Judicial Treatment of Pro Se Litigants: The Struggle to Remain Neutral

Introduction

The phrase, “pro se,” “which means on behalf of one’s self, is generally used to describe litigants who appear in court without lawyers to represent them.”¹ Over the past three decades, the number of pro se litigants in United States courts has dramatically increased, with “the number of cases [in state courts] in which at least one side is pro se [now] outnumbering those in which counsel represents both parties.”² In 2007, non-prisoner pro se litigants filed over twenty thousand cases in federal district courts in a one-year period.³ Federal appellate courts experienced a twenty percent increase in pro se appeals between the years of 1993 and 2004, and most recently a forty-nine percent increase.⁴ Additionally, pro se litigants accounted for one of the parties in thirty-nine percent of federal cases.⁵ Recently in 2010, in the United States Court of appeals, 55,992 appeals were filed and pro se filings accounted for 28,931 of the appeals—

¹ BOSTON BAR ASSOCIATION TASK FORCE ON UNREPRESENTED LITIGANTS, REPORT ON PRO SE LITIGATION, 4 (1998)(emphasis added).
² “The number of unrepresented litigants has surged nationwide, especially in family law cases, with reports indicating that eighty to ninety percent of family law cases.” Drew A. Swank, Esq., The Pro Se Phenomenon, 19 BYU J. PUB. L. 373, 376 (2004-2005).
⁴ Id. at 985, 989.
⁵ VanWormer, supra note 3, at 989.
that is more than half (51.67%). Moreover, the United States District Court for the District of Massachusetts reported, “receiving, on average, 500 civil cases annually filed by indigent, unrepresented litigants.” Pro se prisoner litigants bringing mostly civil rights claims and habeas corpus petitions accounted for seventy percent of the caseload.

In poorer state courts, already suffering from minimal resources and overflowing dockets, the influx of cases with pro se litigants has added to the burden. In California state courts alone, the percentage of pro se litigants has surged from one percent in 1971 to nearly seventy-five percent as of 2005. The New Hampshire Supreme Court Task Force on Self-Representation reported that “one party [proceeded] pro se in eighty-five percent of all civil cases in the district court and forty-eight percent of all civil cases in the superior court.” Further, the Boston Bar Association’s, 1998 Task Force on Unrepresented Litigants reported, “that litigants without lawyers [appeared] in striking numbers in all Massachusetts courts.” In 1998, Suffolk County reported that sixty-seven percent of all cases involved a pro se party.

The increase of pro se litigants in both federal and state courts, many of which have difficulty “completing forms and following basic court procedures,” creates problems and delays in an already overburdened court system. “Inadequately prepared pro se litigants often tie up courts with continuances and modifications,” and court staff often must spend a significant

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6 Though the number of pro se cases filed has fluctuated over the years, the number of cases filed pro se has consistently stayed between 50,000 to 70,000. United States Courts, Judicial Facts and Figures (2010).
7 Id.
8 Boston Bar Association Task Force on Unrepresented Litigants, supra note 1, at 1.
9 Swank, supra note 2, at 376.
10 Id.
11 VanWormer, supra note 3, at 990.
12 Boston Bar Association Task Force on Unrepresented Litigants, supra note 1, at 1.
13 Id.
14 Id. at 5.
amount of time assisting pro se litigants and explaining the procedures involved, many of which are unfamiliar to pro se litigants. Additionally, when surveyed many federal and state court judges agreed upon eight major issues they face when adjudicating cases with pro se litigants:

(1) Litigation delays; (2) maintaining judicial impartiality; (3) attorney impatience; (4) pro se litigant’s perception that he is being ‘railroaded’ or that evidentiary rules and court procedures get in the way of the truth; (5) maintaining control over the pro se litigant; (6) getting the pro se to comply with court procedures and evidentiary rules; (7) counsel’s reluctance to press advantage over a pro se litigant; and (8) in the contrary, overkill by attorneys.

Most troubling to the federal judges surveyed was that “despite efforts to deal evenhandedly with pro se litigants, the desire to ensure that no plausible position is unexplored and to explain judicial procedures which represented parties have explained by their counsel may create an unconsciously administered advantage for pro se litigants.” Although many courts, including the United States District Court for the District of Massachusetts, now supply pro se litigants with guides and instructions for filing a complaint and filling out frequently used forms, there is no hard line guide to help judges navigate the unique problems they face when handling cases with pro se litigants.

This paper will examine judiciary interactions with pro se litigants, specifically in the context of how judges remain neutral in cases involving pro se litigants and whether any leniency shown to pro se litigants confers an advantage on them. Using law review articles, statistical reports, and personal observations, this paper attempts to determine a pattern of judicial behavior towards pro se litigants and whether that pattern consists of judges showing them extraordinary leniency. Finally, the paper will suggest guidelines that judges may follow when dealing with pro se litigants.

15 Id.
16 Id. at 6.
17 Id. at 25.
Representing Oneself: A Brief History

The right to represent oneself was established early in United States history. An individual’s right to represent oneself and litigate without the representation of counsel originates from British common law and is rooted in a number of Constitutional provisions. Under the Sixth Amendment of the United States Constitution, “federal and state criminal defendants are guaranteed the right of counsel, [as well as] the inverse right to refuse counsel.”

The right of civil litigants to represent oneself in federal courts, however, is not conferred by the Sixth Amendment. That right originates from British common law and is codified in the United States Code. In 1215, “the Magna Carta announced that ‘to no one will we sell, to no one will we refuse or delay, right or justice.’” Preserving much of British common law, the American legal system retained the idea expressed in the Magna Carta, embodying the principle that “the courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, and the illegal alien.” In the Judiciary Act of 1789, The United States First Congress solidified this principle, proclaiming, “that in all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys

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19 Id. (referring to the First, Fifth, Fourteenth, and Sixth Amendments, the Privileges and Immunities Clause, and the Due Process Clause).
20 It is important to note that unlike criminal defendants, civil litigants, do not have the right to state-appointed counsel should be unable to afford counsel themselves. VanWormer, supra note 3, at 986.
21 Id. at 987.
22 Id.
23 Id.
24 Thompson, supra note 17, at 602.
at law as by the rules of the said courts respectively.”  


26 Eventually, states followed suit and through statute or by the state’s constitution, conferred the right of self-representation upon the individual state.  

Although the right to self-representation in the United States has existed since the 18th Century, the influx of pro se litigants is a relatively recent phenomenon.  

28 As court dockets grew and American society became more litigious, access to representation for low to moderate-income individuals became a growing concern for many legal scholars.  

29 In the 1990s, the ABA reported, that fewer than thirty percent of the legal problems of low-income households enter the court system and forty percent of the legal problems of moderate-income households enter the court system.”  

30 The report also noted that, “almost eighty percent of low-income households who had legal problems had not involved a lawyer in the situation.”  

31 Furthermore, when low-income households “had legal needs, thirty-eight percent of the time they took no action.  

32 Thus, lower-income and moderate-income individuals have historically looked to three sources when in need of counsel to litigate a civil matter: (1) court-appointed counsel; (2) the public and

25 VanWormer, supra note 3, at 987 (citing JUDICIARY ACT OF 1789 § 35 (1789)).  
27 See VanWormer, supra note 3, at 988.  
28 Thompson, supra note 17, at 604.  
29 Id.  
30 Id. at 605 (citing Roy W. Reese & Carolyn A. Eldred, AM. BAR. ASS’N, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 22 (1994)).  
31 Id.  
32 Id.
private legal service programs; and (3) the bar.\textsuperscript{33} “Demand for assistance, [however], has traditionally exceeded supply.”\textsuperscript{34}

Historically, both state and federal courts have subsidized access to the court system for indigent litigants by waiving court filing fees.\textsuperscript{35} Though applicants can request that the court waive the requisite filing fees and costs, courts have discretion to allow a request upon reviewing an applicant’s affidavit, statement of assets, and taking into account the “nature of the action, defense, or appeal.”\textsuperscript{36} Applicants can also request court-appointed counsel, however, counsel is usually appointed only in “exceptional circumstances,” and usually “provide assistance to only the neediest of parties.”\textsuperscript{37} I, myself, assisted on a pro bono case in which the plaintiff proceeded pro se for five years without much progress before the court appointed pro bono counsel.

Besides seeking court-appointed assistance, litigants in need of counsel can also look to public and private legal aid programs.\textsuperscript{38} In the 1960, Congress designed an assistance program that provided legal representation for civil litigation matters for low-income individuals.\textsuperscript{39} The legal assistance program was highly successful, increasing the number of lawyers that served indigent clients from 600 to 2500.\textsuperscript{40} During the last two decades, however, “federal funding for legal services programs has been cut by one-third [and] greater restrictions have been placed on

\textsuperscript{33} Thompson, supra note 17, at 606.
\textsuperscript{34} Id.
\textsuperscript{35} “In 1948, Congress implemented 28 U.S.C. § 1915, permitting an individual to request to proceed in an action without responsibility for fees or security.” Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} See id. at 607.
\textsuperscript{40} See id.
the type of cases and the type of clients that government-funded programs can help.”41 As a result, legal aid assistance for low-income individuals is a rarity.

Low-income individuals in need of legal assistance can also look towards the bar for legal representation.42 Along with billable hours, many firms require their attorneys to provide a number of pro bono hours.43 Reports note, however, in recent years pro bono services have diminished and firms have “decreased their pro bono hours by thirty-three percent.”44 Moreover, less than twenty percent of firms “achieved the ABA’s recommended fifty hours of pro bono service per attorney per year.”45

With legal resources for low-income individuals abating and court-appointed counsel awarded to a small number of cases, it is no surprise that the presence of pro se litigants have increased. For many low to moderate-income litigants that desire access to the court system, they must look to themselves for representation.

Facing Challenges: Issues Unique to Dealing with Pro Se Litigants

Litigation Delays

Pro se litigants pose a number of problems in the court system, one of them being causing delays in an already over-burdened system.46 As “non-professionals in a professional system,” pro se litigants often cause delays and increase the use of already scarce judicial resources.47 Pro se litigants often miss or are unprepared for scheduled hearings and thus force rescheduling.48

41 Id.
42 Id.
43 See id.
44 Id.
45 Id.
47 Id.
48 See id.
Furthermore, because pro se litigants are often unfamiliar with court procedures and etiquette, they “force deviation from court routines designed for the efficient handling of cases.”\textsuperscript{49} As a result, cases involving pro se litigants often take longer to reach a resolution than cases where the parties are represented by counsel.\textsuperscript{50} In a survey of 100 court clerks, eleven percent responded that they spend more than fifty percent of their time on pro se litigants.\textsuperscript{51} Furthermore, due to a lack of knowledge of substantive and procedural law, pro se litigants often inundate the court with the filing of illogical and useless pleadings, motions, and briefs.\textsuperscript{52}

Pro se litigants can be extremely litigious and the continuous filing of duplicative and/or illogical pleadings, motions, and briefs places an undue burden on the court.\textsuperscript{53} For example, Chukwuma E. Azubuko has filed or appealed over 100 actions in federal courts.\textsuperscript{54} In 1995, after his driver’s license was suspended, Azubuko filed an appeal in the United States District Court for the District of Massachusetts.\textsuperscript{55} The District Court dismissed the appeal, at which point Azubuko appealed the dismissal to the United State Court of Appeals for the First Circuit.\textsuperscript{56} When the First Circuit denied the appeal, Azubuko sought a writ of certiorari from the Supreme Court of the United States.\textsuperscript{57} Azubuko later brought suit, pro se, against Framingham State College for “incorrectly grading his exams and unreasonably lowering his grades.”\textsuperscript{58} Four years later, after the dismissal of the action against Framingham State College, Azubuko attempted to

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Swank, \textit{supra} note 2, at 384.
\textsuperscript{53} Id.
\textsuperscript{55} Id. at 7 (citing Azubuko v. Registrar of Motor Vehicles, 95 F.3d 1146 (1st. Cir. 1996)).
\textsuperscript{56} Id.
\textsuperscript{57} Id. (citing Azubuko v. Registrar of Motor Vehicles, 520 U.S. 1157 (1996)).
\textsuperscript{58} Id. (citing Azubuko v. Bs. of Tr. of Framingham State Coll., Suffolk Superior Court C.A. No. 91-6590-D).
relitigate the action in two separate suits in two different counties and also brought suit against
the judge who dismissed his action.\(^59\) As a result of his constant filing of repetitive suits,
Azubuko is prohibited from filing any actions in Suffolk County Superior Court without prior,
written approval of the Regional Administrative Justice.\(^60\) Similarly, Azubuko has been under an
order by Judge Young of the United States District Court for the District of Massachusetts
prohibiting Azubuko from filing in the District Court unless approved by a judge.\(^61\)

While Azubuko is an extreme example of an extraordinarily litigious pro se litigant, there
are other pro se litigants that participate in overly aggressive, duplicative, and increasingly
burdensome pro se litigation practices.\(^62\) A large number of pro se cases involve prisoners
bringing habeas corpus petitions and 42 U.S.C. § 1983 claims against prisons and their
officials.\(^63\) In 2006 and 2007, around fifty-four percent of filing in the courts of appeal were by
prisoners.\(^64\) In a society where prison populations show a much higher prevalence of illiteracy,
pro se filings by many of the prisoners impose a significant burden and delay among the court
system above that of the average pro se litigant.\(^65\) In 1998, almost half of the prison population
lacked a high school diploma or GED, and fourteen percent did not possess greater than an

\(^{59}\) Id.; Azubuko v. Bd. of Tr. of Framingham State Coll., Middlesex Superior Court, C.A. No.
97-5562; Azubuko v. Peter Lauriat, Justice of the Superior Court, Suffolk Superior Court,
C.A. No. 97-5016-C; Azubuko v. Bd. of Tr. of Framingham State Coll., Suffolk Superior Court,
C.A. No. 97-5015-B).

\(^{60}\) Id. at 7 (citing Memorandum of Decision and Order, Feb. 20, 1998 (Hinkle, J.), Azubuko v.
Bd. of Tr. Of Framingham State Coll., Suffolk Superior Court, C.A. No. 97-50150-B.)

\(^{61}\) Donaldson, supra note 54, at 7.

\(^{62}\) Donaldson also mentions pro se litigant, Mark Reznik who has filed a number of suits and
appeals in the Massachusetts District Court. In fact, in one case, Reznik “filed more than
one hundred motions in eleven months.” Id. at 7-9.

\(^{63}\) Landsman, supra note 45, at 443.

\(^{64}\) Id.

\(^{65}\) John Matosky, Illiterate Inmates and the Right of Meaningful Access to the Courts, 7 B.U.
eighth grade education. Court clerks and judges often find it difficult to discern the plaintiff’s claims because the complaints are poorly written and unclear. Furthermore, the large number of inmate filings also poses problems. In 1995, prisoners brought nearly 40,000 new lawsuits in federal court—filing suits at the rate of twenty-five suits per 1000 inmates and thirty-five times more frequently than non-inmates. Although the Prison Litigation Reform Act, enacted in 1996, restricted prisoner’s access to federal courts and decreased inmate filings, prisoner pro se litigants still account for a large number of pro se litigants in federal and state courts.

While working for the Massachusetts Department of Correction, I observed a number of pro se filings by inmates. Many of the pro se complaints were repetitive, lengthy, and illogical. When stating section 1983 claims, the complaint would often repeat verbatim the statutory language even where inapplicable, and would often cite most of the Amendments of the Bill of Rights as the basis for their claims. Due to a lack of knowledge of the substantive law, pro se inmates often took a “kitchen sink” approach when drafting their complaint, bringing any claims that are remotely related. The pro se inmates often filed frivolous and repetitive motions or motioned the court for numerous extensions. Furthermore, inmates appearing pro se were either “habed” into court or appeared by video-conference. Many times, hearings were delayed or cancelled and were rescheduled due to problems with prisoner transport or technical glitches with the video conferencing system. The difficulty of disposing of and resolving prisoner litigation is reflected in the 2008 Annual Report of the Director from the Administrative Office

66 Id.
67 See id.
68 See id.
70 By 2001, filings decreased to 22, 206 filings—still a significant number. Id. at 1559, 1582.
71 One pro se inmate whose case was in front of Judge Lauriat in the Massachusetts Superior Court, continuously filed motions to compel regarding his confiscated material, even though the motions were repeatedly denied.
of the United States Courts, reporting that disposal of prisoner litigation was the second smallest percentage of disposed of matters.\textsuperscript{72}

Regardless of whether pro se litigants are inmates or non-inmates, particularly litigious, or just highly ignorant of the legal process, the lack of experience inexorably causes delays. Unfortunately, in an effort to clear dockets and enable pro se litigants to litigate their meritorious claims, a large amount of judicial resources are required. Thus, pro se litigants burden the court system in more ways than one.

\textit{Controlling Pro Se Litigants and Enforcing Evidentiary and Procedural Rules}

The lack of counsel for pro se litigants not only causes delay in court proceedings, but also results in pro se litigants retaining unrealistic expectations, which would be “checked” by counsel if the party had an attorney.\textsuperscript{73} In a survey by the Boston Bar Association Task Force, “every single judge who responded expressed concern over the unrealistic expectations” of many pro se litigants and reported that pro se litigants’ “misperceptions about the availability and efficacy of judicial remedies and the lack of understanding [often resulted] in frustration and dissatisfaction with both the judicial process and the result in a particular case.”\textsuperscript{74} These unrealistic expectations, resulting from being personally and emotionally tied to their claim, may lead to many pro se litigants feeling “a sense of unfairness, helplessness, and futility” and turning hostile and angry towards the court.\textsuperscript{75} Such feelings may result in pro se litigants resorting to violence or unruly behavior, and failure to properly adhere to evidentiary and procedural rules.\textsuperscript{76}

\begin{itemize}
\item \textsuperscript{73} Landsman, supra note 45, at 451.
\item \textsuperscript{74} Boston Bar Association Task Force on Unrepresented Litigants, supra note 1, at 22.
\item \textsuperscript{75} Landsman, supra note 45, at 451.
\item \textsuperscript{76} See id.
\end{itemize}
In the Boston Bar Association Task Force Survey, clerks reported being verbally abused on many occasions and several were concerned about their safety at times.\textsuperscript{77} One judge even reported having a pro se litigant that was so angry, he picketed in front of the courthouse for months.\textsuperscript{78} Other demonstrations of anger by pro se litigants have been more violent and extreme.\textsuperscript{79} In response to growing concerns about the risk of violence involving angry pro se litigants, the Ninth Circuit’s Task Force on Self-Represented Litigants “suggested that expenditures for the training of court personnel to handle pro se litigants might be placed ‘within the category of improving court security.’”\textsuperscript{80}

While observing a pro se trial in the United States District Court for the District of Massachusetts, in front of Judge Young, the pro se litigant’s annoyance and frustration was obvious, although he did not respond violently. The pro se litigant had filed suit against a police officer defendant, charging claims of Arrest without Probable Cause, Use of Excessive Force, Assault and Battery, and Intentional Infliction of Emotional Distress. He claimed that he was unfairly arrested for drunk driving when these events occurred. The pro se litigant was an inmate at the time of the trial. The pro se litigant very obviously felt that he had been grievously wronged and while being examined by defense counsel exhibited signs of distress and annoyance at certain questions. For example, when repeatedly asked about his refusal to take the field sobriety test and provide a urine sample, the pro se litigant was noticeably perturbed and

\textsuperscript{77} Boston Bar Association Task Force on Unrepresented Litigants, supra note 1, at 23.
\textsuperscript{78} Id. at 26.
\textsuperscript{79} Sadly, in 2005, Bart Ross, a pro se litigant in a medical malpractice case that Judge Lefkow had dismissed, murdered the mother and husband of Judge Lefkow, a federal judge for the United States District Court for the Northern District of Illinois. Landsmen, supra note 45, at 452 (citing Don Babwin, Police: Wisconsin Death Has Lefkow Tie, CHICAGO TRIBUNE.COM (March 11, 2005).
\textsuperscript{80} Landsman, supra note 45, at 452 (citing Ninth Circuit Judicial Council Task Force on Self-Represented Litigants, Final Report 26 (2005)).
continued to state that he did not want to take the test. Additionally, during closing arguments, the pro se litigant continuously appealed to and plead with the jury to follow their common sense, although the litigant, himself, have an unprepared, unfocused, and highly repetitive closing statement.

In addition to responding to and controlling the anger of pro se litigants, judges also have problems getting pro se litigants to properly adhere to conduct, procedural, and evidentiary rules.81 Because the pro se litigant “has no interest in a long-term relationship with the court,” there is “little motivation to adhere to rules of appropriate conduct.”82 Pro se litigants are more likely to “neglect time limits [and] have problems understanding and applying the procedural and substantive law pertaining to their claim.”83 Although many courts have not created uniform guidelines on how judges should handle situations in which pro se litigants do not adhere to conduct and procedural rules, the Massachusetts state courts’ have developed a specific approach.84 When a pro se litigant engages in improper conduct, judges in Massachusetts state courts, first “gradually tighten procedural leeway.”85 If the conduct continues, a judge may issue orders “specific to certain kinds of behavior in the action at hand.”86 Upon continuation of disruptive conduct and failure to follow procedure, and on defendant’s motion, the judge has

81 Landsman, supra note 45, at 451.
82 Id.
83 Swank, supra note 2, at 384; While observing a pro se litigant in front of Judge Young, I observed that the litigant had to be reminded of his time limits, especially during the closing statements. Also at times it was clear that the pro se litigant knew that opposing counsel’s questions were objectionable, but did not know why, at which point Judge Young sustained the objection and stated the basis for it. Further when asked about his reasons for not taking the field sobriety test, the pro se litigant responded that he did not want to take the test, at which point Judge Young interjected and told the jury that a person is not legally required to take a field sobriety test.
84 See Donaldson, supra note 54, at 13.
85 Id.
86 Id.
discretion to dismiss the pro se litigant’s case.\textsuperscript{87} One problem with this particular approach is that because pro se litigants only have a temporary relationship with the court, sanction to not carry the same impact as they do on attorneys repeatedly sanctioned for disruptive behavior.\textsuperscript{88} Thus, although sanctions may affect the pro se litigants case, it rarely (except in extreme circumstances) affects the litigants ability to file additional cases in the future.\textsuperscript{89}

In dealing with pro se litigants, many attorneys complain that “pro se litigants don’t know or follow court rules, don’t understand or obey the law, and worse that judges give them unfair leeway.”\textsuperscript{90} Without any professional legal training, most pro se litigants enter the court system with an ideal of justice inconsistent with how the system really works and a strategy based on the most recent taping of a courtroom television show.\textsuperscript{91} With such a skewed view, it is no surprise that many pro se litigants not only walk away disillusioned and frustrated, but also that they take up significant time and resources in the court room, requiring assistance above and beyond what counsel-assisted parties require.\textsuperscript{92} Until a more streamlined process for dealing with pro se litigants is developed, delay, frustration, and difficult applying court room etiquette and rules will continue to plague interactions with pro se litigants.

\textsuperscript{87} Id.  
\textsuperscript{88} See id. at 15 (noting “that sanctions only apply to the case at hand”).  
\textsuperscript{89} See id. at 7, 12.  
\textsuperscript{91} See Landsman, \textit{supra} note 45, at 451.  
\textsuperscript{92} See id.
The Most Significant Problem: Maintaining Judicial Impartiality while Simultaneously Facilitating Proper Resolution of the Matter on the Merits

Judicial neutrality is the touchstone of the United States legal system, ensuring the legitimacy, fairness, and democracy of the American judicial process. Judicial impartiality is so central to the American judicial process that “the legal system has built up a complex and multi-faceted structure to protect and emphasize this neutrality.” Canon 2 of the Model Code of Judicial Conduct states, “a judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” One major concern for judges dealing with pro se litigants is how to deal with them “in the courtroom without departing from the judicial role as a neutral, impartial decision maker.” This section will examine judges’ interactions with pro se litigants and their attempts to maintain the appearance of impartiality while facilitating the just resolution of meritorious claims. The section will also examine the duties that courts owe pro se litigants, and what guidelines, if any, that case law has set for relaxing procedural and evidentiary standards.

Outlining the Problem: Are Judges’ Interactions with Pro Se Litigants Neutral?

Because pro se litigants require more guidance and assistance than litigants that have the assistance of counsel, judges “tend to see the special demands created by pro se litigants as potentially embroiling them in the proceedings in ways that suggest partiality.” In dealing with pro se litigants that are ignorant of the various procedural and substantive nuances of law, the

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94 Id. at 427.
95 Id. (citing MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1997)).
97 Landsman, supra note 45, at 452.
judge is placed in a precarious position, especially when the litigant’s opponent has an attorney, which introduces an additional component of imbalance and advantage. The judge’s choices are to either not intervene and risk that the pro se litigant “may be unable to present evidence supporting its position” and risk an unjust result, or intervene on behalf of the pro se litigant and risk “violating the duty of impartiality and denying the represented party the benefit of retained counsel.”

Even the Supreme Court has expressed such concerns. In Pliler v. Ford, Justice Thomas stated, “that requiring a district judge to explain the ‘details of federal habeas corpus procedure’ to a pro se litigant ‘would undermine district judges’ role as impartial decisionmakers.’” Concerns that a pro se litigant’s inability to navigate the legal profession may result in an unfair result may “tempt judges to assume a paternalistic attitude towards the litigants—abandoning adversarial neutrality in favor of a fatherly or motherly effort to do what is best for all concerned.”

Though many judges do not and would not go as far as abandoning neutrality, when surveyed, a majority of judges indicated that they take specialized steps when dealing with pro se litigants. The majority of judges stated that they typically “explain the nature of the proceedings, explain possible disadvantages of going pro se, hold conferences to get a better understanding of the issues, and write explanations of procedure and law to make judicial decisions easier to understand.” An example of the latter, explaining procedure and law to facilitate understanding of decisions, can be seen in a Memorandum and Order issued by Judge

98 Judicial Techniques, supra note 96, at 16.
99 Id.
100 Landsman, supra note 45, at 452.
101 Id. (citing Pliler v. Ford, 542 U.S. 225, 231 (2004)).
102 Id.
103 BOSTON BAR ASSOCIATION TASK FORCE ON UNREPRESENTED LITIGANTS, supra note 1, at 26.
104 Id.
Saylor of the United States District Court for the District of Massachusetts, in a recent case in which one of the parties was an inmate, pro se litigant. In *Richard Lariviere v. Worcester House of Correction*, 11-40149-FDS, Judge Saylor issued a Memorandum and Order: (1) granting plaintiff’s motion to proceed *in forma pauperis*; (2) directing the plaintiff to file an amended complaint; and (3) denying, “without prejudice, the plaintiff’s motion for appointment of counsel.” In part B of the analysis, Judge Saylor explains that the plaintiff must amend his complaint to state the names of other defendants, in order to withstand dismissal. Judge Saylor explains the various procedural requirements of the Federal Rules, as well as the requirements for stating a cause of action under 42 U.S.C. § 1983. Judge Saylor informs the pro se litigant that the amended complaint “must clearly identify the alleged misconduct of each defendant,” and that “if there is more than one cause of action, the amended complaint must indicate against whom each cause of action is brought.” Judge Saylor also informs the pro se litigant of the requirements for stating a claim under section 1983, outlining in detail what the amended complaint must allege.

Similarly, in another case with a pro se litigant, Judge Saylor entered an order: (1) granting the plaintiff’s motion to proceed *in forma pauperis*; (2) directing the plaintiff to file an amended complaint; and (3) denying motion for appointment of counsel. Again, in detail

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106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.*
Judge Saylor informs the pro se plaintiff that he must amend the complaint to avoid dismissal; using much of the same language in the same order as was used in the Lariviere Order.\textsuperscript{111}

In \textit{Bloomer v. Becker College and Edmund J. Paro}, No. 09-11342-FDS, in which both sides were represented by counsel, Judge Saylor’s Memorandum and Order granting in part and denying part the defendant’s motion to dismiss plaintiff’s complaint, has subtle differences from the memorandums and orders issued in the two previously discussed cases.\textsuperscript{112} While Judge Saylor’s Memorandum is lengthy and detailed and gives the basis for his decision, it lacks the instructional component present in \textit{Ward} and \textit{Lariviere}. For example, in the part A of the analysis, Judge Saylor states very simply that counts 1 and 2 are dismissed “because plaintiff has not alleged that it had actual knowledge of her sexual harassment or that there was quid pro quo harassment.”\textsuperscript{113} In contrast, Judge Saylor’s Memorandums and Orders in \textit{Ward} and \textit{Lariviere} are nearly devoid of any “legalese” or Latin terms, with the exception of \textit{in forma pauperis}—knowledge of which can be assumed, considering the plaintiff filed a motion requesting to proceed \textit{in forma pauperis}.\textsuperscript{114}

In both cases involving complaints filed by pro se litigants, Judge Saylor’s Memorandums go beyond stating that the plaintiff must amend the complaint and providing a basis for his decision, it informs the plaintiff of what (lacking any extensive specificity, in other words, Judge Saylor does not rewrite the complaint) what must be included in the amended complaint to state a cause of action under section 1983 and avoid dismissal.\textsuperscript{115} Although Judge

\begin{footnotes}
\item[111] \textit{Id.}
\item[112] Beth Bloomer v. Becker College and Edmund Paro, Memorandum and Order on Defendant Becker College’s Motion to Dismiss, August 13, 2010, No. 09-11342-FDS.
\item[113] \textit{Id.}
\item[114] See Lariviere, \textit{supra} note 105; see also Ward, \textit{supra} note 110.
\item[115] This is not meant to suggest any impropriety on the part of Judge Saylor. In fact, I had him as a professor and have the utmost respect for him as a judge and teacher. This is
\end{footnotes}
Saylor’s Memorandums and Orders demonstrate a possible difference between treatment of pro se litigants and those represented by counsel, such differences are merely demonstrative of a differing, but neutral approach. Most controversy surrounding the judicial treatment of pro se litigants concerns the relaxation of procedural and evidentiary standards.

Relaxing Procedural and Evidentiary Standards: What Standard Applies to Pro Se Litigants?

Widespread uncertainty exists “as to the proper standards to which pro se litigants should be held throughout the litigation process.” In 1997, more than ninety percent of judges surveyed by the American Judicature Society stated, “that their courts had no general policy addressing” how to apply procedural rules to pro se litigants. Due to the lack of clear guidelines, courts have taken an ad hoc approach to dealing with pro se litigants relaxing procedural requirements where they see fit.

Without clear bright line rules regarding whether and which procedural requirements should be relaxed for pro se litigants, courts generally follow the Supreme Court holding in *Haines v. Kerner*, finding that pro se litigants should be held to “less stringent standards than formal pleadings drafted by lawyers,” and reviewed liberally. In order to encourage the resolution of the case on the merits, however, many courts have liberally construed the Supreme Court’s holding in *Haines*, and extended liberal review standard to relaxing requirements on “service of process, motion to dismiss, summary judgment, discovery rules, and evidentiary

merely an observation on how Judge Saylor’s approach may differ when dealing with pro se litigants and even suggests that Judge Saylor takes an engaged, though neutral approach, as opposed to a passive approach when judging.

116 VanWormer, supra note 3, at 995.
117 Landsman, supra note 45, at 450.
118 Id.
119 Id. (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)).
rules.” In contrast to Haines and the Ninth Circuit decision in Balistreri, in McKaskle v. Wiggins, 465 U.S. 168, the Supreme Court approved “judicial insistence on the presence of ‘standby counsel’ in a criminal trial,” but found that “there is no constitutional right to receive personal instruction from the trial judge on courtroom procedure.” Justice Thomas expanded that language in Pliler, stating that judges do not have a duty to explain habeas corpus procedures to unrepresented litigants.

With no set standard, judges’ treatment of pro se litigants seems to oscillate between the two spectrums. In a survey by the Boston Bar Association Task Force, federal judges reported being “more lenient with deadlines, and in affording opportunities to amend the complaints” when dealing with pro se litigants. The judges also reported “excusing consultation requirements before the filing of motions, allowing a second chance to meet a requirement for admissible evidence to support a contention, and letting [pro se] litigants talk, and then listening ‘with the ear of a diagnostician’ to see if there are issues they want to present but have not successfully articulated.” This paternalistic treatment of pro se litigants has led many judges and attorneys to question whether pro se litigants are receiving an advantage in litigation, and whether this type of preferential treatment violates a judges’ moral responsibility to remain impartial.

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120 Landsman, supra note 3, at 450 (referring to Balistreri v. Pacifica Police Dep’t., 901 F.2d 696, 698-99 (9th Cir. 1990)(recognizing that the Court “has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements.”)).
121 Id. (citing McKaskle v. Wiggins, 465 U.S. 168, 183 (1984)).
122 Id. (citing Pliler, 542 U.S. at 227).
123 Id.
124 Boston Bar Association Task Force on Unrepresented Litigants, supra note 1, at 26.
125 Id.
Generally, lower federal courts are “split as to whether Haines should be expanded to encompass other aspects of pro se actions,” with many judges finding that pro se litigants “are entitled to particularized instruction concerning the consequences of failing to properly respond to motions for summary judgment.”127 Others argue that pro se litigants are not entitled to relaxed procedural standards outside of the liberal review of the complaint set by the Supreme Court in Haines.128 Proponents of this point of view, argue that pro se litigants must bear the consequence of their choice to proceed without representation.129

Although there is no set standard on how judges should treat pro se litigants and the uncertainty continues to foster debates about whether judges’ are being paternalistic by relaxing standards and informing pro se litigants, a third option exists—the idea that judges taking specialized steps to ensure a quick resolution on the merits in cases involving pro se litigants by relaxing procedure are not exhibiting partiality, but rather are actively, yet neutrally engaging in the judicial process.130 In his article, The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se, Richard Zorza “two dimensions of judging.”131 The first dimension is an “engaged” approach to judging, in which judges actively engage in a case.132 The second dimension is a “passive” approach to judging; in which judges “do not engage the parties.”133 Under Zorza’s construction, judges can be neutrally or non-neutrally engaged, as well as neutrally or non-neutrally passive.134 Judges

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128 See id.
129 See id.
130 Zorza, supra note 93, at 430.
131 Id.
132 Id.
133 Id.
134 Id.
that engage neutrally in cases with pro se litigants, “create an environment in which all the relevant facts are brought out, engages the parties, as needed, to bring out these facts, and their foundation, and ensures neutrality by making sure that each side gets their side fully out.”

In contrast, non-neutrally engaged judges “intervene to deter or prevent one side getting their story before the court, or allows bias to cloud how evidence is seen.”

Considering the actions that many judges report taking towards pro se litigants and my observations of judicial treatment towards pro se litigants—such as explaining decisions, relaxing procedural requirements, informing pro se litigants of the consequences of their choices, relaxing time restrictions and filing deadlines—are indicative of choices that judges may make if trying to reinstate balance and neutrality in a courtroom where represented parties hold significant advantages over their pro se opponents. In other words, judges’ actions, which have been criticized as paternalistic, may be driven by a motive to simply even an uneven playing field.

**Conclusion: Solutions to the “Pro Se Problem”**

Despite a lack of uniform federal guidelines on how to deal with pro se litigants, many courts are developing guidelines for judges and court staff to follow, as well as providing resources for pro se litigants. For example, the United States District Court for the District of Massachusetts, dedicates two law clerks to pro se litigation, one pro se intake court and one pro se law clerk. The pro se intake clerk “receives case filings and correspondence from pro se litigants.” The pro se law clerk “assists judges of the court and coordinates the court’s civil

\[^{135}\text{Id.}\]
\[^{136}\text{Id.}\]
\[^{137}\text{BOSTON BAR ASSOCIATION TASK FORCE ON UNREPRESENTED LITIGANTS, supra note 1, at 26.}\]
\[^{138}\text{Id.}\]
\[^{139}\text{Id.}\]
pro bono program.” The clerk also performs the initial screening of pro se complaints, and reviews applications to proceed in forma pauperis. Furthermore, the District Court provides a step-by-step guide to filing civil complaints for pro se litigants on its website.

In addition to informational materials for pro se litigants and the employment of specialized staff, a protocol should be developed so that judges and court staff have distinct guidelines on how to deal with pro se litigants. Minnesota trial courts have taken the initiative to draft such a protocol. The Minnesota protocol sets out ten detailed guidelines judges should follow when dealing with pro se litigants:

(1) Verify that the party is not an attorney and understands that they have a right to be represented by an attorney; (2) Explain the process of the hearing or trial; (3) Explain the elements; (4) Explain that the plaintiff bears the burden of proof; (5) Explain the kind of evidence that may be presented; (6) Explain the limits of the evidence that can be considered; (7) Ask both parties whether they understand the process and procedure; (8) Non-attorney advocates are permitted to sit at counsel table but cannot argue on behalf of a party; (9) Questioning by the judge should be directed at obtaining general information to avoid the appearance of advocacy; and (10) whenever possible a matter should be decided and the order prepared immediately.

The use of protocols such as the Minnesota protocol, with examples and explanations, would at the very least provide a framework for judges to operate within when dealing with pro se litigants. The protocol could go as far to set boundaries of acceptable behavior, so that judges have an idea what actions place them outside the bounds of impartiality. Furthermore, courts could implement seminars and workshops on the proper judicial treatment of pro se litigants.

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140 Id.
141 Id.
142 See id. at 27.
143 The idea of a guideline is controversial, with some judges arguing that a strict protocol would only frustrate the process. Id. at 27.
144 Judicial Techniques, supra note 96, at 18.
145 Id.
146 See id.
Although courts are still figuring out how to facilitate the just resolution of cases on the merits involving at least one pro se litigant, while maintaining the appearance of impartiality, relaxing procedural requirements and making sure pro se litigants are informed in no way frustrates judicial neutrality. While judicial neutrality is central to the American judicial system, so is the idea that claims will be resolved on the merits and not on who hires the better attorney or who hires one at all. In keeping with the ideal of reaching swift and just resolutions, judges’ particularized treatment of pro se litigants does no more than restores order and balance to a system that becomes disrupted when one party lacks access to an attorney, and ensures that pro se litigants have proper access to courts.