly, emerging guidelines steer clear of the legal advice versus legal information distinction in favor of a more useful list of "do's" and "do not's," even though the formal prohibition against giving legal advice has not been eliminated.[86]

A similar evolution is underway in the area of "unbundled" legal services or "discrete task assistance." The practice of providing assistance short of full representation is hardly new; legal ser-

84. CHARLOTTE (BECKY) STRETCH, OVERVIEW OF ETHICS 2000 COMMISSION AND REPORT, http://www.abanet.org/cpr/e2k/e2k-ov_mar02.doc (last visited Mar. 16, 2008).

85. *Id.* In light of the realities of practice, the changes to the Model Rules do not begin to resolve the plethora of ethical questions triggered by the changes in technology. *See, e.g.*, WILLIAM HORNSBY, ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVICES, IMPROVING THE DELIVERY OF AFFORDABLE LEGAL SERVICES THROUGH THE INTERNET (1999), http://www.unbundledlaw.org/program/11%20-%20Lawyering%20over%20web%20-%20hornsby.pdf; Jeffrey M. Aresty & Peter D. Lepsch, *Professional Responsibility in a Global World: A Lawyer's Role Redefined in the Age of the Virtual Practice*, 8 NEW ENG. J. INT'L & COMP. L. 37 (2002), *available at* http://www.nesl.edu/intljournal/vol8/aresty_v8n1.pdf; Peter Jaffe, *Legal Practitioners Take Note: Virtual Lawyering Has Arrived*, THE NAT'L L.J., June 19, 2000, at B15.

86. *See, e.g.*, Engler, *supra* note 1; Greacen, *supra* note 7.

vices lawyers have provided legal advice and assistance through hotlines, pro se clinics, and the preparation of pro se pleadings for years without explicit treatment of these programs in the text of the ethical rules. Many private lawyers perform similar tasks, although often under the cloud of being sanctioned for ghost-writing, or they are forced to undertake full representation. Yet, the effort to expand and formalize this practice—partly in response to the high incidence of unmet legal needs and high costs of hiring attorneys—has faced strong resistance from many in the organized bar. Over time, through a similar evolution inspired by conferences, publications, and meetings, a change in attitudes favoring unbundled legal services is evident across the country, reflected in part by changes in ethical and procedural rules in many jurisdictions.[87]

A final example involves the role of the judge apart from cases involving unrepresented litigants. Scholars have noted for years the changing role of judges with respect to techniques for managing their dockets, or for dealing with particularly complex litigation.[88] More recently, "problem-solving courts," such as drug courts, mental health courts, and domestic violence courts, are emerging across the country, creating new challenges and modified roles for the judges who preside in those courts.[89] The community courts have developed, from a similar desire to solve problems more effectively than the solutions the traditional, adversarial courts have been able to craft, and carry with them a changing role for judges as well.[90]

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87. For a state-by-state analysis and updates of unbundled legal services and discrete task representation, see "Unbundled" Legal Services, A Look at What Is Happening Around the Country, http://www.unbundledlaw.org/States/states.htm (last visited Mar. 11, 2008). In the Model Rules, the adoption of Rule 6.5, which concerns "nonprofit and court-annexed limited legal services programs," provides one illustration of the modification of rules to facilitate the changing needs of practice. MODEL RULES OF PROF'L CONDUCT R. 6.5 (2007).

88. Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 977 (2004).

89. *Id.* at nn.57–58; *see also* Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 Law & Pol'y 125 (2001), *available at*://www.courtinnovation.org/_uploads/documents/p-s%20court%20primer%20PDF3.pdf; Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125 (2004). *See generally*, Center for Court Innovation, http://www.courtinnovation.org (last visited Jan. 28, 2008).

90. *See, e.g.*, Rolando Acosta, *The Birth of a Problem-Solving Court*, 29 FORDHAM URB. L.J. 1758, 1759 (2002) (arguing that problem-solving courts have evolved from the recognized failure of the court system to deal effectively with cases that are characterized by a confluence of social, legal, and human problems).

IV. TOWARDS AN IMPARTIAL COURT SYSTEM THAT PROVIDES JUSTICE FOR UNREPRESENTED LITIGANTS

A. *Articulating Core Principles For Understanding the Proper Judicial Role*

As many of the examples above illustrate, the evolution of ethics is a dynamic process. The area of judicial ethics is no exception.[91] That realization makes it even more important to understand the full extent of the problems facing courts flooded with unrepresented litigants, to envision the full range of solutions permissible under existing rules, and to adjust our attitudes to allow judicial ethics to be part of the solution rather than part of the problem. A crucial component of the process of crafting effective solutions involves insuring that the problems have been properly framed in the first place. Where a range of permissible responses exists, identifying core principles to help guide the discussion is crucial.

Many discussions framing the problem recognize that the flood of unrepresented litigants creates challenges for judges.[92] The scenarios similarly cause problems for court-connected mediators, court clerks, other court personnel, and opposing counsel.[93] The solutions we craft must respond to these challenges.

That is not, however, the full scope of the problem. On a daily basis in courts across the country, unrepresented litigants are forfeiting important rights and denied meaningful access to justice—not due to the governing law and facts of their cases, but due to the absence of counsel. Those familiar with the courts may disagree as to how large or small this category of cases may be. Part of the agenda for anyone attempting to address the problems is the development of reliable evaluation tools to identify the litigants in this category. What is beyond dispute is that the problem is real, widespread, and devastating for litigants seeking justice in the courts. That the absence of counsel leads to the forfeiture of rights is evident from various reports, confer-

91. The formal rules are often the last to reflect the changes. Moreover, in each area, it is a mistake to assume that the formal rules on paper reflect the actual practice. For a troubling example involving widespread violations of the ethical rules governing lawyer negotiations with unrepresented litigants, see Engler, *supra* note 8, *passim.*

92. *See supra* notes 1–7 and accompanying text.

93. Greacen, *supra* note 7.

ences, and litigation seeking appointment of counsel and must be taken as a given as we craft solutions.[94]

This reality underscores the need to recognize general principles that must guide the discussion of the proper role not only for the judge, but also for other court personnel.[95] First, the stated goal of our system of justice is to provide fairness and justice. Our traditional understanding of the proper roles of the players in the system was developed under rules that imply that unrepresented litigants are the exception, not the rule, in our adversary system. Given the realities of many of our courts in the early twenty-first century, our traditional understanding of the roles is frustrating—rather than furthering—the goal of fairness and justice. As between abandoning the goal or changing the roles, we should not abandon the goal.[96]

Second, we must revise our notion of impartiality. We can no longer accept the idea that impartiality equals passivity. To the contrary, a system that favors those with lawyers over those without lawyers, without regard to the applicable law and the facts of a case, is a partial (rather than impartial) system. To avoid having a system that penalizes those without lawyers, the courts in general, and judges specifically, must be prepared to play an active role to maintain the system's impartiality: "the judge . . . must be as active as necessary to ensure that the legal system's promise of fairness and substantial justice is not frustrated by the litigant's appearance without a lawyer."[97] This concept is easier to accept where all sides are unrepresented, and more challenging where one side is represented. Yet, that is the scenario in which the active role of the judge is most important. As long as the judge is equally prepared to help all sides, as needed, the problem is not one of impartiality, but the appear-

94. For descriptions of the operations of various courts involving unrepresented litigants, see, for example, Engler, *supra* note 1, at 2047–69 and Engler, *supra* note 8, at 104–30. For an overview of studies discussing the impact of counsel, including a comparison of outcomes in similar cases involving represented and unrepresented litigants, see Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed* (unpublished manuscript, on file with author).

95. For a more detailed discussion of these principles, see Engler, *supra* note 1, at 2022–27.

96. *Cf.* GRAY, *supra* note 3, at 48 ("The adversary system is not ensconced in the code of judicial conduct, nor is the primary purpose of the code to protect the formalities of the adversary system.").

97. Engler, *supra* note 1, at 2028. I rejected the notion that the active role amounts to a violation of the duty to remain impartial: "[T]he call for judges to provide vigorous assistance to unrepresented litigants is consistent with the need for impartiality." *Id.*

ance of impartiality. The solution is to provide clear guidelines and explanations, not to require the judges to sit back passively regardless of the unfairness that follows in terms of process or outcome.

Third, we must revisit our notions of voluntariness where unrepresented litigants are involved. The operation of many of our courts still depends on an assumption that those without counsel are "choosing" to "self-represent." It also assumes that their choices along the way, such as whether to settle or go to trial, what witnesses and evidence to produce, or on what terms to settle, are "voluntary" if they are understood and not the product of coercion. Yet, in a world with a widely documented shortage of lawyers for the poor in civil cases, courts must recognize that a litigant's appearance without counsel is most often compelled, not voluntary. Regarding the individual decisions made by litigants, we should be using a standard akin to "informed consent," accepting as voluntary only the choices made by litigants aware of their options and the advantages and disadvantages of those options.[98]

Fourth, we should remember that the roles of the players are interconnected, and that context matters. How active a judge must be depends in part on how much assistance the litigant receives before appearing before the judge. The more that clerks and other personnel are permitted to provide extensive assistance, and the more that assistance is supplemented by creative and effective assistance programs, the less the judge must do, while, nonetheless, retaining overall responsibility for the fairness of the proceeding. Similarly, what is necessary and proper for a judge in the context of a high-volume court flooded with unrepresented litigants may be different from what seems proper in a different setting. The range of judicial actions is not only appropriate, but consistent with the Canons of Judicial Conduct.

The court decision in *Oko v. Rogers* remains instructive: "The heavy responsibility of ensuring a fair trial in . . . a situation [involving a pro se litigant] rests directly on the trial judge. The buck stops there."[99] The buck does stop with the judge, and the

98. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2007) (defining "informed consent"). The Massachusetts Guidelines encourage judges to consider the standard of informed consent in determining whether waivers of rights by unrepresented litigants in settlement agreements are "knowing and voluntary." *See supra* note 68 and accompanying text.

99. Oko v. Rogers, 446 N.E.2d 658, 661 (Ill. App. Ct. 1984). As the authors of *Judicial Techniques* observe, "[t]his is the only case we found that is directly on point for the issue addressed in this article." Albrecht et al., *supra* note 16, at 42.

judge is responsible for ensuring the fairness of his judgment and orders, and procedures that produce them.

B. *The Scholarly Critique of the Passive Role*

The principles articulated above are at odds with the narrow view equating the requirement of impartiality with the need for judges to perform their roles in a passive way. A growing number of commentators have called for a rejection of the passive role. The commentators argue not only that the more active role is ethically permissible, but also that it is necessary to avoid a partial system that favors those with lawyers and in which unrepresented litigants are denied meaningful access to justice due to the absence of counsel. They weigh in with views closer to the approach I articulated in my 1999 article than to the more limited role endorsed by the authors of *Judicial Techniques* and *Reaching Out or Overreaching.*

Dr. Jona Goldschmidt rejects the idea that impartiality equals passivity and urges judges to be far more active in the adversary process.[100] Goldschmidt, co-author of *Meeting the Challenge,* proposes guidelines for judges and court personnel consistent with the principle that impartiality does not equal passivity. The authors of *Judicial Techniques,* while agreeing that judges cannot maintain a passive role, "do not necessarily espouse all [of Dr. Goldschmidt's] recommendations for a more active role for judges and court staff."[101]

Fresh on the heels of that statement, however, Richard Zorza, one of the four authors of *Judicial Techniques,* published an article on his own that in fact urges a far more active role than the *Judicial Techniques* authors articulated. Zorza's "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."[102] As Zorza explains, "[j]udicial neutrality and judicial passivity are very different, and should not be confused;" the "appearance of neutrality" and "true neutrality" are very different in the pro se context, "and true neutrality often requires a form of engagement that may seem inconsistent with traditional expectations for the appearance of neutrality."[103] According to Zorza, the

100. 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 (2002).

101. Albrecht et al., *supra* note 16, at 45.

102. Zorza, *supra* note 10, at 425.

103. *Id.* at 426.

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."[104]

Professor Deborah Rhode urges courts to assist unrepresented litigants as part of the goal of providing access to justice.[105] Building on my work, as well as the Goldschmidt and Zorza pieces, Professor Russell Pearce urged a model of the judge's role closer to the inquisitorial system, if that is what is required to provide access to justice for those without counsel. According to Professor Pearce, "[r]ather than serving as a passive umpire, judges should be active umpires responsible for remedying process errors that would deprive the court of relevant evidence and arguments and that would ensure informed consent to settlements."[106]

Most recently, Professor Paris Baldacci, focusing on the particular problems of the New York City Housing Court, organizes the commentary into three types of models for change: (1) a "more active judicial role within the strictures of the present system," (2) "incorporating the simplified evidentiary procedures applicable to small claims actions," and (3) "adopting an administrative procedure or inquisitorial model in which the judge bears an affirmative duty to develop the factual record and identify the controlling law."[107] While acknowledging that the various proposals "challenge our adversarial system's received traditions of judicial passivity and impartiality, narrowly understood," Professor Baldacci proposes, "as have other commentators, a more active, inquisitorial-based role for Housing Court judges."[108]

C. *The Importance of Context*

Professor Baldacci's focus on the New York City Housing Court illustrates that the needs of unrepresented litigants vary from context to context, and that effective responses must be tailored to particular contexts. For example, studies of housing courts across the country routinely show that the provision of counsel to the tenant is a crucial factor affecting case outcomes

104. *Id.*

105. DEBORAH L. RHODE, ACCESS TO JUSTICE 81–86 (2004) (discussing the increase in pro se litigants and the problems that are inherent therein).

106. Pearce, *supra* note 88, at 977 (2004).

107. Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659 (2006).

108. *Id.* at 696.

and preventing eviction.[109] Yet, studies also show that landlords typically prevail against unrepresented tenants—and they do so with shocking speed—regardless of whether the landlord is represented or not.[110]

Professor Baldacci articulates working hypotheses that explain why certain forms of assistance may not be sufficient in particularly intractable contexts. He observes "[t]he fundamental problem for pro se litigants in having their defenses or claims heard is not primarily their lack of information or understanding, but the structural dynamics in Housing Court which work to silence the pro se litigant even when she has some knowledge regarding defenses or claims."[111]

The example of housing courts highlights the importance of context in determining the level of help necessary in a particular court or case. The help needed in certain housing courts may be different from what is needed in courts handling family law matters, and both may be different from courts handling other civil

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109. *See* Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 485 (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 420 (2001); Russell Engler & Craig S. Bloomgarden, Summary Process Actions in Boston Housing Court: An Empirical Study and Recommendations for Reform 5 (May 20, 1983), http://www.nesl.edu/clsr/projects/PSP/EnglerPubs/Engler_Bloomgarden.pdf.

110. The titles themselves are disturbing and revealing. *See, e.g.*, THE WILLIAM E. MORRIS INST. FOR JUST., INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS 8 (2005), http://www.lawhelp.org/documents/254961Final%20eviction%20report-P%20063.06.05.pdf (eighty-seven percent of landlords represented); LAWYER'S COMM. FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 13 (2003), http://www.lcbh.org/pdf/full_report.pdf (fifty-three percent of landlords represented); MONITORING SUBCOMM., CITY-WIDE TASK FORCE ON HOUSING COURT, 5 MINUTE JUSTICE OR "AIN'T NOTHING GOING ON BUT THE RENT!" (1986).

111. Baldacci, *supra* note 107, at 661–62. In reaching his hypotheses, Baldacci relies not only on studies of the New York City Housing Court, *id.* at 660 n.3, but also on Professor Barbara Bezdek's seminal study of Baltimore's Rent Court, *Silence In The Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992). Professor Baldacci posits these additional hypotheses:

> Pro se litigants usually have only a very generalized understanding regarding both the defenses and claims relevant to their cases and regarding how to present those defenses or claims to the trier of fact. . . . The root cause of this systemic silencing may be, in part, a slavish adherence to what is perceived to be the strictures of the adversarial system, including the resulting notions of the appropriate role of judges in such a system.

Baldacci, *supra* note 107, at 661–62.

matters. The analysis regarding the need for more active judicial help requires a similar process to that which courts must undertake to determine the level of help unrepresented litigants need. Almost a decade ago, I proposed the following six factors as a starting point for this analysis:

> (1) The prevalence of unrepresented litigants in the court generally; (2) the volume of cases the court typically handles; (3) the complexity of the proceeding(s); (4) the adversarial or contested nature of the proceeding(s); (5) the extent to which cases regularly pit an unrepresented party against a represented one; (6) the extent to which a power imbalance exists between the parties.[112]

Where these factors suggest that help is necessary to avoid the routine forfeiture of important rights by litigants without counsel, judges must play a more active role.

Tailoring responses to a particular context is not unusual as courts struggle to respond to the volume of cases in which litigants appear without counsel. For example, courts handling family law and housing matters are among the courts seeing the highest incidence of unrepresented litigants.[113] Not surprisingly, those same courts, and advocates practicing in the areas of family law and housing law, are in the forefront of the movement to identify innovative ways to respond to the growing crisis.[114]

Pilot programs involving limited representation, appearances by lay advocates, and court-based assistance programs often involve rule changes or revised interpretations of existing rules; they are also typically targeted to high-volume courts.[115] Case law

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112. Engler, *supra* note 1, at 2044–46. For a more detailed explanation of the factors, see *id.*

113. *See, e.g., id.* at 2047–52, 2057–69; *see also infra* note 115 and accompanying text.

114. Engler, *supra* note 1, at 1998–2007, 2065–66 (describing initiatives to help unrepresented litigants in New York City Housing Court); *see also* John M. Greacen, *Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts*, 44 JUDGES' J. 24 (2005); N.Y. COUNTY LAWYER'S ASS'N, *supra* note 9; Bonnie Rose Hough, *Evaluation of Innovation Designed to Increase Access to Justice for Self-Represented Litigants*, *in* THE FUTURE OF SELF-REPRESENTED LITIGATION 109, 109–18, http://www.ncsconline.org/WC/Publications/Res_ProSe_FutSelfRepLitfinalPub.pdf (last visited Mar. 15, 2008); Bainbridge D. Testa, *New Housing Ct. Chief Plans to Expand Volunteer Program*, MASS. LAW. WEEKLY, Jan. 6, 2003, at 1; Neil Steiner, An Analysis of the Effectiveness of a Limited Assistance Outreach Project to Low-Income Tenants Facing Eviction (Oct. 14, 1997) (unpublished manuscript, on file with author).

115. For example, unbundling, limited representation, and lawyer-for-the-day programs often begin in the family law and housing areas. A prominent role for lay advocates involves victim witness advocates in domestic violence settings. *See, e.g.*, ROBYN MAZUR & LIBERTY ALDRICH, WHAT MAKES A DOMESTIC VIO-

and administrative rules applicable to particular contexts often do the same, as illustrated by the standards for the approval, or subsequent vacatur of, stipulations in the New York City Housing Court; where the stipulations involve unrepresented litigants, the judge must consider the characteristics of the courts and litigants in the required analysis.[116]

If the need to tailor responses to particular contexts is not new, neither is the image of an active judge directed both to maintain impartiality and provide substantive justice. Small claims court judges are bound by the duty of impartiality, but still are typically required to discover relevant facts and provide justice.[117] Administrative law judges must remain impartial, but they also have a duty to develop the record and provide extensive assistance.[118] Similarly, judges in problem-solving and community courts go far beyond the traditional role of judges developed in the adversarial setting.[119]

Indiana's 1997 Advisory Opinion on Judicial Qualifications prescribes a more active role for judges "in a non-adversarial setting" to avoid inappropriate and avoidable denials of relief.[120] Using examples of litigants seeking a name change or simple

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LENCE COURT WORK? LESSONS FROM NEW YORK 3 (2003), *available at* http://www.courtinnovation.org/pdf/what_makes_dvcourt_work.pdf.

116. *See, e.g.*, Administrative Notice (AN LT-10) (1997), discussed in N.Y. COUNTY LAWYER'S ASS'N, *supra* note 9, at 16. Decisions involving the vacatur of stipulations permit vacatur where stipulations are unduly harsh and one-sided, particularly where vulnerable litigants waive important rights. *See, e.g.*, *In re* Estate of Frutiger, 272 N.E.2d 543 (N.Y. 1971); Solack Estates, Inc. v. Goodman, 45 N.Y.S.2d 906 (App. Term 1979), *aff'd* 432 N.Y.S.2d 3 (App. Div. 1980); Amsterdam Co. v. Levy, N.Y.L.J., Mar. 9, 1987, at 14 (App. Term.); McAvoy v. Chaplin, N.Y.L.J., July 15, 1983, at 13 (App. Term.); Cabbad v. Melendez, 81 A.D.2d 626 (N.Y. App. Div. 1981); 144 Woodruff Corp. v. LaCrete, 154 Misc. 2d 301 (N.Y. Civ. Ct. 1992). Available evidence, however, suggests that the protections exist on paper, rather than in reality. *See, e.g.*, Engler, *supra* note 8, at 142–43; N.Y. COUNTY LAWYER'S ASS'N, *supra* note 9, at 16.

117. While small claims courts are structured to provide a forum in which litigants may have their cases heard fairly without the need to retain counsel, ample evidence indicates that, in cases such as debt collection, the rights of unrepresented litigants are trampled in small claims court cases where the unrepresented litigants face "repeat players" represented by counsel. *See, e.g.*, Engler, *supra* note 8, at 118–22. The Boston Globe published a four-part "spotlight series" exploring this issue. *Debtors' Hell*, BOSTON GLOBE, July 30–Aug. 2, 2006, *available at* http://www.boston.com/news/specials/debt/ (last visited Mar. 11, 2008).

118. *See, e.g.*, Engler, *supra* note 1, at 2017.

119. *See supra* notes 89–90 and accompanying text.

120. Ind. Comm'n on Judicial Qualifications, Advisory Opinion 1-97 at 1, *available at* http://www.in.gov/judiciary/jud-qual/docs/adops/1-97.pdf (last visited Jan. 30, 2008).

divorce, the opinion advises that it is not improper for judges to assist litigants who "ha[ve] failed in some minor or technical way, or on an uncontroverted or easily established issue . . . ."[121] As many of our courts focus on unrepresented litigants, maintaining a rigid distinction between "adversarial" and "non-adversarial" settings is harder to defend. The variation in individual practices, evident in the reports and conferences, demonstrates that certain judges are far more active than the narrow vision of judicial impartiality would suggest.

D. *Judicial Ethics at a Crucial Cross-Roads*

1. The Active Role Is Necessary in Particular Contexts

Judicial Techniques, Reaching Out or Overreaching, and the Massachusetts Guidelines reflect the progress made over the past decade in recognizing the need for judges to assist unrepresented litigants and the techniques at judges' disposal for doing so within the confines of the ethical rules governing judges. At the same time, however, the documents stop short of endorsing more active steps that may be necessary to avoid outcomes that are unfair or unjust to unrepresented litigant—not due to the facts of their case and applicable law, but due to the absence of counsel. None explicitly asserts that impartiality requires an active judicial role in a context in which unrepresented litigants routinely forfeit important rights due to the absence of counsel. None proposes that the tools be mandatory in targeted contexts, as opposed to discretionary. None frames the debate in terms of measuring the level of assistance needed in relation to what is necessary to avoid particular outcomes that are unjust and unfair based on the facts of the case and the governing law.

Recall the tools urged by the authors of *Judicial Techniques.* Judges should prepare, provide guidelines and explanations, create an informal, yet structured, atmosphere, and ask questions. They should remain alert to power imbalances, avoid losing control of the proceeding, set special ground rules for objections, and attempt to convince attorneys of the benefits of proceeding informally. Judges might offer the unrepresented litigant a continuance and the option to seek assistance.[122]

These techniques may afford a litigant meaningful access to justice and may prevent a forfeiture of the litigant's rights due to the absence of counsel in some cases. The problem occurs where the techniques are not sufficient to do so. A continuance does

121. *Id.*
122. *Id.*

not guarantee that the litigant will return with counsel in a country with widely-documented unmet legal needs and a desperate shortage of available counsel for those who cannot afford to hire their own. Directing the litigant to seek assistance will not be enough if the available assistance is not sufficient to protect the litigant from suffering an unfair result. The unrepresented litigant still may not be able to hold her own in the heat of the battle in the courtroom, or in the hallway outside the courtroom. Even with informal proceedings, relaxed rules of evidence, and lengthy explanations, some unrepresented litigants will still forfeit their rights due to the absence of counsel. The New York City Housing Court illustrates the point: simply insuring that a litigant understands settlement terms will be insufficient in a context in which litigants have only a generalized understanding of their rights and are silenced by the structural dynamics of the court in which they appear.[123]

The Massachusetts Guidelines reveal shortcomings as well. As noted above, the Guidelines, and accompanying commentary, wisely urge judges to try to determine whether settlement agreements were entered into voluntarily, to ascertain whether a waiver of substantive rights by unrepresented litigants is "knowing and voluntary," and to consider the phrase "'knowing and voluntary' as that phrase is used in the context of informed consent."[124] Yet the same commentary, relying on a 1996 guide published before the dramatic changes over the past decade, reports that "there is no consensus on the extent to which judges are obligated to ensure that settlement agreements are substantively fair and reasonable."[125]

The settlement provisions highlight the larger limitation with the Massachusetts Guidelines: they are simply "advisory."[126] They were developed "to assist judges in recognizing the areas in which they have discretion and to assist them in the exercise of that discretion."[127] However wise the Guidelines may be, as long as they are advisory and discretionary, judges are free to ignore them, except to the extent that failure to take certain discretion-

123. *See* Baldacci, *supra* note 107, at 661.

124. MASSACHUSETTS GUIDELINES, *supra* note 62, § 3.4 cmt. The Commentary cites Rule 1.0(e) from the ABA Model Rules of Professional Conduct, quotes the definition in the Model Rules, and more generally defines informed consent as "the agreement by a person to a proposed course of conduct after receiving adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct." *Id.*

125. *Id.* (citing GOLDSCHMIDT & MILORD, *supra* note 3, at 53).

126. *Id.*

127. *Id.*

ary actions rises to the level of an abuse of discretion. This is true regardless of how much help an individual litigant may need, or how routinely litigants in a particular context may need extensive assistance.

A similar limitation applies to the Proposed Best Practices encouraged in *Reaching Out or Overreaching*. The document instructs that judges "may" and "should" exercise their discretion to make equitable procedural accommodations and to provide self-represented litigants a reasonable opportunity to be heard.[128] Yet, if the matter is left to the discretion of individual judges, nothing compels judges to take these discretionary steps. Moreover, there are no guarantees that even these important steps—making equitable procedural accommodations and providing litigants a reasonable opportunity to be heard—will provide the assistance some litigants need to avoid forfeiting important rights and obtain meaningful access to justice, simply because they are unrepresented.

Where the roles envisioned for judges by *Judicial Techniques*, *Reaching Out or Overreaching*, or the Massachusetts Guidelines do not permit judges to provide the help litigants need in particular contexts, we must consider the consequences of that decision. Wherever the line is drawn, judges will not be permitted to take certain actions. As long as the prohibited actions are unrelated to the issue of whether those without counsel suffer unfair or unjust outcomes due to the absence of counsel, the concerns raised in this article are not implicated.

Where, however, the judicial actions are necessary to prevent unfair or unjust outcomes, the insistence on prohibiting judges from playing that role is troubling. The interrelationship between judges and other players in the system underscores the danger of finalizing the judicial role in a vacuum, without regard to context. If court personnel, for example, are permitted to play an expansive role, or if our evaluation tools demonstrate that assistance programs are sufficient, or if a particular forum has a sufficient supply of advocates, it will be easier for judges to preside over fair proceedings and avoid unjust results. The key is not that judges must do certain things beyond maintaining the ultimate responsibility for the proceedings before them, but that the system as a whole must be structured to provide justice for those without counsel.[129]

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128. GOLDSCMIDT ET AL., *supra* note 1, at 89.

129. As stated above, the roles are interconnected, and how one role must be shaped depends on the context, the needs of the unrepresented litigants, and the roles of other players available to help. *See supra* Part IV.A (para-

We are at a crossroads where no other player in the system can provide the assistance necessary to prevent unfair or unjust outcomes, and our attitudes prohibit the judges from doing so. One solution is to admit, publicly and frankly, that our court system simply cannot provide justice for those without lawyers in that subset of cases. This solution would be disappointing for a system that promises justice to all and which utilizes images of balanced scales of justice. At least the "solution" would be honest. A second solution is to isolate these most troubling cases and develop a consensus, whether in the courts or the legislatures, that the time has come for a right to counsel in certain civil cases, also called a "Civil Gideon."[130] If counsel is available to protect litigants, the concerns regarding the rights of unrepresented litigants and the role of judges are no longer implicated.[131]

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graph discussing the fourth general principle guiding the role of the judge and other court personnel).

130. I have discussed elsewhere the extent to which the more active participation of the players in the court system, including judges, is a key component to an "access to justice" strategy that seeks to provide justice for litigants in civil cases without requiring appointment of counsel at public expense for all litigants in all cases. *See* Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REV. 196 (2006). That strategy involves three interrelated components. First, the key players in the legal system, including judges, court-connected mediators, and clerks, should be required to provide assistance as necessary to insure that unrepresented litigants do not forfeit important rights due to the absence of counsel. Second, the expanded roles should be supplemented by assistance programs, short of full representation by a lawyer in court. Both steps must be accompanied by rigorous evaluation to identify which programs and techniques are successful in stemming the forfeiture of rights in particular contexts and which simply relieve pressure on the courts without altering the outcomes. Third, a civil right to counsel should attach where the expanded roles of the key players and assistance programs cannot stem the forfeiture of important rights of unrepresented litigants. For a discussion of the importance of understanding the Civil Gideon initiative as an exercise in effectuating social change rather than framing legal claims, see Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697 (2006).

131. Thus, the move should be supported not only by advocates for the poor, but judges, court-connected mediators, clerks and other court personnel, lawyers, and lay advocates across the country. In August 2006, the ABA's House of Delegates adopted Resolution 112A, urging the provision of "legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody," as determined by each jurisdiction. AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION 12A (2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf. For a more detailed discussion of efforts through litigation and legislation to obtain an expanded right to appointed counsel in civil cases, see *Special Issue, A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV. 163–293 (2006).

Viewed in this light, the active judicial role is wise policy in terms of marshaling scarce resources in the effort to provide access to justice. Revising the roles of the players, including judges, is the most cost-effective response to the problem because it involves modifying roles for existing players rather than demanding new resources. Where litigants receive the help that they need either from the expanded roles of those within the court system or from the assistance programs that are available in many courts across the country, full representation by a lawyer may not be necessary. But, where the revised roles and assistance programs are insufficient, counsel must be provided. We can no longer accept the routine processing of cases with unfair results for unrepresented litigants. Absent a right to appointed counsel in civil cases, the categorical limitation on the more active role of the judge urged by *Judicial Techniques*, the Best Practices, and the Massachusetts Guidelines must be rejected.

2. The Active Role is Ethically Permissible

Critics will continue to argue that providing further judicial assistance is going too far. Indeed, those same critics would likely resist the more modest steps articulated in *Judicial Techniques*, *Reaching Out or Overreaching*, and the Massachusetts Guidelines. These concerns mirror language in some cases warning that the judge may not play the role of advocate or attorney for the unrepresented litigant, practice law on their behalf, or give legal advice.[132] Other objections to the more active role expressed by judges include the opinion that assisting unrepresented litigants amounts to giving them a "free lunch," that some unrepresented litigants will try to use their unrepresented status to a tactical advantage, and that steps to assist unrepresented litigants will increase the likelihood that they choose to by-pass counsel even when they have the means to retain counsel.[133] Even where judges are permitted to be more active, critics, including many judges, would argue it is impractical to expect them to do so given the crushing volume of cases before them and the amount of time that would be required for each case. The dockets would grind to a halt.

The practical arguments relating to the time involved do not stem from concerns of judicial ethics regarding the proper role of the judges. They may well implicate other aspects of the judicial canons, such as disposing of all judicial matters promptly;

132. *See* Engler, *supra* note 1, at 2013.

133. *Id.* at 2015; GOLDSCMIDT ET AL., *supra* note 1, at 52.

even there, however, the duty carries with it the obligation to dispose of matters fairly, a requirement that necessarily tempers the pressure for speed. Nor are the solutions to the docket issue to be found solely in our understanding of judicial ethics; changes in the entire court system, not just the behavior of judges, hold the keys to the solution.

The objections not based on practical issues stem from notions of the "proper" role of judges. While framed in terms of judicial ethics, the concerns are not grounded in specific prohibitions that appear in the canons of judicial ethics. Rather, they arise from interpretations of the general notions articulated in the canons and case law regarding impartiality, neutrality, and partisanship. As explained above, however, it is not the formal ethics rules governing judges that compel our adherence to those notions. The existing rules permit the judicial behavior urged in this article. It is our attitudes, and the related interpretations of general principles and ethical guidelines, that must be changed.

Education, training, guidelines, and protocols are important tools in accelerating the transition in our attitudes. Individual judges prepared to exercise their discretion in a manner that seeks to protect vulnerable unrepresented litigants will find invaluable tools in the documents discussed in this article. Sharing techniques that work, and incorporating the techniques as part of judicial education and training, broaden the menu of available techniques and embolden judges who might otherwise feel isolated and fearful to use those techniques. As our understanding changes as to the skills and temperament that are imperative for judges regularly handling cases with unrepresented litigants, the selection of judges will change as well.[134] Finally, the adoption of protocols is crucial, but with the obvious caveat that the devil is in the details. The adoption of protocols restricting more active judges, rather than providing guidance to judges in their efforts to provide needed help, would be worse than the absence of protocols in the first place.[135]

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134. *See* ZORZA, *supra* note 3, at 109–13 (regarding the selection and training generally of "self-help" judges). New judges will be selected in an era in which the need for judicial assistance to unrepresented litigants is increasingly accepted as part of the role of the judge in particular contexts. As judges selected against this backdrop replace judges appointed and trained in an earlier era, the pace of the change should accelerate..

135. Protocols and guidelines will reflect at least to some extent the prevailing attitudes in a particular jurisdiction. Any such protocols will be the result of an intensely political process, going further than some would like, and not as far as others have urged. Yet, they also reflect shifts over time. The recently adopted guidelines in Massachusetts likely would not have garnered the neces-

CONCLUSION

The past decade has seen a dramatic trend toward supporting the more active role of judges in trying to insure that litigants appearing without counsel in civil cases obtain access to justice despite the absence of counsel. Yet, at each turn, innovations and initiatives to justify and effectuate the more active role face traditional objections that equate impartiality to passivity, regardless of the context of the inquiry. The governing principles, critique of the passive role, and intractable, high volume courts illustrate the dangers of accepting the limits on the judicial role urged by some commentators. Until and unless a Civil Gideon is implemented in a manner that provides counsel for vulnerable litigants in court, judges must be permitted to provide litigants with the help they need. The buck stops with the judges. Where no one else in the court system can provide the necessary assistance, judges must be permitted to perform their duties in a manner that achieves justice. Nothing in the rules of judicial ethics prohibits this course of action, and it is only our attitudes, reflected in our interpretations of ethical rules, guidelines, and protocols, that require changing. The dramatic shift in our attitudes over the past decade provides hope that the day we liberate our judges to provide justice is not too far away.

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sary support a decade ago; guidelines drafted a decade from now will reflect any intervening shift in attitudes.