

# JUDICIAL ASSISTANCE TO SELF-REPRESENTED PARTIES: LESSONS FROM THE CANADIAN EXPERIENCE

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## **Introduction**

American and Canadian courts have recently made great strides in developing out-of-court assistance programs for self-represented litigants (SRLs)<sup>1</sup> who now appear before judges in those countries in increasing numbers. Since the late 1990's,<sup>2</sup> the bar and judiciary has struggled with the phenomenon, and no shortage of meetings, conferences, and "summits" have been convened on the subject. The general literature and commentary about the pro se phenomenon has been growing at a fast pace.

The focus of these efforts has been on finding the best programs and policies to serve SRLs outside the courtroom, and providing instruction for preparing legal pleadings that comply with procedural requirements. The purposes of these programs are not only to foster good customer service, which progressive courts like to see themselves as providing, but also to facilitate efficient case processing. The types of cases at which these programs are directed are primarily those arising in such areas family law,

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<sup>1</sup> Courts in American states on the East Coast, the Midwest, and the South generally refer to SRLs as *pro se* litigants, from Latin meaning for oneself, or on one's own behalf. BLACK'S LAW DICTIONARY (7<sup>th</sup> ed.) 1236 (1999). Western state courts (e.g., Arizona, California) refer to them as *pro pers*, a shorthand version of the phrase *pro persona*, meaning for one's own person., *Id.* at 1232, or *in propria persona*, meaning in one's own person. *Id.* at 796. In Commonwealth countries, the phrase commonly used is "litigants in person."

<sup>2</sup> Jona Goldschmidt, Barry Mahoney, Harvey Solomon, and Joan Green, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998) [hereafter MEETING THE CHALLENGE].

guardianships, name changes, landlord-tenant, small claims, and other SRL-frequented areas of civil law. Many of these are uncontested cases, and often involve standardized preparation of forms or rote testimony being given to satisfy statutory requirements.

These growing, laudatory efforts by courts in both the U.S. and Canada, whether characterized as “assistance” programs or “self-service” centers do not, however, address the fundamental problem, i.e., How do we provide SRLs with fair, contested trials (or other evidentiary hearings) that can fairly be construed as a “meaningful opportunity to be heard”?<sup>3</sup> One of the best measures of procedural fairness is the action of the trial judge him or herself. But what if the trial judge is given no guidance regarding treatment of SRLs?<sup>4</sup> In America, the judiciary has increasingly grappled with the question, How far can a judge go in guiding or assisting a SRL in such a way as to avoid the possibly harsh or unjust consequences resulting from their lack of familiarity with the judicial process?<sup>5</sup>

Despite calls for clarification of the judge’s role in these circumstances,<sup>6</sup> the

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<sup>3</sup> See note 13, *infra* for the origin of this phrase.

<sup>4</sup> See Goldschmidt, et al., MEETING THE CHALLENGE, *supra* note \_\_\_\_, at 52 (reporting that most judges surveyed said that their “primary challenge” is maintaining impartiality in the mixed cases, where one is self-represented and their opponent is represented).

<sup>5</sup> Here I refer to their unfamiliarity with the rules of procedure, the rules of evidence, substantive elements of proof, burdens of proof, and courtroom etiquette.

<sup>6</sup> Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2044 (1999) (noting the absence of rules for cases in which one party only is represented is a “gaping hole” to be remedied in the justice system); Judicial Council of California, Task Force on Self-Represented Litigants, STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 23 (February, 2004) (available at [www.courtinfo.ca.gov/reference/documents/selfreplitsrept.pdf](http://www.courtinfo.ca.gov/reference/documents/selfreplitsrept.pdf)) (visited August 16, 2005)

The degree to which a judge is responsible for ensuring a fair hearing, and deciding what measures can be taken to protect constitutional safeguards for all litigants without compromising judicial impartiality, is a source of stress for judicial officers and for court staff as well. In particular, the situation in which an attorney represents one party and the other party is self-represented creates an extremely difficult courtroom environment. Judicial education in this area should attempt to provide judges with techniques they can employ to ensure due process and protect judicial impartiality.

Maryland Administrative Office of the Courts, AN EXECUTIVE PROGRAM ASSESSMENT FOR STATE COURT PROJECTS TO ASSIST SELF-REPRESENTED LITIGANTS: FINAL REPORT SUBMITTED TO THE STATE JUSTICE

current reluctance of the judiciary to assist SRLs is fostered by both the traditionally passive role of the adversarial trial judge, and American case law that generally refuses to recognize a duty of judicial assistance.<sup>7</sup> Yet, most trial judges have come to grips with the reality that they have to assist SRLs to some extent to avoid the harsh results of their lack of legal knowledge.

Canada, in contrast, has through its decisional law both recognized a duty of reasonable judicial assistance in civil<sup>8</sup> and criminal<sup>9</sup> cases, and more clearly defined the

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INSTITUTE 36 (January 7, 2005), which, after studying nine pro se assistance programs in five states, that courts, recommended, *inter alia*:

[Recommendation #1] Expand the scope of the court's efforts from a single program to the entire court. . . [A] major flaw in most programs [is] that the court as a whole is not sufficiently involved in moving the cases of self-represented litigants to a conclusion. . . [T]he court uses its programs to 'open the courthouse door' but devotes little effort thereafter to ensuring that self-represented litigants are able to navigate the corridors and courtrooms of the courthouse and exit with the relief to which they are entitled. . . This broader focus needs to include . . . the provision of assistance not only in forms preparation, but also in preparation for hearings and trials . . . ; [and] the treatment of self-represented litigants in the courtroom, including judicial perception of the limitations on their role in eliciting information from self-represented litigants . . .

[Recommendation #2] Expand the scope of the court's efforts to include assistance with contested matters and with trial preparation . . . Court programs must provide assistance for self-represented litigants in more complex, contested cases.

*See also* Supreme Court of Virginia Pro Se Litigation Planning Committee, SELF-REPRESENTED LITIGANTS IN THE VIRGINIA COURT SYSTEM: ENHANCING ACCESS TO JUSTICE 7 (September, 2002) (available at [http://www.courts.state.va.us/publications/pro\\_se\\_report.pdf#search='SELFREPRESENTED%20LITIGANTS%20IN%20THE%20VIRGINIA%20COURT%20SYSTEM%3A%20ENHANCING%20ACCESS%20TO%20JUSTICE'](http://www.courts.state.va.us/publications/pro_se_report.pdf#search='SELFREPRESENTED%20LITIGANTS%20IN%20THE%20VIRGINIA%20COURT%20SYSTEM%3A%20ENHANCING%20ACCESS%20TO%20JUSTICE')) (last visited February 23, 2006) (Recommending, *inter alia*, adoption of "appropriate protocols and specific scripts for inclusion in benchbooks for judges to use with self-represented litigants in the courtroom. These should cover responses to questions self-represented litigants ask at each stage of the litigation process, including whether or not it is appropriate for the court to even answer such questions"); Committee on Pro Se Parties and Civil Justice Reform of the Governor's Task Force on Civil Justice Reform, *Report of the Committee on Pro Se Parties and Civil Justice Reform* (undated), available at <http://www.state.co.us/cjrtf/report/report4.htm> (last visited February 23, 2006) (Reporting that "[J]udges are often in a quandary when unrepresented litigants appear in their courtrooms: Do they 'help' the pro se party, and possibly disadvantage the represented party, or do they hold the pro se litigant's feet to the fire and require him or her to follow the same rules and procedures required of represented parties?").

<sup>7</sup> The language most often cited in support of the rule of non-assistance states: "A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for as pro se defendant that would normally be attended to by trained counsel as a matter of course." *McKaskle v. Wiggins*, 465 U.S. 168, 183-184 (1984). The supreme court reached this holding in a criminal case. American courts have generally taken this to mean that, if no judicial assistance is required in criminal cases, then certainly none is required in civil cases.

<sup>8</sup> "It is generally recognized that the court should provide some assistance to an unrepresented litigant." *Manitoba (Director of Child and Family Services) v. A. (J.)*, 247 D.L.R. (4th) 490; 2004 D.L.R. LEXIS 499 [32](\*23). *See also*, *A.C.M. v. P.F.M.*, [2003] M.J. No. 386 (QL), 2003 MBQB 244, 126 A.C.W.S. (3d) 665 sub nom. *Magda v. Magda* (Q.B.).

scope of that duty.<sup>10</sup> At the risk of becoming embroiled in the controversy over whether American courts should make use of foreign law,<sup>11</sup> my goals in this paper are to illuminate the issues relating to judicial assistance as they have arisen in Canada, and to describe Canadian courts' approaches to delineating the boundaries of three categories of judicial assistance to SRLs: (a) required; (b) permissible; and (c) impermissible.<sup>12</sup>

While we can speculate as to why American courts' views of judicial assistance are so different (I would say, less progressive and harsher toward SRLs) from those held

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<sup>9</sup> The requirement of reasonable assistance is a well established duty consistent with the duty to ensure the accused has a fair trial in criminal cases. *See e.g.*, *R. v. McGibbon*, [1988] 45 C.C.C. (3d) 334, 347 (“[T]he trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defense, and to guide him throughout the trial in such a way that his defence is brought out in its full force and effect”). The extent of assistance will depend on the particular circumstances of each case. *R. v. Callow*, [2000] 2000 W.C.B.J. LEXIS 10659. The legal basis of the duty in Canada is traced to the right to a fair trial and the traditional judicial power “to elicit evidence not otherwise led by questioning witnesses.” *Barrett v. Layton*, [2003] O.J. No. 5572; 2003 ON.C. LEXIS 4796 [37-38](\*17)]. These and other cases recognizing the duty of judicial assistance are collected in the Appendix.

<sup>10</sup> It is well established that all persons presiding over adjudicative tribunals owe a duty of fairness to the parties who appear before them. *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, 636. *See also*, Mary Jane Mossman and Heather Ritchie, *Access to Civil Justice: A Review of Canadian Legal Academic Scholarship, 1977-1987*, 1990 ACCESS TO CIVIL JUSTICE 59-\_\_\_ (1990) (arguing that the concept of access to justice has moved from one of formal equality of access, which entitles all persons to an equal opportunity to appear before the court, to one of effective equality of access, which addresses the specific barriers which impede a specific litigant's pursuit of justice).

<sup>11</sup> Here I refer to the recent remarks of U.S. Supreme Court Justice Antonin Scalia bemoaning the fact that his judicial brethren had cited international sources in support of their judgments interpreting constitutional law, and the resulting speeches, debates, and scholarship on this issue. *See* the full text of the debate between Justice Scalia and Justice Breyer regarding the use of foreign law in U.S. courts (available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>) (last visited March 17, 2006). But most appellate courts frequently refer to relevant case law from other states or federal courts on same or similar issues for their non-binding, yet persuasive, importance, when novel legal questions arise, constitutional or otherwise. Presumably, this is done because of the similarity of (a) federal and state governmental interests in general, (b) populations and their customs, and (c) the legal and judicial practices in these neighboring states (not to mention the people being governed by both governments). Thus, where we have a neighboring foreign country with so much in common, and which happens to have addressed certain legal issues before us and with greater frequency, why shouldn't we avail ourselves of their experience in the matter? To disregard a body of case law that is both accessible and relevant to a novel issue (like judicial assistance or accommodation to SRLs) is tantamount to ignoring scientific research simply because it was conducted in a foreign country. Neither science or medicine have nationalistic boundaries; nor should the law.

<sup>12</sup> For another example in which this method was used in the context of judicial ethics, see Jona Goldschmidt and Lisa Milord, *JUDICIAL SETTLEMENT ETHICS: JUDGES' GUIDE* (1996) (organizing judicial settlement strategies into “appropriate” and “inappropriate” categories, based on deliberations of a committee comprised of judges, attorneys, and non-lawyers).

by Canadian courts, it is more important to inform the American judiciary of this interesting body of case law in order to advance the debate on this issue. We should care about these authorities and give them careful consideration because they come from a Commonwealth country with common historical and legal roots, a common language (for the most part), a similar, diverse culture, respect for the rule of law, and the same bedrock values of fairness, adversarial justice, and impartiality. Put simply, Canadian courts are one step ahead of us; they are past the question of recognition of a duty of reasonable judicial assistance. They are already articulating the parameters of that duty. Their experience with this issue can therefore be of great value, and a starting point, for those active in the future debates and deliberations surrounding the dimensions of reasonable accommodation for SRLs.

### **I. Ethical Guidelines for Judges: U.S and Canada**

American judges have insufficient guidance with respect to balancing their ethical obligation of maintaining impartiality and neutrality with their legal obligation of providing a fair or “meaningful” hearing.<sup>13</sup> Neither current rules of judicial ethics nor

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<sup>13</sup> A fundamental requirement of due process is “the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). “It is an opportunity which must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See also*, *Wilkinson v. Austin*, 125 S. Ct. 2384, 2395, 2005 U.S. LEXIS 4839 (2005):

The requirements of due process are “flexible and cal[.] for such procedural protections as the particular situation demands,” *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972), we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures. The framework, established in *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), requires consideration of three distinct factors:

“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.*, at 335, 47 L. Ed. 2d 18, 96 S. Ct. 893.

The flexibility concept of due process has direct applicability to the issue of judicial assistance. In other words, judicial accommodations may be needed more in some cases than others. For some reason,

their interpretive decisions address their concern in the context of contested “mixed” cases, in which one party is a SRL and the opponent is represented by counsel.

The current ABA *Model Code of Judicial Conduct* (1990) includes the duties to avoid “impropriety and the appearance of impropriety,”<sup>14</sup> to perform judicial duties without bias or prejudice,<sup>15</sup> and to “dispose of all matters promptly, efficiently, and fairly.”<sup>16</sup> These general platitudes are also commonly found in state judicial ethics codes. Lacking are guidelines or interpretive commentaries related to those sections of the present code which deal with fairness and impartiality in the context of pro se cases, mixed or otherwise.<sup>17</sup> This is why case law has thus far been the only available guidance for a trial judge in these cases. Given their long-standing concern for guidance, it is difficult to explain why this “gaping hole” in judicial ethics has never been filled.

Fortunately, the ABA at this writing is considering changes to its *Model Code*.<sup>18</sup>

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the supreme court did not consider this principle before using the language that it did in *Faretta v. California*, 422 U.S. 806 (1975), *McKaskle v. Wiggins*, 465 U.S. 168 (1984), and other cases in which they showed no sympathy for pro se litigants, and as a consequence have spawned a body of case law very harsh toward them, making reform in this access-improvement area very difficult indeed.

<sup>14</sup> ABA, MODEL CODE OF JUDICIAL CONDUCT, CANNON 2 (1990).

<sup>15</sup> *Id.*, Canon 3(B)(5). The commentary adds that a judge “must perform judicial duties impartially and fairly.”

<sup>16</sup> *Id.*, Canon 3(B)(8). The commentary to this Canon notes that “a judge must demonstrate due regard for the rights of the parties to be heard . . .”

<sup>17</sup> There is only one oft-cited ethics advisory opinion of the Indiana Commission on Judicial Qualifications which addresses a judge’s duty in an uncontested pro se case (Advisory Op. 1-97). In that opinion, the commission noted that judges have a duty of neutrality and impartiality, but,

from time to time, judges who have before them pro se litigants whose pleadings or presentations are deficient in some minor way, sometimes take an unnecessarily strict approach to those deficiencies, turn the litigants away on those grounds, and, in the name of strict neutrality, violate other sections of the Code of Judicial Conduct. . . . [In such a case] the judge violates the Code by refusing to make any effort to help that litigant along, instead choosing to deny the litigant’s request or relief. (at 1)

After citing the examples of a party seeking a name change who omits the required allegation in the petition that the change is not sought to defraud creditors, and the case of a party who omits an allegation respecting their county of residence in a divorce action, the commission found:

A judge should make inquiry of the parties to establish this element of their petition, and proceed appropriately, rather than deny the petition and excuse the parties from the courtroom on the basis of their omission. . . . [T]he judge has a duty and a responsibility to not simply turn that citizen away on the basis of a minor failure to establish every pertinent detail. (at 2)

<sup>18</sup> See the Final Draft Report, (last visited February 22, 2006).

The ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct recently circulated a Final Draft of its proposed revision of the *Model Code*. It states, in relevant part:

To ensure impartiality and fairness to all parties, a judge must be objective and open-minded, and must not show favoritism toward anyone. 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.<sup>19</sup>

Time will tell how this addition to the *Model Code*, if approved, will be operationalized in litigation, and how effective it will be in securing to SRLs their right to a meaningful opportunity to be heard. If the Final Draft is approved, judges will for the first time have a basis in judicial ethics to act affirmatively to, as it states, "ensure pro se litigants the opportunity to have their matters fairly heard." No longer will opposing counsel in a mixed case be able to thwart the judge's efforts to provide SRLs with needed guidance, information, or assistance with the threat of a disqualification motion or a judicial ethics complaint. This is a welcome development.

What remains, however, is the articulation of the boundaries of the "reasonable accommodation" to which SRLs may soon be provided.<sup>20</sup> Judges still want to know "How far can we go?" to help (or "accommodate") SRLs, especially in the mixed case

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<sup>19</sup> *Id.*, Canon 2, R. 2.06, Comment 3. In my judgment, references to SRLs should have been included in at least two other places in the Final Draft. For example, Rule 1.02 requires that "A judge shall avoid impropriety and the appearance of impropriety," and defines at Comment 2 the test for impropriety. Here, the draft should state that a judge's reasonable accommodation which may be provided to a SRL is not a proper basis for a claim of impropriety. See *Barrett v. Layton*, [2003] O.J. No. 5572; 2003 ON.C. LEXIS 4796 [45-48](\*20-23) (holding, in part, that reasonable apprehension of bias does not arise from a judge's providing reasonable assistance to a SRL).

Also, under Canon 2, Rule 2.02(B) requires that a judge "shall not, in the performance of judicial duties, by words or conduct manifest bias, prejudice, or harassment . . . based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status . . ." This laundry list should have included "status as a self-represented litigant."

<sup>20</sup> The same term is used in the Americans with Disabilities Act of 1990. See 42 U.S.C. § 12112(b)(5) (defining discrimination to include the failure to provide "reasonable accommodations"). This statute, the regulations promulgated thereunder, and the case law interpreting their application in a variety of circumstances affecting disabled persons may soon be creatively used for the interpretation of the term "reasonable accommodation" in the context of pro se litigation.

situation. They do not want to witness the harsh results that often flow from a party's unfamiliarity with the legal process, and are entitled to some guidance on the question of judicial assistance. They already have certain duties (required assistance) established by scattered case law that goes beyond the U.S. Supreme Court's declaration that SRLs are not entitled to "personal instruction by the trial judge, on courtroom procedure."<sup>21</sup> But these cases are inadequate guidance because they are few in number, scattered across numerous jurisdictions, and often inapplicable to the specific situation at hand.<sup>22</sup> While the permission<sup>23</sup> granted in the ABA's Final Draft of the *Model Code* to provide a "reasonable accommodation" is a good start, American judges still need better "black letter" guidance in this area, which I believe is best available from Canadian case law.<sup>24</sup>

As for the Canadian rules governing the duty of impartiality, they, like those contained in the American code, are codified in a code known as the *Ethical Principles for Judges* (1998).<sup>25</sup> It consists of Statements, Principles, and Commentary. Relevant provisions are as follows: "A judge must be and be seen to be free to decide honestly and

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<sup>21</sup> McKaskle v. Wiggins, 465 U.S. at 183.

<sup>22</sup> See e.g., Meckley v. U.S., 1992 U.S. App. LEXIS 9033 (\*4) (4<sup>th</sup> Cir. 1992) (trial judge has "some responsibility to assist pro se litigants who are unable to identify the proper defendant"); Timms v. Frank, 953 F. 2d 281, 285 (7<sup>th</sup> Cir. 1992) (trial judge has duty to provide "fair notice" to SRLs of their obligations upon the filing by their adversary of a Rule 56 summary judgment motion "in ordinary English"); Cincinnati M.H.A. v. Morgan, 155 Ohio App. 3d 189, 194 (2003) (trial judge "should make clear to a [SRL] . . . that he or she has the right to cross-examine the opposing party"); Gilbert v. Nina Plaza Condo Association, 64 P. 3d 126, 129 (AK. 2003) (trial judge has duty to inform SRL of her right to file a motion to compel discovery in order to secure documents needed to comply with court's pretrial order, and to give her a reasonable opportunity to do so).

<sup>23</sup> Based on the language used in the Final Draft, we cannot yet characterize the "reasonable accommodation" provision as an ethical "duty," per se. It appears to be in the nature of ethically permissible, but not obligatory, conduct.

<sup>24</sup> Other potential sources of future guidance for judges on this issue are statutes, state constitutional provisions (which could be interpreted more broadly than the U.S. Constitution has been interpreted by the supreme court), state judicial conduct organizations rulings, state ethics advisory committee opinions, and supreme court or judicial council rules.

<sup>25</sup> The document is a product of the Canadian Judicial Council. It is intended "to provide guidance to judges on ethical and professional questions and to better inform the public about the high ideals which judges embrace and toward which they strive." Canadian Judicial Council, ETHICAL PRINCIPLES FOR JUDGES, Stat. 1, Commentary 1, available at <http://www.cjc-ccm.gc.ca/cmslib/general/ethical-e.pdf> (last visited February 28, 2006).



impartially on the basis of the law and the evidence;<sup>26</sup> “the very thing this document seeks to further” is “the rights of everyone to equal and impartial justice administered by fair and independent judges”;<sup>27</sup> and judges must “uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial judges.”<sup>28</sup>

The provision of the code directly on point is Statement 6: “Judges must be and should appear to be impartial with respect to their decisions and decision making.” The relevant Principles that follow include: “Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary”;<sup>29</sup> “The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person”;<sup>30</sup> “While acting decisively, maintaining firm control of the process and ensuring expedition, judges should treat everyone before the court with appropriate courtesy”;<sup>31</sup> and “Judges should not give legal or investment advice.”<sup>32</sup>

These Canadian principles of judicial ethics, therefore, mirror those in the U.S. Fortunately for Canadian SRLs, the decisional law there has developed such that judges not only have greater authority, but an obligation to provide them with reasonable judicial assistance. Before turning to this body of Canadian law, it may be useful to pause and

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<sup>26</sup> *Id.*, Statement I, Principle 1.

<sup>27</sup> *Id.*, Principle 3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, Principle (A)(1).

<sup>30</sup> *Id.*, Principle (A)(3).

<sup>31</sup> *Id.*, Principle (B)(1).

<sup>32</sup> *Id.*, Principle (C)(1)(d). On its face, this principle appears to contradict the Canadian judges’ duty of reasonable assistance, as it has been defined by Canadian court decisions. One would be hard pressed to argue that informing a defendant of his right to challenge the validity of a search, or the qualifications of an expert, as Canadian judges are required to do, is mere legal information and not legal advice, since it requires the application of legal rules to particular facts, one of the traditional definitions for legal advice. This illustrates the limited utility of the legal advice versus legal information distinction as it applies in the context of the relationships between judge and SRL.

consider the nature and complexity of the challenge at hand.

## II. Conceptualizing the Duty of Judicial Assistance

There are a constellation of factors to be considered in answering the question of how far a judge can go to assist a SRL. Assistance (or “accommodation,” in the language of the proposed *Model Code* revision) may take many forms, and may be offered in a myriad of contexts during in the litigation process. The variation in need for assistance among SRLs is also wide. Thus, development of a typology in which such assistance is categorized into required, permissible, and impermissible categories should be useful to the judiciary. It will not be as exact as judges would like it to be, but it will be better than no guidance at all.

Analysis of the judicial assistance question must begin with – and be considered within the context of – litigants’ right to represent themselves. In Canada, as in the U.S.,<sup>33</sup> civil<sup>34</sup> and criminal<sup>35</sup> litigants have a right of self-representation. Canadian citizens also have a common law right of access to courts.<sup>36</sup> In criminal cases, § 11(d) of the Canadian *Charter of Rights and Freedoms* (1982) (akin to the Bill of Rights) provides

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<sup>33</sup> See *Faretta v. California*, 422 U.S. 806 (1975) (recognizing the fundamental right of self-representation in criminal cases under the Sixth Amendment). Additional bases were recognized in *Corfield v. Coryell*, 6 F. Cas. 546, 552 (1823) (recognizing that the privileges and immunities clause includes a fundamental right “to institute and maintain actions of any kind in the courts of the state”); *Chambers v. Baltimore & Ohio Ry. Co.*, 207 U.S. 142 (1907) (recognizing the right to sue and defend in the courts is one of the highest and most essential privileges of citizenship); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (recognizing the right of access to the court is one aspect of the First Amendment right of petition for redress of grievances).

<sup>34</sup> “The adversarial system operates whether or not parties to a civil action are legally represented. It is, therefore, not simply an adjunct of legal representation.” *Barrett v. Layton*, [2003] O.J. No. 5572; 2003 ON.C. LEXIS 4796 [21](\*8-9). “Fairness . . . demands that he have a fair opportunity to present his case to the best of his ability. . . .” *Dauids v. Davids*, [1999] O.J. No. 3930 (QL), 125 O.A.C. 375 [36] (\*\_\_\_).

<sup>35</sup> *The Queen v. Vescio* [1949] S.C.R. 139, 142; 1948 S.C.R. LEXIS 5 (\*8-9) (“It is a fundamental principle of our criminal law that the choice of counsel is the choice of the accused himself, that no person charged with a criminal offence can have counsel forced upon him against his will, and that it is the paramount right of the accused to make his own case to the jury if he so wishes, instead of having it made for him by counsel”).

<sup>36</sup> The right of “access to justice” has been recognized as a “paramount” or “fundamental” right. *British Columbia Government Employees Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, 228 (S.C.C.).

that anyone charged with an offense has a right to “a fair public hearing by an independent and impartial tribunal.” Thus, in both countries judges are required to provide all persons – represented or not – with access to justice, through fair, meaningful, and impartial hearings.

Given these rights, is it fair to establish a justice system in which a SRL has no right to any (or very limited) information or guidance before and during such a “meaningful” and “impartial” hearing to which they are entitled? No fair-minded person would agree with such a proposition, but that is the current state of American law, i.e., a legal policy of non-assistance. The question, therefore, should not be whether judicial assistance should be provided where appropriate, but, what is the nature of that assistance? Beginning with that assumption, therefore, we must first address the relevant distinction between a judge providing legal information, versus giving legal advice.

This legal information versus legal advice distinction typically arises in the context of assistance offered to SRLs by non-judicial court staff. Court clerks already have some rough guidelines to navigate the fine line between these two categories of assistance, so as not to overstep the boundaries established by unauthorized practice law rules (common to both the U.S. and Canada).<sup>37</sup> Judges may think they know the difference between legal advice and legal information, but – due to the growth of pro se litigation – an emerging body of U.S. case law continues to clarify the court’s duty to provide the SRL with certain legal information that judges once thought was legal advice.<sup>38</sup> Thus, the legal information/legal advice distinction is blurred and of limited

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<sup>37</sup> John M. Greacen, ‘*No Legal Advice from Court Personnel*’: What Does That Mean?, THE JUDGES JOURNAL (Winter, 1995) [hereafter “No Legal Advice”].

<sup>38</sup> See *supra* note 22. John Greacen counsels court clerks not to answer questions that include the words “Should I” on grounds that these words mean the questioner wants advice regarding whether he or she

utility in the context of judicial assistance.

An important consideration in the determination of the parameters of judicial assistance is the nature and posture of the case. Thus, it is relevant whether the proposed assistance is to be given in a civil or a criminal case, or at an administrative hearing. If civil, are there large sums at issue, or is the matter a small claim? If criminal, are the charges simple, or serious and complex? This consideration is particularly relevant where the assistance or accommodation involves relaxation of the rules of evidence.<sup>39</sup>

There is in addition the distinction that can be drawn between situations involving a claim on appeal by a SRL that a judge breached his or her duty of assistance to them, as distinguished from a represented party's claim that the court breached its duty of impartiality by the nature or extent of the assistance provided. Each of these claims approaches the question of "how far?" from a different perspective. Presumably, if judges are given examples of decisions from each perspective, they will get a better sense of what constitutes required, permissible, and impermissible judicial practice.

Judicial assistance can be afforded in many ways and for many purposes. It can come as a response to a specific request by the SRL, or in response to actions of the represented party. The assistance may involve rulings that are the product of the exercise

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should take a particular course of action. Greacen, "No Legal Advice," *supra* note \_\_\_\_ at 15. This guidepost is less than satisfactory in the case of a SRL, for example, who has unsuccessfully attempted to discover documents that she needs in order to comply with the court's pretrial order. A judge under *Gilbert v. Nina Plaza Condo Association*, 64 P. 3d 126, 129 (AK. 2003), is obligated to inform her of the procedure for compelling production of documents, and to give her a reasonable opportunity to do so. In this case, she has insufficient information to even know of the availability of the procedure, and is not expected to ask, "Should I move to compel production of documents my opponent has refused to produce?" Rather, under *Gilbert*, the judge should *sua sponte* provide that information as soon as it becomes clear that the SRL needs certain documents but is unaware of the procedure to compelling their production. Has the judge given impermissible legal advice? Additional examples of such situations may be cited, but the point is that the distinction between legal information and legal advice for judges is even more fuzzy than it is for court staff.

<sup>39</sup> On reform of the use and application of the rules of evidence. See John Sheldon and Peter Murray, *Rethinking the Rules of Evidentiary admissibility on Non-Jury Trials*, 86 JUDICATURE 227-31 (March-April, 2003),

of sound judicial discretion or active intervention. For example, decisions on the adequacy or interpretation of a SRL's pleadings, requests for adjournments, and requests to avoid the harsh consequences of a procedural or evidentiary rule, each involves judicial discretion to which – absent an abuse of discretion – appellate courts in both the U.S. and Canada usually defer.

Or, judicial intervention may involve proactive assistance, including such conduct as informing the SRL of missing proof, pointing out tactical dangers, raising important legal issues, strictly applying, relaxing, or ignoring the rules of evidence, or, in its most innocuous form, participating in the questioning of witnesses. A further distinction can be made between active intervention to assist a SRL for the permissible purpose of facilitating the orderly conduct of the trial, versus impermissibly assisting on grounds of mere sympathy. It is unfair to judges to assume that they will lose their neutrality merely by providing reasonable assistance of the type reflected in Canadian jurisprudence reviewed here.

Ultimately, similar rules in both countries governing the propriety of disqualification requests come into play when a represented party claims a judge provided undue assistance to the SRL. Under either the U.S. test, permitting disqualification where a judge's impartiality might be "reasonably questioned,"<sup>40</sup> or the Canadian test, where the apprehension of bias must be a "reasonable one, held by reasonable and right-minded persons applying themselves to the question and obtaining thereon the required information,"<sup>41</sup> the principle of reasonable judicial assistance or

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<sup>40</sup> 28 U.S.C. § 455(a).

<sup>41</sup> R. S. (R.D.), [1997] 118 C.C.C. (3d) 353 (S.C.C.).

accommodation as such cannot be reasonably questioned.<sup>42</sup>

### III. Canadian Approaches to Judicial Assistance

Canadian case law contains a treasure trove of principles arising in different contexts involving questions of judicial assistance to SRLs. It should be of great benefit to the American judiciary in formulating standards of reasonable assistance or accommodation whenever it decides to do so. Putting the case law of the two countries side-by-side for comparison as I did when preparing for a presentation to the 2004 meeting of the Canadian Bar Association made it clear that Canadian authorities differ markedly from those in the U.S. by their recognition of an explicit duty of reasonable judicial assistance (*albeit* limited by the same principles of fairness and impartiality as we espouse).

It would be misleading, however, to leave the impression that Canadian courts have answered all the questions regarding the judicial role in pro se litigation, mixed or otherwise. Those courts continue to struggle with the question of the boundaries of the duty of judicial assistance; but the SRL's legal entitlement to reasonable judicial assistance is already well established. As the Manitoba Court of Appeal noted,

The extent to which judges should afford an unrepresented litigant additional "leeway" with respect to court procedures and the rules of evidence is an increasingly vexing problem for courts at all levels. It is generally recognized that the court should provide some assistance to an unrepresented litigant [citations omitted]. But at the same time this must be done in such a way as not to breach either the appearance of or reality of judicial neutrality . . . How to balance the sometimes competing imperatives of helping a litigant who is in need of assistance while maintaining impartiality is a recurring dilemma for both trial and appellate courts.<sup>43</sup>

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<sup>42</sup> See *infra* note 43 for a description of an opinion rejecting the claim equating judicial assistance, *per se*, with bias to ward the represented party.

<sup>43</sup> *Manitoba (Director of Child and Family Services) v. A. (J.)*, 247 D.L.R. (4<sup>th</sup>) 490, 501; 2004 D.L.R. LEXIS 499 [32] (\*\*23).

In a recent appeal from an administrative tax determination, the Federal Court of Appeal explained its approach to reviewing claims of inadequate, or excessive, judicial assistance:

The burden of dealing with unrepresented litigants falls most heavily on trial courts. Courts of appeal should be careful not to make this task even more difficult by being overly critical of attempts to assist the litigants and to move the process along. The trial judge's overreaching responsibility is to ensure that the trial or hearing is fair. If, after taking into account the whole of the circumstances, the reviewing court is satisfied that the trial was fair, it ought not to intervene simply because the trial judge departed from the standards of perfection at one point or another.<sup>44</sup>

After conducting a thorough search for all cases (trial and appellate) illustrating Canadian courts' approaches to reasonable assistance I extracted the relevant language on the subject of judicial assistance and inserted it into four tables which appear in the Appendix. Tables I, II, and III place that language into required, permissible, and impermissible forms of judicial assistance. The forms of assistance in each table are further grouped by type of case (civil or criminal). Table IV then presents a list of judicial decisions in which a judge's discretion, exercised *against* a SRL, was upheld. Thus, these judicial actions do not fall into the required, permissible, and impermissible categories, but, rather, shed light on the parameters of adverse yet permissible judicial actions against SRLs.

### **A. Required Forms of Assistance**

Table I lists examples of language in Canadian case law describing the duty of reasonable judicial assistance. The two columns in this table, for civil and criminal cases,

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<sup>44</sup> *Wagg v. Canada*, [2003] F.C.J. No. 1115; 2003 Fed.C.C. LEXIS 1070 [36>(\*30). See also *R. Wolkins*, [2005] N.S.J. No. 2; 2005 NS.C. LEXIS 2 [85>(\*51-52):

The nature of the advice and assistance provided by the judge can only be assessed in light of the requirement for a fair trial in the particular case and cannot be captured by any specific binding guidelines as to what that advice and assistance ought to consist of. The fairness of a trial is a matter of fact in each case. The question on appeal is the fairness of the trial and that must be determined in light of the specific facts of each case.

respectively, give examples of various forms of assistance found by the courts to be required by law, or required as a matter of “fairness” or “natural justice.”

While the concept of judicial assistance arose in the context of criminal cases, it has now been extended to civil cases.<sup>45</sup> In the civil context, the power of judges in Canada to assist SRLs depends in part on whether the matter arises in the general jurisdiction courts (including family courts, which in both countries are bound by ordinary civil litigation rules), or small claims or other informal courts (such as the tax court), or in other administrative hearings.<sup>46</sup> The latter two categories tend to give rise to more expansive language describing the power and duty of judicial assistance because of statutory language requiring that the rules of evidence either do not apply, should be relaxed, are not binding, etc.

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<sup>45</sup> See e.g., *Barrett v. Layton*, [2003] O.J. No. 5572; 2003 ON.C. LEXIS 4796, [45-48]. This is by far the most interesting and eloquent defense of the proposition that SRLs in civil and criminal cases are entitled to an equal degree of judicial assistance based upon the principle that the right to a fair trial is common to all types of cases. One of the most interesting parts of the opinion, in which a trial judge denied a motion for disqualification based on an alleged appearance of impropriety from her having given assistance to a SRL, is the judge’s discussion of what “appearance” her conduct had on a reasonable person:

Reasonable persons properly informed respecting the requirement of a fair trial and properly informed that trial fairness includes trial on the merits, and also cognizant of the disadvantages of litigating one’s own case without knowledge of the trial process, which disadvantages include the real prospect that emotions will intrude upon effective functioning at trial, would conclude that a reasonable apprehension of bias does not arise from the occurrences in issue. The steps taken are reasonably regarded as conduct required of a trial judge in the interests of justice to protect the unrepresented person’s right to a fair trial. As such, these steps are neither an inappropriate intrusion into the adversarial process nor an improper denial to the plaintiff of her right to be represented vigorously by her counsel. . . . reasonable and right-minded persons, properly informed respecting the requirement of a fair trial and properly informed that trial fairness includes trial on the merits, and also cognizant of both the duty of the trial judge to ensure trial fairness and the right of the trial judge to elicit relevant evidence, if justice requires that, would not think that the steps taken to ensure a fair hearing are decisional steps.

Such reasonable and right-minded persons would recognize that the multifaceted obligations of a trial judge require attention not only to ensuring a fair hearing process but also to refraining from decisions respecting the merits until all of the evidence has been heard. Since trial judges are entitled to question witnesses, the process of questioning cannot reasonably be seen as inferring a decision that the subject of the questioning will be the basis of the judgment. Consequently, prompting an unrepresented person to consider whether to elicit or to give further testimony about issues pleaded by her but not addressed in evidence cannot reasonably be seen as inferring such a premature decision.

<sup>46</sup> The latter are labeled in the appropriate cells of the tables, and appear after the cited language from ordinary general jurisdiction (i.e., non-small claims court) civil cases.



Regardless of context, judges (or hearing officers, in administrative tribunals) are required to instruct the SRL regarding the basic format and rules of procedure they will need to follow. While there is a need to balance fairness across both or all parties to a legal dispute, the Canadian authorities require judges to ensure the SRL understands the nature of the proceedings. They must take into consideration the fact the litigant is unrepresented, but prevent undue prejudice from this fact. They should point out the salient issues of law and procedure, and provide the SRL with a fair opportunity to present their cases to the best of their ability. Some active assistance may be required, depending on the circumstances of the case and the background of the SRL. Active participation in questioning during the presentation of SRL's case to ensure fairness is also required. In small claims and administrative hearings, a judge should advise the SRL about the format of the hearing, the principles of cross-examination and the requirements and effect of particular relevant rules of evidence.

The primary duty of judges in criminal trials is to conduct them in such a way as to enable the self-represented defendant (SRD) "bring out his defense with its full force and effect." Judges must throughout the trial prevent the introduction of inadmissible evidence against, or unfair conduct towards, the SRD. It may come as a surprise to American readers that Canadian judges, in furtherance of this duty, have the duty to raise certain issues of what to Americans are of a constitutional nature, such as the right to testify or not testify, and the issues of the legality (and the admissibility of the fruits) of searches, or the voluntariness (and admissibility) of statements given to the police.<sup>47</sup>

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<sup>47</sup> Cf. *People v. Jones*, 3 Cal. Rptr. 2d 602, 606, 1992 Cal. App. LEXIS 55 (Cal. Ct. App. 1992) (no duty to advise SRD of right to testify); *People v. Barnum*, 29 Cal. 4th 1210, 64 P. 3d 788, 799 (Cal. 2003) (no duty to inform SRD of right to be free from self-incrimination); *People v. Partee*, 157 Ill. App. 3d 231, 511 N.E. 2d 1165 (Ill. App. Ct. 1987) (no duty to advise of right to exercise peremptory challenges, citing *McKaskle*

Judges are also required to provide various information and warnings to SRDs, such as their right to change their position regarding admissibility of an item between trial and retrial, to engage in discovery, to contest by voir dire the qualifications of experts against them, and to present evidence in mitigation of sentence.

### **B. Permissible Forms of Assistance**

Table II presents language from Canadian reviewing courts describing examples of permissible judicial assistance provided to SRLs by trial judges. These were often noted in the context of rejections of SRLs' claims on appeal that the assistance they were given was inadequate. And, because the courts did not criticize these forms of assistance or disparage them in any way, they are characterized as permissible methods of assistance.

Canadian courts permit proactive assistance generally, up to the point at which it might be considered objectionable if the litigants were each represented. Interventions to clarify testimony, conduct witness questioning, prompt a SRL to provide testimony on a specific point or subject, or to elicit specific (or illustrative) evidence during cross-examination is also permissible. During a trial, the judge may prompt the SRL to testify regarding an issue that she raised in her pleadings, but about which she has not testified. The judge may also suggest or illustrate the type of issues which might be the subject of a cross-examination by the SRL. And, of course, judges may conduct their own questioning in order to clarify the meaning of a SRL's testimony.

In small claims, judges have greater powers to conduct the inquiry, even to the point of not permitting cross-examination, and conducting the trial by way of eliciting

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*v. Wiggins*); U.S. v. Pinckey, 548 F. 2d 305, 311 (10<sup>th</sup> Cir. 1977) (no duty to advise SRD of rules of evidence).

narratives and questions posed to the parties and their witnesses. Relaxation of the rules of evidence is permitted not only in small claims cases, but in informal tax court proceedings and other administrative proceedings.

As to permissible assistance in criminal cases, the list is lengthy. Judges may not only make sure the SRD understands the nature of the proceedings, he may direct his or her attention to relevant legal considerations in the case. SRDs may benefit from “indulgences” not ordinarily afforded a represented defendant, such as permitting opening statements or motions to dismiss for want of evidence out of turn, an ordering the prosecution to provide him with a copy of its closing argument, and re-opening cross-examination after it was concluded.

Judges may also explain the need and relevance of transcripts of prior proceedings, or provide the SRD with daily transcripts. They may order adjournments to give the SRD time to prepare a cross-examination or to interview a witness, direct the prosecutor to subpoena witnesses for him, as well as a list of daily prosecution witnesses. Additional permissible assistance includes warnings of various kinds (e.g., that certain evidence or a line of inquiry is irrelevant, was not advancing the SRD’s case, or would be prejudicial to him), making a witness exclusion order *sua sponte*, and generally having a dialogue with the SRD throughout the trial regarding relevant issues.

### **C. Impermissible Forms of Assistance**

Table III presents examples of what Canadian courts have held to be impermissible forms of judicial assistance. While the foregoing examples of required and permissible assistance might leave the reader the impression that a high level of assistance may be provided, Canadian, like American, judges are constrained by the

potential prejudicial effect of such assistance upon the represented party.

Thus, any assistance that amounts to advocacy for the SRL, or which results in overriding the rights of the represented party is impermissible. Bending rules of procedure or evidence in favor of the SRL will be impermissible if it does not give effect to existing law, or if it is prejudicial to the represented party. Judges may treat SRL pleadings liberally, but may not redraft pleadings. Nor may the court give substantial legal advice to a SRL during a lengthy trial is impermissible.

Judges cannot may explain the basic format and procedures of trials, but may not instruct them on the “nuances and subtleties” of complicated bodies of law. While they must ensure that SRLs are aware of the salient legal and procedural issues pertaining to their case, they may not suggest theories or weaknesses in the represented party’s case. Nor may they provide SRLs of the elements of the causes of action they have brought, or give an opinion of which cause of action would more likely result in a remedy or other favorable outcome. Where the trial judge believes he is in need of expert testimony after the evidence is closed, he should not summarily grant the SREL an adjournment; rather, he should suggest the adjournment and let the represented party be heard on the question. Further, a judge should not put words into the SRL’s mouth, or make premature rulings in his behalf before all the evidence is in.

This issue of what information to provide or not provide a SRL is a thorny one for both judges and court staff. The cases seem to suggest that some measure of assistance by way of information is required, and is in some cases permissible, but providing elements of a cause of action is impermissible. This is the American rule as well. But I question whether it is wise, fair, and even enforceable. Knowledge of procedures and

manner of presentation of evidence is useless unless a SRL knows what evidence he or she is called upon to offer. The civil SRL is, after all, litigating with the proverbial “one hand tied behind his back” when he knows he is entitled to a remedy but doesn’t know the technical legal name of that remedy or its essential elements. A SRD is in a much better position inasmuch as he or she is at least given a copy of the charges, and later a jury instruction containing the elements of each charge.

In regards to cases that do not require the filing of specific court forms, and where pleadings have to be drafted, clerks of court do not want to risk the threat of UPL sanction for assistance in reference to matters such as the elements of a cause of action (or, e.g., in the case of a statute of limitations question) and do not, therefore, provide this information. Nor does the judiciary believe it should provide this information, as judged by this case law, so it is not unexpected that courts as institutions have not ventured into the business of disclosure of such information.<sup>48</sup>

This situation in my judgment is not fair under any conception of justice, yet there are cases in both countries upholding this unwritten prohibition of disclosure of cause-of-action information based on impartiality concerns. There is no unfair advantage given to a SRL who is informed of the elements of the cause(s) of action he wishes to pursue. The information would seem to merely put the SRL in the position he would be in if he had legal representation. Thus, the effect is one more accurately characterized as “leveling the playing field,” than “taking unfair advantage.” The only “prejudice” is to the represented party who may lose his advantage by having representation, and may have to face a trial on the SRL’s claims that pass muster. We are, by denying the SRL this

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<sup>48</sup> At this point in the conversation someone invariably raises the point, “If SRL’s know *that* kind of information, why would they need lawyers?” That is a good question, but one outside the scope of this paper.

information, *de facto* immunizing from liability the class of persons who happen to be sued by SRLs, litigants who are denied the information necessary to bring the dispute to litigation.

The contradiction is illustrated by the typical case of the SRL whose complaint is dismissed because it “fails to state a cause of action,” perhaps after several amendments. The stated rationale for the dismissal includes the fairness owed to the represented defendant who is entitled to know which causes of action he is being required to defend against. Thus, in the courts of both countries, procedural fairness appears to protect the represented civil defendant’s interests in knowing the nature of the causes of action being brought against him, while the self-represented plaintiff is ironically not entitled to know what recognized causes of action are available to him, and their essential elements.

The final forms of assistance noted are derived from appeals of administrative hearing or informal tax court decisions. These, of course, are proceedings statutorily created and are oriented to the specific purposes of their enabling legislation. In those contexts, hearing officers have a broader role and function, an almost inquisitorial style. They are expected to – perhaps not to disregard altogether – but to relax the rules of evidence, protect the parties from prejudicial evidence and unfair conduct, and to assist the SRL in developing their case. Note that these final impermissible practices could be described in their converse and reconceptualized: from a prohibition to a duty, or requirement.

As to criminal case assistance, Canadian courts hold that judges may not act as the defendant’s advocate, nor provide a level of assistance so high as to be equivalent to that of an attorney. They must treat the SRD and prosecutor equally. Judges cannot

assist to the point of being coercive or discouraging defendants from testifying as they wish regarding a relevant issue. They may not allow a defendant to proceed pro se if he shows signs of incompetence, or an inability to absorb the guidance provided by the court. Judges in criminal cases need not provide such assistance as pointing out possible prior inconsistent statements. Nor should they derail the SRD's defense strategy. And, in the case of a SRD in need of an interpreter, the judge should direct his questions to the defendant, rather than to the court-appointed interpreter.

#### **D. Permissible Adverse Rulings**

Table IV contains a short list of cases in which adverse rulings against a SRL by a trial judge were upheld. These cases are useful to show the American judiciary that there are indeed limits to the accommodations to which Canadian SRLs are entitled.

Thus, judges have been upheld where they have denied adjournments sought by SRLs to consult with counsel, or conditioned an adjournment on the SRL's compliance with previous court orders. They may dismiss an action where the SRL should have raised the allegations in a previous action, and may refuse to allow a second opportunity to file affidavits where the first did not comply with legal requirements.

Judges may admit a document into evidence over an SRL's objection where she declines an invitation to take an adjournment to prepare a respond to it. They may also strike pleadings when they are incomprehensible or otherwise not in compliance with legal requirements. Finally, a judge may allow some hearsay and some leading questions against a SRL without improperly violating his duty of reasonable assistance.

Having considered the manner in which Canadian decisional law illuminates boundaries for the judiciary with respect to judicial assistance, let us examine another method of treating SRLs: using judicial protocols.

#### IV. Judicial Protocols

I and other commentators have called for guidelines or protocols to guide trial judges on the question of judicial assistance.<sup>49</sup> The Minnesota courts are the only ones that have formulated a “Suggested Protocol” for domestic violence cases, which is commonly found in most pro se litigation conference notebooks and used as a model for other courts.<sup>50</sup> Surprisingly, while most state courts provide judges with bench books containing questions to pose or information to provide litigants in various cases, there are no other published court protocols for cases involving SRLs.<sup>51</sup> There are, however, some

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<sup>49</sup> Jona Goldschmidt, *The Pro Se’s Struggle for Access to Justice: Meeting the Challenge of bench and Bar Resistance*, 40 FAM. CT. REV. 36, 48-49 (2002) (proposing a required admonishment to the parties, in cases where one party is self-represented, stating in part that “the court needs all relevant evidence to make a proper judgment. The court’s assistance in facilitating the introduction of evidence should not be viewed as an indication of the weight, if any, the court will give to that evidence”); 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. Leg. Ethics 422, 441-42 (2004) (proposing a set of judicial “explanations” to litigants about how judges will be “engaged” in the trial process, but will retain their neutrality).

<sup>50</sup> The protocol is available at: [http://www.ajs.org/prose/pdfs/Sugested\\_Protocol.pdf](http://www.ajs.org/prose/pdfs/Sugested_Protocol.pdf) (visited August 16, 2005). It has also been recommended for use by an Idaho bench committee. The essential features are: (1) Verify that a party is not an attorney, understanding that he or she is entitled to be represented by an attorney, and chooses to proceed pro se without an attorney; (2) Explain the process; (3) Explain the elements; (4) Explain that the party bringing the action has the burden to present evidence in support of the relief sought; (5) Explain the kind of evidence that may be presented; (6) Explain the limits on the kind of evidence that can be considered; (7) Ask both parties whether they understand the process and the procedure; (8) Non-attorney advocates should be permitted to sit at counsel table with either party and provide support but should not be permitted to argue on behalf of a party or to question witnesses; (9) Questioning by the judge should be directed at obtaining general information to avoid appearance of advocacy; and (10) Whenever possible the matter should be decided and the order prepared immediately at the conclusion of the hearing for service on the parties.

<sup>51</sup> This is not to say there is no interest in their development. See e.g., “Committee find [sic] pro se litigation on the rise in Georgia, suggest responses,” available at <http://ww2.state.ga.us/courts/supreme/prose.htm> (visited September 23, 2003) reporting the activities of a state supreme court pro se committee, and stating that the committee recommended:

The concerns of judicial and court personnel should be addressed by developing protocols and



additional models.

In 1997, the Australian Family Court formulated a set of useful guidelines to assist the judges of that court that are worth setting out here in their entirety.<sup>52</sup> They are as follows:

1. A judge should ensure as far as possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial;
2. A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross-examine the witnesses;
3. A judge should explain to the litigant in person any procedures relevant to the litigation
4. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation
5. If a change in the normal procedure is requested by the other parties such as calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course
6. A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;
7. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;
8. A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated;

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policies in coordination with trial judges' councils and the Council of Superior Court Clerks. These protocols should be included in manuals, benchbooks and regular training, and might contain specific examples of proper information versus improper legal advice and/or sample dialogues for proceedings in pro se cases.

*See also*, Supreme Court of Virginia Pro Se Litigation Planning Committee, SELF-REPRESENTED LITIGANTS IN THE VIRGINIA COURT SYSTEM: ENHANCING ACCESS TO JUSTICE 31 (September, 2002), available at [http://www.courts.state.va.us/publications/pro\\_se\\_report.pdf#search='SELFREPRESENTED%20LITIGANTS%20IN%20THE%20VIRGINIA%20COURT%20SYSTEM%3A%20ENHANCING%20ACCESS%20TO%20JUSTICE'](http://www.courts.state.va.us/publications/pro_se_report.pdf#search='SELFREPRESENTED%20LITIGANTS%20IN%20THE%20VIRGINIA%20COURT%20SYSTEM%3A%20ENHANCING%20ACCESS%20TO%20JUSTICE') (last visited March 7, 2006) (reporting a recommendation that the court "Adopt appropriate protocols and specific scripts for inclusion in benchbooks for judges to use with self-represented litigants in the courtroom. These should cover responses to questions self-represented litigants ask at each stage of the litigation process, including whether or not it is appropriate for the court to even answer such questions").

<sup>52</sup> *See Johnson v. Johnson*, [1997] 22 Fam. L.R. 141, F.L.C. 92-764, as modified in *Re: F, Litigants in Person Guidelines*, [2001] 27 Fam. L.R. 517, Fam. C.A. 348.

9. Where the interests of justice and the circumstances of the case require it, a judge may:
- draw attention to the law applied by the court in determining issues before it
  - question witnesses
  - identify applications<sup>53</sup> or submissions<sup>54</sup> which ought to be put to the court
  - suggest procedural steps that may be taken by a party
  - clarify the particulars of the orders sought by a litigant in person or the basis for such orders
  - The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

Another proposed protocol<sup>55</sup> recently formulated, based upon an analysis of judicial ethics rules and Massachusetts case law, provides as follows:

A judge should:

1. Set the tone for an affirmative response to self-represented litigants.
2. Provide self-represented litigants with information and services to better enable them to use the court.
3. Confirm that the unrepresented party is not an attorney, understands that he or she is entitled to be represented, and chooses to proceed without an attorney.
4. Inquire into factors relevant to the defendant's subjective understanding of his decision to proceed pro se and its consequences.
5. Explain the process and ground rules (that the judge will hear both sides, with the petitioner presenting first, and that everything said will be recorded by the court reporter, etc.).
6. Explain the elements that a petitioner must show in order to prevail on his or her claim.
7. Explain that the party bringing the action has the burden to present evidence in support of his or her claim.
8. Explain the type of evidence that may be presented.
9. Explain that there are limits on the kind of evidence that may be considered.
10. Ask both parties whether they understand the process and procedure.
11. Limit judicial questioning to inquiries aimed at eliciting general information.
12. Assure that pro se litigants have the opportunity to meaningfully present their case

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<sup>53</sup> This term refers to petitions or complaints.

<sup>54</sup> This term refers to evidence.

<sup>55</sup> Lisa Green, Meeting the Challenge of Pro Se Litigation: Guidelines for Judges (February 27, 2003) (unpublished Working Paper of the Bellow-Sacks Access to Civil Legal Services Project, Harvard Law School), available at <http://www.law.harvard.edu/academics/clinical/bellow-sacks/papers/Green%20-Final%20Pro%20Se%20Guidelines%20for%20Judges.pdf> (last visited March 8, 2006).

and ensure that procedural and evidentiary rules are not used to impede the legal interests of unrepresented parties.

13. Inform the jury that the pro se litigant has exercised his constitutional right to represent himself, so that he or she will be acting as his or her own attorney.
14. Where applicable, use precedent from small claims courts and administrative agencies rather than precedent from federal or higher state courts, or from criminal cases, in which the court's objective seems to be to deter litigants from self-representation.
15. Examine the papers and talk to unrepresented parties about negotiations with opposing parties, particularly when the opposing party has counsel, in the settlement context.
16. Where an unrepresented party to a settlement agreement appears to have a language barrier, have the settlement agreement translated or explained in the party's primary language.
17. Whenever possible, decide the matter and prepare the order immediately upon the conclusion of the hearing so it may be served on the parties.

A judge should not:

1. Take sides in a case or proceeding pending before the court.
2. Provide information to one party that he or she would be unwilling or unable to provide to all other parties.
3. Treat pro se litigants more harshly than litigants who are represented by counsel.
4. Hold a self-represented litigant in contempt without first warning the litigant that his or her conduct is objectionable.
5. Coerce parties into surrendering the right to a hearing by the courts in an attempt to dispose of the matter promptly.

In a recent appeal in a Canadian criminal case,<sup>56</sup> the court devised the following proposed procedures for treating self-represented defendants:

- Ask why the person is unrepresented. And if they want to be represented, find out if there is any reasonable thing that could be done to assist them in getting representation. For example, granting an adjournment to retain counsel or an agent.<sup>57</sup>
- If the court concludes that the trial can proceed fairly without representations, determine if the defendant understands the charges and what the case is that he or she has to meet. Explain the charge and what the prosecution is required to prove.
- Explain that the Prosecution has the onus of proof and that the standard is proof beyond a reasonable doubt.
- Explain briefly the mechanics of the trial. For example, the right of each

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<sup>56</sup> R. v. Messina, [2005] O.J. No. 4663; 2005 ON.C. LEXIS 5603 [28>(\*14-16).

<sup>57</sup> "Agent" under Canadian law refers to non-lawyers who are permitted to represent defendants in minor criminal cases.

side to call witnesses, introduce documentary evidence, object to evidence adduced, the choice to testify or not, and that if the person chooses to testify they will be cross-examined, and the right to make submissions at the appropriate junctures during the trial.

- The same should be done if a voir dire is held. And if one is held, what a voir dire is should be explained.
- Ask if the person needs pen and paper to take notes during trial.
- Explain the role of the Justice vis-à-vis the undefended person, that is, that the Justice is there to ensure that he or she has a fair trial and can offer some guidance regarding the procedures of the trial, but cannot act as the person's advocate.
- Ask if the person has any questions, and tell the person to ask if during the trial there is something that they do not understand.
- Make an order for exclusion of witnesses.<sup>58</sup>

American judges, appellate courts, and state judicial conduct committees should examine these protocols and consider adopting appropriate parts, or formulating similar ones for their jurisdiction. They should also consider the principles announced in Canadian decisional law as set forth in this paper. These are excellent starting points, or even models, for a full and long-overdue debate in the U.S. regarding SRLs' right to judicial assistance, or some measure of accommodation, in civil and criminal cases.

## V. Conclusion

The rule requiring impartiality furthers the fairness of a trial, as does the truth-

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<sup>58</sup> Cf. Myron Moscovitz, *Advising the Pro Se Defendant: The Trial Court's Duties under Faretta*, 42 BRANDEIS L.J. 329, 341 (2003-04), where the author proposes the following "List of Trial Rights" to be read to a self-represented defendant: (1) The right to appear at trial in civilian clothing; (2) The right of access to legal materials (to the extent allowed by the jurisdiction); (3) The right to pretrial discovery (if allowed by the jurisdiction); (4) The right to jury trial; (5) The right to ask questions to prospective jurors (to the extent voir dire by parties is allowed by the jurisdiction); (6) The right to exercise challenges for cause and a specific number of peremptory challenges; (7) The right to present an opening statement; (8) The right to object to prosecution evidence, based on rules of evidence; (9) The right to cross-examine the prosecution witnesses, in compliance with the rules of evidence; (10) The right to subpoena witnesses for the defense; (11) The right not to testify; (12) The right to testify, with a warning that the prosecutor will have the right to cross-examine; (13) The right to present a closing argument; and (14) The right to appeal. The author adds that a reading of the List of Trial Rights "should conclude with a statement that it is not exclusive – the jurisdiction might provide additional rights not specifically mentioned," and, reflecting the American rule on non-assistance, that "the judge will not assist the defendant with additional information about these rights or advice about how to exercise them." *Id.* at 343.

finding function of the court. Both are the foundations of any rational conception of justice. They should, and must, be reconciled for all litigants, particularly those who choose or cannot afford counsel in both civil and criminal cases. The problem of reconciling these judicial obligations is a continuing conundrum of judicial ethics, but it need not be.

Whose responsibility is it to develop guidance for judges in this critical area? The proposal to revise the *ABA Model Code of Judicial Conduct* by including authority for “reasonable accommodations” to SRLs is a welcome but only partial step toward “bright line” judicial guidance on this subject. There is now a possibility that state supreme courts and judicial ethics committees can begin to address the challenge of establishing such guidelines. The formidable barrier to doing so will be American state and federal appellate case law, which heretofore has generally refused to recognize a duty of reasonable assistance. Given the harsh language of the U.S. Supreme Court indicating no entitlement by SRLs to “personal instruction by the trial judge,”<sup>59</sup> it is unlikely that we will see any dramatic changes to the general rule requiring SRLs to comply with the same rules and standards as required by represented parties. Unless case law more sympathetic to SRLs emerges, hopefully from the promising effort of the ABA to revise its *Model Code* and subsequent cases brought by aggrieved SRLs who were denied assistance, it is likely that the promised authority to make “reasonable accommodations” for SRLs will at best be interpreted very narrowly, or at worst ignored.

What, then, can judges do to develop guidelines for the reasonable accommodations as the ABA Joint Commission recommends SRLs may now afforded? Bench and bar committees should take examples of the kind of assistance offered to

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<sup>59</sup> *McKaskle v. Wiggins*, 465 U.S. at 183 (1984).

SRLs in Canada, and perhaps other Commonwealth countries, and consider them in discussions leading to state supreme court, ethics committee, or judicial council rule-making. Adoption of at least a general policy embodied in a single statement acknowledging the duty of the trial judge to provide reasonable accommodations to ensure a fair trial or meaningful hearing would be a good start. If more particular rules or a protocol are formulated, these can be tested on an experimental basis if strong opposition is expected, then thoroughly debated prior to statewide (or local) implementation.

Canadian cases, in which trial and appellate judges have resolved many of the problems American judges face in pro se litigation, can be studied for their reasoning and results. A judicial practice trend could emerge through such rulemaking, acknowledging the duty to provide reasonable judicial assistance to SRLs, which in turn appellate and supreme courts would have to recognize and incorporate into their future decisions.<sup>60</sup>

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<sup>60</sup> Consideration should also be given to new case management strategies, such as a three-track system for cases where (1) the parties are each represented, (2) each party is self-represented, and (3) one party is represented and the other is not. The strictness of expected compliance with the rules of procedure and evidence, and other formalities, as well as the extent of judicial assistance to be expected would vary accordingly. Critics of improving SRL's access to the court demand that reasonable judicial assistance should be extended to all parties, represented or not. Drew A. Swank, *In Defense of Rules and Roles: the Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 Am. U. L. Rev. 1537, 1586 (2005). This is not, as Swank suggests, an "exceedingly dangerous and slippery slope." *Id.* Every litigator knows that trial judges routinely bend over backwards for young lawyers and help them through in the litigation process, and assistance from court staff is also generally abundant. The SRL has never had the benefit of that assistance, which requires reform of this aspect of the legal system. The Canadian approach shows that judicial assistance can work without a collapse of the justice system. To argue as Swank does that "The only true way of ensuring that the line between judge and advocate would not be crossed would be to prohibit judges from giving advice to any party, represented or not," *Id.* at 1584-85, is to evidence not only one's sweeping mistrust of judges and their ability to provide a fair trial, but a callous disregard for the frequently harsh results of a complex system lawyers have created. Preventing those who have a constitutional right to represent themselves from utilizing the courts due to such a system is a form of protectionism which disregards the fundamental concept of equal justice. As Justice Newburn, dissenting, stated in *Teegarden v. Director, Arkansas Employment Security Division*, 267 Ark. 894, 591 S.W. 2d 675, 678 (1979): "Lest the citizenry lose faith in the substance of the system and the procedures we use to administer it, we can ill afford to confront them with a government dominated by forms and mysterious rituals and then tell them they lose because they did not know how to play the game or should not have taken us at our word."

How difficult and likely will it be for such a grass-roots effort to emerge from the judiciary? It will surely not emanate from the bar, despite its lip service to the concept of access to justice for all. Pro se advocacy groups themselves are powerless to effect any change in judicial practice. Trial judges and their committees and organizations will thus have to lead this effort, and resolve the objections of many of their brethren who continue to be philosophically oppose any judicial assistance. Trial judges are the ones who have to deal with the stress and frustration of seeing the harsh results from SRLs' lack of legal knowledge. Thus, no one but trial judges themselves can start the process of implementing uniform, practical guidelines for managing SRLs in the courtroom and fulfilling their mutual duties of impartiality and equal justice for all.

## APPENDIX

### APPENDIX I

**Table I - Required Assistance**

Canadian Cases	
<b>Civil</b>	<b>Criminal<sup>61</sup></b>
Making SRL <sup>62</sup> aware of the nature of the proceedings <sup>63</sup>	Providing SRD's <sup>64</sup> with a fair trial <sup>65</sup> which includes judicial assistance <sup>66</sup>
Directing SRL's attention to salient points of law and procedure <sup>67</sup>	Assisting SRD by extending its helping hand to guide him throughout the trial in such a way that his defence, or any defence the proceedings may disclose, is brought out to the jury with its full force and effect <sup>68</sup>
Providing a measure of assistance <sup>69</sup>	Instructing and assisting the SRD

<sup>61</sup> To constitute reversible error, the breach of duty of reasonable assistance must result in a "miscarriage of justice." *R. v. Wolkins*, [2005] N.S.J. No. 2; 2005 NS.C. LEXIS 2 [83>(\*51).

<sup>62</sup> Refers to self-represented litigant.

<sup>63</sup> *Wagg v. Canada*, *supra* note \_\_\_\_, at [33>(\*29); *Wadhams v. Andy Estate*, [2003] B.C.J. No. 2722, 2003 B.C.C. LEXIS 4821 [28>(\*13).

<sup>64</sup> Refers to self-represented defendant.

<sup>65</sup> *R. v. Wolkins*, *supra* note \_\_\_\_.

<sup>66</sup> There is a "heavy onus" on the trial judge to assist an unrepresented defendant. *R. v. Tran*, [2001] Ont. C.A. LEXIS 449 (\*15).

<sup>67</sup> *Wagg v. Canada*, *supra* note \_\_\_\_, at [32>(\*27). This general statement was made in the context of an appeal via an "Informal Procedure" in the tax court, and the Federal Court of Appeal cited a decision arising from a small claims court appeal (*Clayton v. Earthcraft Landscape, Ltd.*, [2002] N.S.J. 516) (overturning the decision of a small claims court adjudicator who did not draw to the SRL's attention the fact that his documentary evidence would be entitled to more weight if he called the author of the document as a witness). The court in *Wagg* made the following statement, not expressly limited to tax court proceedings:

A trial judge who is dealing with an unrepresented litigant has the right and the obligation to ensure that the litigant understands the nature of the proceedings. This may well require the judge to intervene in the proceedings. However, the trial judge must be careful not to give the perception of having closed his or her mind to the matter before the Court.

*Id.*, at [33>(\*29).

<sup>68</sup> *R. v. Darlyn*, [1946] 88 C.C.C. 269, 271-272 (B.C.C.A.):

[The second of the two] traditional common law rules which have become so firmly imbedded in our judicial system that a conviction is very difficult to sustain on appeal if they are not observed" is that, "it is not enough that the verdict in itself appears to be correct, if the course of the trial has been unfair to the accused. An accused is deemed to be innocent, it is in point to emphasize, not until he is found guilty, but until he is found guilty according to law.

*Id.*, at [20>(\*16).

<sup>69</sup> *A.C.M. v. P.F.M.*, [2003] M.J. No. 386; 2003 MB.C. LEXIS 609 [5>(\*2) (But "It would have been better, I think, had the magistrate, particularly in crucial areas, done less leading and avoided what I will describe as a 'running commentary'" [8>(\*4).

<sup>70</sup> *R. v. McGibbon*, [1988] 45 C.C.C. (3d) 334, 347: "How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must of necessity be a



	throughout the course of the trial <sup>70</sup>
Balancing the issues of fairness, and being mindful of both or all parties <sup>71</sup>	Explaining thoroughly to an accused person who is charged with a serious offense of his right to counsel and the importance of exercising it <sup>72</sup>
Ensuring SRL is not unduly prejudiced by his lack of knowledge of pleading and procedure <sup>73</sup>	Explaining matters of procedure and the rules of evidence <sup>74</sup>
Extending to SRL a degree of understanding and appreciation <sup>75</sup>	Explaining how the trial will proceed, and conscious of the need to protect the SRD's rights, and intervening to ensure that questionable prosecutorial evidence was not admitted <sup>76</sup>
Accommodating SRLs' unfamiliarity with the process so as to permit them to present their case, while respecting the rights of the other party <sup>77</sup>	Preventing introduction of demonstrably inadmissible evidence <sup>78</sup>
Treating the SRL fairly, and attempting to accommodate SRL's unfamiliarity with the process so as to permit him or her to present their case, while respecting the	Informing SRD of his right to testify in his own defense, or not to do so <sup>80</sup>

matter of discretion.”

<sup>71</sup> Toronto-Dominion Bank v. Saville, [2000] O.J. No. 806 (QL), 95 A.C.W.S. (3d) 440 (S.C.J.) [18].

<sup>72</sup> R. v. H. (B.C.), [1990] 58 C.C.C. (3d) 16, 22 (“The legal system in Canada is mainly adversarial. It works best when each side is represented by a qualified advocate. Inevitably, a litigant in person [SRL] is at a disadvantage. In strict theory, this should not be so, but it is a fact and there is no use denying it”). The judge is obligated “to point out to the accused that he or she would be at a distinct disadvantage in proceeding without the assistance of competent counsel and that the accused is entitled to have such counsel.” R. v. McGibbon, [1988] O.A.C. LEXIS 638 [29](\*26); 31 O.A.C. 10.

<sup>73</sup> Lieb v. Smith, [1994] Nfld. & P.E.I.R. LEXIS 1211 [71](\*40); 120 Nfld. P.E.I.R. 201 (upholding dismissal of SRL's complaint). The court added:

However, the fact remains that the litigation must, from the outset, be conducted in a manner that is fair to both sides. The appropriate balance must be struck to enable the personal litigant to proceed without prejudicing the other party's right to require that the Rules of Court are properly followed. At the end of the day, insofar as pleadings are concerned, both parties must be in no doubt as to the legal and factual issues to be put before the court.

*Id.*, at [15](\*10).

<sup>74</sup> R. v. Ford, [2001] W.C.B.J. LEXIS [33](\*16); 49 W.C.B. (2d) 47. The nature and extent of the explanation depends upon “the nature of the charge, the complexity of the evidence, and the sophistication and education and experience of the defendant, in pursuit of a fair trial.”

<sup>75</sup> Ayangma v. Prince Edward Island, [2005] P.E.I.J. No. 31; 2005 PE.C. LEXIS 35 [56](\*40).

<sup>76</sup> R. v. Wood, [2005] 196 C.C.C. (3d) 155; 2005 C.C.C. LEXIS 106 [19](\*15-16).

<sup>77</sup> Davids v. Davids, [1999] O.J. No. 3930 (QL), 125 O.A.C. 375 [44] (\*19-20).

<sup>78</sup> R. v. Tran, [2001] Ont. C. A. LEXIS 449 (trial judge erred by not conducting voir dire into admissibility of SRD's breathalyzer readings in DUI prosecution, where there was a “genuine issue” as to its admissibility). *Cf.*, R. v. Travers, [2001] 44 C.R. (5<sup>th</sup>) 201 (N.S. C.A.) (trial judge has obligation to conduct voir dire hearing upon “strong evidence” of a prima facie *Charter* breach); R. v. Arbour, [1990] 4 C.C.R. (2d) 369, 372 (trial judge required to inquire into any possible infringement of *Charter* rights).

<sup>79</sup> Davids v. Davids, [1999] O.J. No. 3930 (QL), 125 O.A.C. 375 [36].

rights of the other party <sup>79</sup>	
(admin. hrg) Explaining format of hearing, and basic principles of cross-examination; offering some measure of assistance to ensure fair hearing <sup>81</sup>	Raising issue of, and conducting hearing on, voluntariness (and admissibility) of statements SRD gave to police <sup>82</sup>
(small claims) Advising SRL that letter from witness would be given less weight than oral testimony <sup>83</sup>	Raising issue of admissibility of fruits of warrantless search, and conducting hearing on the issue <sup>84</sup>
(admin hrg) Explaining why calling respondent as SRL's own witness gives opposing counsel unfair advantage (i.e., leading questions permitted, etc) <sup>85</sup>	Raising issue of whether any procedure proposed by the prosecution (e.g., allowing complainant to give her testimony through an intermediary out of the room) would infringe on the SRD's "right to cross examination," and conducting a hearing on

<sup>80</sup> R. v. Husain, [2004] O.J. No. 4994; 2004 ON.C. LEXIS 5503 [39>(\*19); R. v. Tran, [2001] 2001 Ont. C.A. LEXIS 449(\*22-23). In *Tran*, the trial judge's

perfunctory comments respecting the [self-represented] appellant's right to testify are to be contrasted with the thorough explanation given by the trial judge to the unrepresented defendant is [citing cases], who took care to ensure that the defendant was aware of both his right to testify, and his right to elect not to testify. In that case, the trial judge also explained to the defendant that if he testified he would be cross-examined by the Crown attorney, and that he might be asked about his criminal record if he had one.

The defendant in *Tran* was also in need of an interpreter: "It was incumbent on the trial judge to recognize that the task of conducting a fair trial for this unrepresented defendant would require a significant degree of instruction and vigilance on his part.: *Id.* at (\*23).

<sup>81</sup> Kelly v. Nova Scotia (Police Commission), [2005] N.S.J. No. 24; 2005 NS.C. LEXIS 346 [73>(\*33-34).

<sup>82</sup> R. v. Dimmock, [1996] B.C.A.C. LEXIS 2846 [34>(\*25-26) (judge has duty to inform SRD that he could withdraw from a pretrial agreement in which he consented to the introduction of a hearsay document, and to raise an objection to it). Evidence of what an accused states to police officers cannot be admitted without a voir dire unless there is an informed waiver by the accused of the right to have voluntariness tested on a voir dire. R. v. Park, [1981], 37 N.R. 501.; 59 C.C.C. (2d) 385, 389-392 (S.C.C.); R. v. Korpony, [1982] 1 S.C.R. 41; 44 N.R. 103; 65 O.C.C. (2d) 65.

<sup>83</sup> Clayton v. Earthcraft Landscape, Ltd., [2002] N.S.J. No. 516; 2002 NS.C. LEXIS 789 [28>(\*14) ("Failing to warn the witness of this constituted a denial of natural justice"). In Canada, small claims court adjudicators have "a duty to assist unrepresented parties particularly where a legal or procedural issue of which the party may not be aware is relevant." Bidart (c.o.b. Atlantic Recreation & Marine) v. McLeod, [2005] N.S.J. No. 250; 2005 NS.C. LEXIS 311 [10>(\*5).

<sup>84</sup> R. v. Travers, [2001] 1 W.C.B.J. LEXIS 2388, 49 W.C.B. (2d) 588.

<sup>85</sup> *Id.*, [12-13>(\*5-6) (SRL called police officer he was complaining about to the Police Commission, "without an appreciation of the consequences/limitations of questioning your own witness and the concurrent potential advantage conferred upon opposing counsel, that is, the ability to cross-examine/lead his own client . . . Also, the procedure deprived [the SRL] of the opportunity to hear what [the officer] had to say first before he . . . did his own questioning . . . At the same time, opposing Counsel had the advantage of hearing {the SRL's} questions first. He thus got further potential advantage in questioning his own client without having to anticipate what would be asked in cross-examination. The procedure followed also limited [the SRL's] to some extent . . . to responding to [the officer's] "cross-examination" by questions in re-direct") [13>(\*6).

<sup>86</sup> R. v. H. (B.C.), [1990] W.C.B.J. LEXIS 8779; 10 W.C.B. (2d) 469 (summary) (unpublished) ("The accused at one point was asked whether he waived voir dire concerning the admissibility of a statement and although the trial judge had thought he explained the accused's rights to him fully, the wisest course in

	the question <sup>86</sup>
	Informing SRD that he has the right at trial to change his previous position (stated at pretrial conference) on the admissibility of hearsay document
	Informing SRD of his right to disclosure (discovery) <sup>87</sup>
	Explaining the purpose of expert testimony, and affording SRD opportunity to participate in voir dire of government's expert
	Informing SRD of his right to offer submissions (evidence) in mitigation of sentence during penalty phase <sup>88</sup>
	Informing SRD of his right to secure an adjournment to secure counsel, where he had a falling out with his attorney on the day of trial <sup>89</sup>

such circumstances was to hold the voir dire and make a ruling”).

<sup>87</sup> R. v. Husain, [2004] O.J. No. 4994; 2004 ON.C. LEXIS 5503 [39>(\*19); R. v. Payton, [2003] A.J. No. 1425; 2003 AB.C. LEXIS 2465 [110>(\*67) (“In dealing with an unrepresented accused in this situation, any such doubt on the value of disclosure must be resolved in his favour”).

<sup>88</sup> R. v. Callow, [2000] W.C.B.J. LEXIS 10659 [35>(\*18-19); 46 W.C.B. (2d) 363; R. V. Messina, [2005] O.J. No. 4663; 2005 ON.C. LEXIS 5603 [56>(\*33-34).

<sup>89</sup> R. v. Husain, [2004] O.J. No. 4994; 2004 ON.C. LEXIS 5503 [35>(\*16) (“It could not be presumed that the breakdown in the client/solicitor relationship was an attempt by the appellant to manipulate the process for his own purposes [citations omitted] . . . [A] self-represented defendant cannot be presumed to understand that an adjournment application ought to be made in advance pf the trial date”).

**Table II - Permissible Assistance**

<b>Canadian Cases</b>	
<b>Civil</b>	<b>Criminal</b>
Taking a more proactive role, to a point which would be objectionable were litigants represented by counsel <sup>90</sup>	Assisting the SRD in understanding the nature of the proceedings, and attempting to direct his mind to relevant considerations <sup>91</sup>
Intervening for the purpose of focusing the proceedings <sup>92</sup>	Providing certain indulgences which would not ordinarily be given to counsel (e.g., requiring prosecution to give SRDs a copy of its closing argument to give them the opportunity to consider their position and respond, permitting SRDs to make their “no evidence” motion even after they began putting on their defense, and re-opening their cross-examination after they advised they had finished their cross-examination) <sup>93</sup>
Setting aside default judgment (both parties SRL) on a complaint alleging the defendant had engaged in a course of conduct, the description of which judge found “gibberish”; then allowing plaintiff to file an amended complaint <sup>94</sup>	Permitting the SRD to make his opening statement out of turn <sup>95</sup>
Prompting the SRL during her testimony to address issue she raised in her pleadings but not addressed in evidence <sup>96</sup>	Explaining need for transcript or agreed statement of facts re: procedural history of case for purpose of supporting speedy trial challenge <sup>97</sup>
Suggesting or illustrating to SRL the type of issue which might be the subject of	Providing SRD with daily transcripts <sup>99</sup>

<sup>90</sup> *Wagg v. Canada*, *supra* note \_\_\_\_, at [31>(\*26-27).

<sup>91</sup> *R. v. Callow*, [2000] 2000 W.C.B.J. LEXIS 10659 [20>(\*12); 46 W.C.B. (2d) 363.

<sup>92</sup> *Wagg v. Canada*, *supra* note \_\_\_\_, at [31>(\*27).

<sup>93</sup> <sup>93</sup> *R. v. Alpha Manufacturing, Inc.*, [2005] B.C.J. No. 1185; 2005 BC.C. LEXIS 1381 [134>(\*40).

<sup>94</sup> *Poznekoff v. Binning*, [2000] B.C.A.C. LEXIS 83; 2000 BCAC uned 57. Canadian dry, judicial humor is reflected in this opinion, in a case that the British Columbia Court of Appeal said had taken a “tortuous course.” *Id.* at [2>(\*1) The underlying complaint bordered on the frivolous, but the appellate court held that permitting the filing of an amended complaint furthered the overarching purposes of the court rules, i.e., the just and speedy determination of actions on their merits. In so doing, one judge indicated that, “In the peculiar circumstances of this case, which I hope to never see again, I would dismiss the appeal.” *Id.* at [11>(\*8) Another stated to the defendant-appellant (in this transcript of an oral appellate ruling) that, If you can’t afford a lawyer up here, although I don’t think our lawyers are as expensive as those where you live, you can always go as a litigant in person and tell the judge your story. The judge will listen to you., just as we would have listened to you today if we hadn’t already decided that Mr. Suffredine was on a very sticky wicket.” *Id.* at [19>(\*12).

<sup>95</sup> *R. v. McGibbon*, [1988] O.A.C. LEXIS 638 [34>(\*30); 45 C.C.C. (3d) 334.

<sup>96</sup> *Barrett v. Layton*, [2003] O.J. No. 5572, 2003 ON.C. LEXIS 4796 [33>(\*15).

<sup>97</sup> *R. v. Zimmerman*, [2005] O.J. No. 1647; 2005 ON.C. LEXIS 1832 [22>(\*22-23).

<sup>98</sup>

cross-examination <sup>98</sup>	
Questioning SRL to clarify the meaning of SRL's testimony <sup>100</sup>	Allowing in excess of two full days to prepare for cross-examination of a witness <sup>101</sup>
On appeal, raising issue of prejudgment interest to which prevailing SRL may be entitled <sup>102</sup>	Directing the prosecutor to have witnesses subpoenaed for the SRD <sup>103</sup>
(small claims) Interrupting questioning of witnesses on numerous occasions to clarify matters to ensure that the trial was fair to both parties <sup>104</sup>	Ordering government to provide SRD with daily list of witnesses to be called and the order in which they would testify <sup>105</sup>
(small claims) Conducting inquiry of the parties and their witnesses, and not allowing cross-examination <sup>106</sup>	Explaining how to make use of a preliminary hearing transcript in cross-examining the complainant <sup>107</sup>
(informal tax court) Relaxing or disregard rules of evidence as circumstances permit, and considerations of fairness require <sup>108</sup>	Conducting hearing on SRD's claim of omission in trial transcript, and directing prosecutor to call court reporter to testify <sup>109</sup>
(informal tax court) Refusing to admit hearsay document against SRL where admission would not further statutory objectives of the proceeding <sup>110</sup>	Warning SRD that his allegations of unrelated police misconduct were not relevant and not helpful to his cause <sup>111</sup>
	Realizing that SRD and his common law wife were not on good terms, the judge explained to him that he was not obliged to call her, and then called a recess to give him a chance to interview her <sup>112</sup>

<sup>99</sup> R. v. Innocente, [2000] W.C.B.J. LEXIS 10674[169](75): 46 W.C.B. (2d) 386.

<sup>100</sup> Connor v. Township of Brant, [1914] 31 O.L.R. 274, 279-280 (C.A.) ((upholding trial judge's discretionary right to recall and question two plaintiff witnesses at the end of the case); French v. McKendrick, [1931] 1 D.L.R. 696 (Ont. C.A.) (upholding trial judge's authority at the close of the evidence to recall and question witnesses as to missing damages testimony).

<sup>101</sup> R. v. Innocente, [2000] W.C.B.J. LEXIS 10674[169](74): 46 W.C.B. (2d) 386.

<sup>102</sup> Halifax Insurance Co. v. Killick, [2000] N.S.R. (2d) LEXIS 194 [40](32), 187 N.S.R. (2d) 131.

<sup>103</sup> R. v. McGibbon, [1988] O.A.C. LEXIS 638 [34](30); 45 C.C.C. (3d) 334.

<sup>104</sup> Legrady v. Custom House Currency Exchange, Ltd., [2005] B.C.D. Civ. J. 2427; 2005 B.C.D. Civ. J. LEXIS 706 [21](15).

<sup>105</sup> R. v. Innocente, [2000] W.C.B.J. LEXIS 10674[170](74-75): 46 W.C.B. (2d) 386.

<sup>106</sup> Clayton v. Earthcraft Landscape, Ltd., [2002] N.S.J. No. 516; 2002 NS.C. LEXIS 789 [31](7-8).

<sup>107</sup> R. v. McGibbon, [1988] O.A.C. LEXIS 638 [34](30); 45 C.C.C. (3d) 334.

<sup>108</sup> Selmechi v. Her Majesty the Queen, [2002] Fed. Ct. Appeal LEXIS 240 [4](3); 2002 FCA 293. The relevant provision at issue in this case is contained in a statute that provides for an "Informal Procedure" in appeals of tax determinations. It states that the judge of the reviewing Tax Court "is not bound by" any legal or technical rules of evidence in conducting a hearing under the act (Tax Court of Canada Act, R.S.C. 1985, c. T-2, § 18.15(4)).

<sup>109</sup> R. v. McGibbon, [1988] O.A.C. LEXIS 638 [34](31); 45 C.C.C. (3d) 334. The reporter, "in fact, established that there was an omission from the transcript." *Id.*

<sup>110</sup> *Id.* [9](7).

<sup>111</sup> R. v. McGibbon, [1988] O.A.C. LEXIS 638 [34](30); 45 C.C.C. (3d) 334.

<sup>112</sup> R. v. McGibbon, [1988] O.A.C. LEXIS 638 [34](31); 45 C.C.C. (3d) 334.

	Raising the issue of potentially prejudicial prior inconsistent statements, resulting in a ruling excluding the audio portion of a videotape <sup>113</sup>
	Warning SRD that by putting his criminal record before the court and putting his character at issue, its' use was limited and its relevance was questionable <sup>114</sup>
	Warning SRD (charged with sexual assault) that his bringing out previous sexual assault charges that were later abandoned was not advancing his case <sup>115</sup>
	Granting SRD, at the end of his cross-examination, an opportunity to give further evidence by way of re-examination, and explaining the difference between re-examination and argument <sup>116</sup>
	Conducting cross-examination and pursuing lines of defense indicated by the SRD, where accused showed a total incapacity to effectively cross-examine any witness <sup>117</sup>
	Granting SRD a recess after he puts on his defense in order to decide whether he wanted to say anything more <sup>118</sup>
	Checking to see if an interpreter was necessary, making a witness exclusion order on judge's own motion, cutting off prejudicial direct examination by the prosecutor, directing the complainant to answer, allowing the SRD to recall the complainant for further cross-examination, and requiring the prosecutor to make her closing arguments first <sup>119</sup>
	Granting adjournment for further defense preparation when certain defense witnesses do not appear <sup>120</sup>

<sup>113</sup> R. v. Innocente, [2000] W.C.B.J. LEXIS 10674[170](\*75): 46 W.C.B. (2d) 386.

<sup>114</sup> R. v. McGibbon, [1988] O.A.C. LEXIS 638 [34](\*30); 45 C.C.C. (3d) 334.

<sup>115</sup> R. v. McGibbon, [1988] O.A.C. LEXIS 638 [34](\*31); 45 C.C.C. (3d) 334.

<sup>116</sup> R. v. McGibbon, [1988] O.A.C. LEXIS 638 [34](\*30-31); 45 C.C.C. (3d) 334.

<sup>117</sup> R. v. Huebschwerlen, [1965] 45 C.R. 393, 397 (Y.T.C.A.). *But see* R. v. Turlon, [1989] 70 C.R. (3d) 376 (Ont. C.A.) (finding trial judge had conducted "the kind of cross-examination that would have been expected from defence counsel"); R. v. Parton, [1994] W.C.B.J. LEXIS 6745 [33](\*16); 24 W.C.B. (2d) 642 (cross-examination by trial judge improper where SRD "was able to do that on his own").

<sup>118</sup> R. v. McGibbon, [1988] O.A.C. LEXIS 638 [34](\*30); 45 C.C.C. (3d) 334.

<sup>119</sup> R. v. Husain, [2004] O.J. No. 4994; 2004 ON.C. LEXIS 5503 [40](\*19).

<sup>120</sup> R. v. Innocente, [2000] W.C.B.J. LEXIS 10674[170](\*75): 46 W.C.B. (2d) 386.

	Having a continual dialogue with the SRD throughout the trial regarding a number of issues <sup>121</sup>
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<sup>121</sup> R. v. Innocente, [2000] W.C.B.J. LEXIS 10674[170>(\*75): 46 W.C.B. (2d) 386.

**Table III - Impermissible Assistance**

<b>Canadian Cases</b>	
<b>Civil</b>	<b>Criminal</b>
Assuming the role of counsel for the SRL <sup>122</sup>	Being SRD's advocate <sup>123</sup>
Providing substantial legal advice and guidance to SRL in the course of a lengthy trial <sup>124</sup>	Providing same level of assistance as an attorney would provide <sup>125</sup>
Extending fairness and understanding to the degree that court does not give effect to existing law, or permitting the issue of fairness to the SRL to override the rights of the defending party <sup>126</sup>	Providing less than the minimum of assistance required to ensure fair trial, i.e., failing to explain the elements of the offenses, the beyond a reasonable doubt burden on the prosecution, the right to put prosecution to the test and not present any evidence, the purpose of cross-examination if he disagreed with the prosecution's witnesses, or the meaning of "voluntary" in determining admissibility of an inculpatory written statement <sup>127</sup>
Redrafting SRL's pleadings <sup>128</sup>	Treating the prosecutor and SRD differently during trial <sup>129</sup>
Continually bending too far in favor of the SRL if the end result is to do injustice to a litigant who does retain counsel <sup>130</sup>	Making statements to SRL that have an intimidating and coercive effect <sup>131</sup>
Instructing SRL on nuances and subtleties	Discouraging SRD from testifying

<sup>122</sup> Manitoba (Director of Child and Family Services) v. A. (J.), 247 D.L.R. (4<sup>th</sup>) 490, 501; 2004 D.L.R. LEXIS 499 [38] (\*\*27).

<sup>123</sup> R. v. Tauber, [1987] 20 O.A.C. 64, 71 (Ont. C.A.).

<sup>124</sup> R. v. Laycock, *supra* note \_\_\_\_

<sup>125</sup> R. v. Tauber, [1987] 20 O.A.C. 64, 71 (Ont. C.A.) (The duty of assistance "cannot and does not extend to his providing to the accused at each stage of his trial the kind of advice that counsel could be expected to provide if the accused were represented by counsel. If it did, the trial judge would quickly find himself in the impossible position of being both advocate and impartial arbiter at one and the same time").

<sup>126</sup> Toronto-Dominion Bank v. Saville, [2000] O.J. No. 806 (QL), 95 A.C.W.S. (3d) 440 (S.C.J.) [18].

<sup>127</sup> R. v. Parton, [1994] W.C.B.J. LEXIS 6745; 24 W.C.B. (2d) 642.

<sup>128</sup> Lieb v. Smith, [1994] Nfld. & P.E.I.R. LEXIS 1211 [71](\*\*40); 120 Nfld. P.E.I.R. 201 ("It is not for the court to rewrite the pleadings – that is the responsibility of the plaintiff, who would be well advised to rekindle his efforts to obtain the assistance of counsel"), citing Cashin v. Craddock, [1876] 3 Ch. D. 376, 376-377 (C.A.) ("It is not for me to point out to the plaintiff how he might frame his statement of claim if he has any cause of complaint against the defendants . . . But it is my plain duty not to permit the practice of this court to be made an instrument of oppression, and I think that I should oppress the defendants grievously if I suffered them to be called upon to answer such a statement as this").

<sup>129</sup> R. v. Zimmerman, [2005] O.J. No. 1647; 2005 ON.C. LEXIS 1832 [25](\*\*26) (While the Court required copies of cases relied upon by the defendant, no such copies were required from the prosecutor").

<sup>130</sup> Royal Bank v. Hagedorn, [1998] O.J. No. 986, cited in Toronto-Dominion Bank v. Saville, [2000] O.J. No. 806 (QL), 95 A.C.W.S. (3d) 440 (S.C.J.) [5](\*\*2).

<sup>131</sup> R. v. Zimmerman, [2005] O.J. No. 1647; 2005 ON.C. LEXIS 1832 [22](\*\*23).



of an extremely complicated body of knowledge <sup>132</sup>	regarding his recollection of procedural history of case to support speedy trial challenge <sup>133</sup>
Suggesting theories in the SRL's case, or weaknesses in the adversary's case, that ought to be pursued <sup>134</sup>	Permitting defendant to represent himself in the face of signs showing his incompetence, or inability to absorb guidance offered <sup>135</sup>
Informing SRL his claim is unsupported by preferred expert testimony, and summarily granting adjournment, rather than first giving him the option of presenting same at later hearing, and then giving opposing party opportunity to be heard on the question of adjournment <sup>136</sup>	Identifying for the SRD the discrepancies between the complainant's trial testimony and her preliminary hearing testimony <sup>137</sup>
	Interfering with SRL's case to such a degree as to inadvertently derail a strategy

<sup>132</sup> R. v. Laycock, [1996] O.J. No. 3846 (QL), 32 W.C.B. (2d) 427 Gen. Div. [22] (unreported), cited in Manitoba (Director of Child and Family Services) v. A. (J.), 247 D.L.R. (4<sup>th</sup>) 490, 502; 2004 D.L.R. LEXIS 499 [38] (\*\*28).

<sup>133</sup> R. v. Zimmerman, [2005] O.J. No. 1647; 2005 ON.C. LEXIS 1832 [24](\*\*25). The court found "a denial of natural justice and a lack of procedural fairness" that required the intervention of the court:

[T]he learned justice of the peace had a duty to assist the defendant, an unrepresented litigant, in the conduct of his defence . . . Remarks made near the beginning of the application [to dismiss for lack of a speedy trial under § 11(b) of the *Charter of Rights and Freedoms*] such as ". . . it's up to you sir. What do you want me to do? It's not for me to become your advocate, sir . . ." and ". . . sir, I can't tell you anything. Unfortunately, that's not my position. Therefore, sir, if you're not – obviously your motion is currently defective . . . " "did not offer any guidance to the defendant in the presentation of the application. This could have been done in simple language, maintaining the impartiality of the Court and the appearance of justice, on the one hand, and, on the other, ensuring the orderliness and fairness of an unrepresented defendant's trial.

<sup>134</sup> *Id.*

<sup>135</sup> R. v. P.H.L.W., [2004] 190 C.C.C. (3d) 60; 2004 C.C.C. LEXIS 275 [20](\*\*23-24):

In my respectful view, the appellant could not have had a fair trial without counsel. The trial judge encountered an awkward problem: he [sic] was an accused who did not qualify for legal aid, had the means to hire counsel and decided to proceed on his own having exhausted all avenues to obtain state funded counsel. Yet, as the trial progressed, it became evident that the appellant could not adequately defend himself. . . I do not think that the appellant could manage the presentation of the defence").

<sup>136</sup> Bidart (c.o.b. Atlantic Recreation & Marine) v. McLeod, [2005] N.S.J. No. 250; 2005 NS.C. LEXIS 311 [10](\*\*5) ("[T]he time to have done so [i.e., order an adjournment to allow SRL to secure expert testimony] would have been before the Appellant/Defendant was called upon to present his evidence. In that way the Appellant would have known exactly the case he had to meet when he called his witnesses") [9](\*\*5). The court also commented on the necessity for the "appearance of fairness":

By giving him the advice he did [to secure expert testimony after defense case was heard], the Adjudicator may have given the impression that he was assisting the Claimant in the presentation of his case rather than giving some neutral advice. I acknowledge that the difference may be more apparent than real but the perception of the losing party must always be considered. The appearance of fairness can sometimes be as important as fairness itself.

*Id.*, at [10](\*\*56).

<sup>137</sup> R. v. McGibbon, [1988] O.A.C. LEXIS 638 [37](\*\*32-33); 31 O.A.C. 10.

	or force the hand of the litigant <sup>138</sup>
Destroying appearance of fair trial by a combination of different types of intervention <sup>139</sup>	Directing questions to the interpreter instead of the SRD, where the defendant requires a language or hearing interpreter <sup>140</sup>
Putting words into the mouth of SRL <sup>141</sup>	
Adjourning the case for one week after SRL announced she had not subpoenaed a crucial witness <sup>142</sup>	
Providing SRL with the elements of the cause of action he sought to bring, which would be to the detriment of the opposing party and would call into question impartiality of the tribunal <sup>143</sup>	
Advising SRL at start of trial that she would do better to cast her complaint as one cause of action rather than another <sup>144</sup>	
Stating to SRL that she was “shabbily treated” by the defendant, and making other comments evidencing favoritism toward her <sup>145</sup>	
Making findings of fact based only on SRL’s incomplete direct testimony, and	

<sup>138</sup> *R. v. Laycock, supra* note \_\_\_, at [21-23>(\*\_\_\_).

<sup>139</sup> *Limoges v. Investors Group Financial Services, Inc.*, [2003] A.J. No. 1113, 2003 AB.C. LEXIS 2082 [21>(\*8). The court summarized the proceedings, involving a claim of unpaid commissions, as follows:  
This was a remarkable trial. The trial judge chose to ignore the rules of evidence and procedure. In addition, he failed to observe even the most basic legal principles designed to ensure a fair trial and to maintain the impartiality of the tribunal. More specifically, the trial judge made critical findings of fact before the defendant could present its evidence, or even cross-examine the [SRL] plaintiff and her witnesses. He then used those premature and poorly conceived findings to threaten the defendant with punitive costs if it did not settle with the plaintiff immediately. When the defendant refused to accede to this suggestion, the trial judge denigrated the testimony of the defendant’s corporate officer before he heard it all. The trial judge’s many departures from appropriate judicial conduct rendered this hearing unfair . . . I only pause to observe that while the trial judge’s expressed bias may have been welcome news to the plaintiff, to the defendant and any objective observer, this comment must have eliminated any illusion of a fair trial.

*Id.* at [6>(\*3).

<sup>140</sup> *R. v. Messina*, [2005] O.J. No. 4663; 2005 ON.C. LEXIS 5603 [54>(\*32):  
[T]he Court should have made it clear to Mr. Messina that he had a right to make submissions on the question of guilt. The learned Justice of the Peace only asked the interpreter, ‘Does he want to say anything?’ . . . This question does not adequately explain the right to make submissions at the end of the trial . . . [T]his manner of addressing the defendant (indirectly by getting the interpreter to ask him things) leaves open the question of what the interpreter actually said to him.

<sup>141</sup> *A.C.M. v. P.F.M.*, [2003] M.J. No. 386; 2003 MB.C. LEXIS 609 [9>(\*5).

<sup>142</sup>

<sup>143</sup>

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<sup>145</sup> *Limoges v. Investors Group Financial Services, Inc.*, [2003] A.J. No. 1113, 2003 AB.C. LEXIS 2082 [13>(\*5).

stating at this stage that she would be entitled to punitive damages <sup>146</sup>	
Finding in her favor that sympathetic SRL was not independent contractor, despite the terms of her contract and her own pleadings <sup>147</sup>	
(admin hrg) Permitting adverse party to offer irrelevant and prejudicial testimony re: SRL's character and lifestyle	
(adm hrg) Ruling against SRL without providing an adequate explanation for the decision	
(adm hrg) Intervening so as to inadvertently derail a strategy, or force the hand of, the SRL <sup>148</sup>	
(informal tax court) Rejecting evidence on technical legal grounds without considering whether the evidence is sufficiently reliable and probative to justify its admission (factors to be considered, e.g., amount of \$ involved, cost of obtaining more formal proof of facts at issue, etc.) <sup>149</sup>	

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<sup>146</sup> *Id.* [18>(\*7).

<sup>147</sup> *Id.* [13>(\*5).

<sup>148</sup>

<sup>149</sup>

**Table IV - Permissible Discretionary Decisions (Civil)**

Denying request by SRL for adjournment during trial to let him consult with counsel regarding advice given him by judge, viewed by court as a consequence of his choice to represent himself <sup>150</sup>
Dismissing SRL's 2 <sup>nd</sup> action where issues could and should have been raised as a defense or counterclaim in 1 <sup>st</sup> action <sup>151</sup>
Refusing SRL 2 <sup>nd</sup> opportunity to file additional affidavit, where her first affidavit contained improper matters not within her personal knowledge <sup>152</sup>
Requiring that SRL comply with previous support order as a condition of adjournment of divorce hearing <sup>153</sup>
Admitting doctors' letters into evidence over SRL's (non-hearsay) objection, where she declined invitation for an adjournment to prepare response to that evidence <sup>154</sup>
Dismissing SRL complaint where the court is left to extract the alleged misconduct from the narrative as a whole, and to somehow relate the misconduct to an unspecified cause of action <sup>155</sup>
Striking a pleading where there has been a "repeated and wholesale disregard of the rules of pleading [that] override the defendant's rights" <sup>156</sup>
The "simple fact that some hearsay was led and some leading questions posed on direct examination does not establish that the judge improperly exercised his discretion to assist [the SRL appellants] or that a new trial is appropriate" <sup>157</sup>

<sup>150</sup> Wagg v. Canada, [2003] F.C.J. No. 1115; 2003 Fed.C.C. LEXIS 1070 [22>(\*23) ("Litigants represent themselves for a variety of reasons. If they come to realize before the commencement of trial that they have underestimated the complexity of the task before them, it is in their interest and the Court's to allow them to obtain representation. But once a trial is underway, I do not think it unfair to hold appellants to their choice to represent themselves, and to be guided by their own judgment") [23] (\*23). On adjournment, see also Schurman v. Canada, [2003] F.C.J. No. 1573; 2003 Fed.C.C. LEXIS 1571 [23>(\*2-3) ("Adjournments are not granted on grounds of sympathy alone and the fact that a person is self-represented, while not irrelevant, will general [sic] bear very little weight").

<sup>151</sup> Baziuk v. BDO Dunwoody Ward Mallette, [1997] Ont. Sup. C.J. LEXIS 4131 (\*11).

<sup>152</sup> Kemp v. Wittenberg, [2001] B.C.T.C. LEXIS 812 [7-8>(\*3). Unfortunately, the opinion does not discuss the extent of the court's duty, if any, to inform the SRL of the proper content of affidavits. One would think this explanation would be included as part of the "fair notice" to SRLs are entitled in the summary judgment process discussed earlier. See *supra* note \_\_\_\_\_, and accompanying text.

<sup>153</sup> Davids v. Davids, [1999] A.C.W.S.J. LEXIS 51900 [40>(\*17); 1999 A.C.W.S.J. 624821.

<sup>154</sup> P.E.K. v. B.W.K., [2003] A.J. No. 1706; 2004 ABCA 135, 2003 AB.C. LEXIS 2695 [8>(\*4) ("While we are sympathetic to her position, there are not two sets of procedures, that is, one for lawyers and one for self-represented parties. In the absence of special provisions, our courts will apply the same legal principles, rules of evidence and standards of procedure regardless of whether litigants are represented by counsel or are self-represented"). *Id.*, [7>(\*3-4).

<sup>155</sup> Lieb v. Smith, [1994] Nfld. & P.E.I.R. LEXIS 1211 [71>(\*40); 120 Nfld. P.E.I.R. 201.

<sup>156</sup> Ayangma v. Prince Edward Island, [2005] P.E.I.J. No. 31; 2005 PE.C. LEXIS 35 [59>(\*41) ("It is not the court's job [to redraft pleadings]. It is not up to the Court to do the plaintiff's editing for him") [55>(\*39).

<sup>157</sup> R. v. Alpha Manufacturing, Inc., [2005] B.C.J. No. 1185; 2005 BC.C. LEXIS 1381 [150>(\*47-48). The court held that two disgruntled SRLs did not establish bias against them by the trial judge by mere suspicion, and credibility determinations themselves do not establish bias. *Id.* at [126>(\*39).