

**December 1, 2004**  
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### **III. Judicial Assistance**

#### **A. American Rule**

Judges meeting the challenge of the increasing numbers of self-represented litigants engage with them at many stages of the civil or criminal litigation process. There may be numerous instances where judges are faced with the question of whether or not to correct an uninformed pro se litigant on a point of law, procedure, or evidence. If they assist on one matter, how far should and can they go in providing further assistance? Unfortunately, American judges still do not have the guidance they seek even if they acknowledge their duty to assist, or if they simply prefer to assist only for purposes of judicial efficiency. Despite calls for change in judicial ethics codes judges must rely upon restrictive if not confusing appellate opinions,<sup>1</sup> their personal philosophies regarding pro se litigants, and the practicalities of these situations, all the while properly concerned with maintaining impartiality in appearance and in fact.

As noted earlier in the discussion of the American rule on noncompliance,<sup>2</sup> self-represented litigants are generally held by state and federal courts to the same standards and procedural and evidentiary requirements as represented litigants.<sup>3</sup> While there are occasional variations and exceptions for cases of imperfect rule compliance, most appellate courts which uphold trial judges' refusals to assist based on noncompliance cite to language in *Faretta v. California* stating that the right of self-representation is not a "license not to comply with relevant rules of procedural and substantive law."<sup>4</sup>

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<sup>1</sup> *See* notes \_\_\_-\_\_\_ and accompanying text.

<sup>2</sup> *See supra* notes \_\_\_-\_\_\_ and accompanying text.

<sup>3</sup> *See supra* notes \_\_\_ - \_\_\_, and accompanying text.

<sup>4</sup> *Faretta, supra*, 422 U.S. at 834-835, fn. 46. This is in sharp contrast with many state and federal

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The most interesting development of late is the recent series of U.S. Supreme Court's pronouncements on the subject. The evolution of supreme court thinking since the 1975 *Faretta v. California* decision must be read in the backdrop of its older opinions in which it held that, with respect to adjudicative tribunals, the basic right of due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the U.S., includes an opportunity to be heard "granted at a meaningful time and in a meaningful manner."<sup>5</sup>

The supreme court ignored this precedent when it dealt with self-represented litigants in its post-*Faretta* decisions. The worst – from the unrepresented litigant's perspective – is *McKaskle v. Wiggins*,<sup>6</sup> a 1984 criminal case. There, the court continued to evidence its anti-pro se attitude by holding that, "A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course. *Faretta* recognized as much."<sup>7</sup>

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administrative tribunals, in which judges have a duty to provide assistance to self-represented claimants. See e.g. *O'Keefe v. U.S. Postal Service*, 318 F. 3d 1310, 2002 U.S. App. LEXIS 23061 (Fed. Cir. 2002) (federal Merit System Protection Board imposes special duty on administrative judges to assist claimants, to conduct fair and impartial hearings, and to interpret their arguments in the most favorable light); *Lewis v. Novartis Nutrition Corp. & Comm'r of Economic Security*, 2003 Minn App. LEXIS 320 (2003) (unemployment judge should assist unrepresented parties in the presentation of evidence, control the hearing so as to protect the parties' right to a fair hearing, and ensure that the relevant facts are clearly and fully developed). One can only wonder at the dissonance between such American appellate decisions upholding statutory duties to provide assistance to ensure fair administrative hearings, and contrary rulings refusing to acknowledge their constitutional duty of judicial assistance to ensure due process and a fair and meaningful hearing in the context of court proceedings.

<sup>5</sup> *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982), quoting *Armstrong v. Manzo*, 380 U.S. 483, 485 (1969).

<sup>6</sup> 465 U.S. 168 (1984). The case held that the right to represent oneself was not violated by the trial judge's appointment of standby counsel.

<sup>7</sup> *Id.* at 183-184. The court refers to *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975) (criminal

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*McKaskle* was followed by *McNeil v. U.S.*,<sup>8</sup> in which the court – in the context of a jurisdictional requirement for bringing an action against the federal government – affirmed the dismissal of a self-represented litigant’s suit under the Federal Tort Claims Act for failure to comply with the statutory requirement of exhaustion of administrative remedies. Despite the strict compliance (or “same standard”) approach reflected in *McKaskle* and *McNeil*, some lower courts took a more pragmatic approach and found that in certain contexts fairness requires some judicial assistance and accommodation.<sup>9</sup>

Surprisingly, the supreme court showed a glimmer of leniency beyond construction of pleadings in *Becker v. Montgomery*,<sup>10</sup> where the court held that a self-represented litigant’s failure to sign a timely notice of appeal as required by court rule was a “non-jurisdictional” defect that showed imperfect compliance, which could be cured by allowing an amendment. Following *Becker*, the supreme court then held in

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defendants have a right to proceed pro se, and counsel may not be appointed for them over their objection).

<sup>8</sup> 508 U.S. 106, 113, \_\_\_ S.Ct. \_\_\_ (1993).

<sup>9</sup> For example, in *Meckley v. U.S.*, the trial judge had dismissed a complaint because it named the wrong governmental official. The Fourth Circuit, in reversing the ruling, held that “the district court has some responsibility to assist pro se litigants who are unable to identify the proper defendant.” 1992 U.S. App. LEXIS 9033, (\*4) (4th Cir. 1992). The trial judge had also erred by dismissing the complaint prematurely because he interpreted the claim too narrowly on constitutional law, where it could also have been interpreted as alleging a claim under the Federal Tort Claims Act. A similar result was reached in *Donald v. Cook County Sheriff’s Dept.* where the Seventh Circuit held that failure to name a defendant correctly, or even name the right defendant, is not necessarily fatal where the litigant is a pro se prisoner and it appears he has suffered a violation of his constitutional rights; the court should assist him in identifying the proper defendant, sometimes by appointing counsel to investigate and conduct discovery if necessary. 95 F. 3d 548, 555-56 (7th Cir. 1996). See also Albrecht, et al., *supra* note \_\_\_.

Only one reported judicial ethics opinion authorizes judicial assistance, albeit in default cases only. Indiana Commission on Judicial Qualifications, Adv. Op. 1-97 (“[N]ormally a judge should not “try a case” for a litigant who is wholly failing to accomplish the task. However, on the occasion where the [unrepresented] citizen has the simplest kind of matter [e.g., uncontested divorce, name change petition] to bring before the court, with no adversarial context, and no indication of any untoward motive or disrespect for the court, the judge has a duty and responsibility to not simply turn that citizen away on the basis of a minor failure to establish every pertinent detail. A judge’s ethical obligation to treat all litigants fairly obligates the judge to ensure that a pro se litigant in a non-adversarial setting is not denied the relief sought only on the basis of minor or easily established deficiency in the litigant’s presentation or pleadings”).

<sup>10</sup> 532 U.S. 757, 121 S.Ct. 1801 (2001),

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*Scarborough v. Principi (Secretary of Veterans' Affairs)*,<sup>11</sup> that failure to aver in a petition for attorneys' fees that they were "substantially justified" as required by statute could be cured by the filing of an amended petition, again finding this to be a non-jurisdictional defect. Thus, the court slightly extended the liberality-in-pleading principle to issues of procedural noncompliance.

Between the issuance of the latter two opinions, the court decided *Castro v. U.S.*,<sup>12</sup> involving a trial judge who had "recharacterized" a pro se prisoner's pleading filed as a motion for new trial under Rule 33 of the Federal Rules of Criminal Procedure as a petition for relief under a federal statute<sup>13</sup> which, unlike Rule 33, restricts a litigant's right to file a second or successive petition under the statute. The supreme court held that the prisoner was entitled to be informed of the court's intent to recharacterize the motion as his first petition under the statute, unless the court informed him of its intent to recharacterize the motion, that recharacterization will subject subsequent applications to the law's "second or successive" restriction, and provided the litigant with an opportunity to withdraw, or to amend, the filing.<sup>14</sup> Here, the court seems to have established an affirmative judicial duty under these facts to -- if not "assist" -- then to inform and warn the litigant of its intent to recharacterize the pleadings and the consequences thereof, a seeming departure from the *McKaskle* principle of judicial passivity and another incremental extension of the liberality-in-pleadings principle..

Justice Scalia, however, in his concurrence, made the following observation with

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<sup>11</sup> \_\_\_ U.S. \_\_\_, 124 S.Ct. 1856 (2004).

<sup>12</sup> \_\_\_ U.S. \_\_\_, 124 S.Ct. 786 (2003).

<sup>13</sup> 28 U.S.C. § 2255.

<sup>14</sup>124 S.Ct. at 789.

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respect to the majority's newly-created duty to provide legal information to the litigant:

Recharacterization is unlike "liberal construction," in that it requires a court deliberately to override the pro se litigant's choice of procedural vehicle for his claim. It is thus a paternalistic judicial exception to the principle of party self-determination, born of the belief that the "parties know better" assumption does not hold true for pro se prisoner litigants.

I am frankly not enamored of any departure from our traditional adversarial principles. It is not the job of the federal court to create "better correspondence" between the substance of a claim and its underlying procedural basis. But if departure from traditional adversarial principles is to be allowed, it should certainly not occur in any situation where there is a risk that the patronized litigant will be harmed rather than assisted by the court's intervention. It is not just a matter of whether the litigant is more likely, or even much more likely, to be helped rather than harmed. For the overriding rule of judicial intervention must be, "First, do no harm." The injustice caused by letting the litigant's own mistake lie is regrettable, but incomparably less than the injustice of producing prejudice through the court's intervention.

To make matters more interesting, the three months later in another pro se prisoner case, *Pliler v. Ford*,<sup>15</sup> the court retreated from the semblance of leniency and the legal information it required judges to provide in the *Becker, Scarborough, and Castro* trilogy of opinions. In *Pliler*, 5 days before a statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) would have run, the prisoner filed two "mixed" petitions for federal habeas corpus relief contained both exhausted and unexhausted claims (where the statute requires exhaustion of claims through the state court before the federal court can entertain them). The magistrate, without awareness of the limitations problem, offered petitioner three options: (1) dismiss the petitions and refile them after exhaustion was complete; (2) dismiss the unexhausted claims and proceed only with the exhausted claims, or (3) contest the finding that some

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<sup>15</sup> 2004 U.S. LEXIS 4384 (2004).

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claims were unexhausted. He chose the first option with regard to one petition, and failed to respond with respect to the second.

The district court dismissed his petitions without prejudice. He then filed two habeas corpus petitions in the California state court, which were both denied. A subsequent federal habeas corpus petition was then dismissed as untimely under the AEDPA, and the district court denied him a certificate of appealability (COA). The court of appeals then held that his first two petitions were in fact timely, granted the COA, and found his later petitions related back to the earlier ones. The court held that, while the district court correctly concluded it did not have jurisdiction to stay the mixed petitions, it could have acted on his stay motions had he chosen the magistrate's second option and then renewed the prematurely filed stay motions. Importantly, the court of appeals held the district judge should have given Pliler two warnings: (1) that it could not consider his stay motions to stay the mixed petitions unless he chose to amend them and dismiss the then-unexhausted claims, and (2) if applicable, that his federal claims would be time-barred, unless there was cause for equitable tolling, when he returned to federal court, if he opted to dismiss the petitions without prejudice and return to state court to exhaust all of his claims.

The supreme court, reversing the court of appeals, reasoned as follows. There is no constitutional right to personal instruction from the trial judge, citing *McKaskle*. Habeas statutes of limitations are “tasks normally and properly performed by trained counsel as a matter of course,<sup>16</sup> that to require advice to the petitioner would undermine

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<sup>16</sup> *Id.* at (\*13).

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district judges' role s impartial decision makers (without any discussion or analysis), and that the information the court of appeals required would itself be misleading if given. It held that the advice could encourage a "stay and abeyance" approach when it might not be in the petitioner's best interests to adopt it because some unexhausted claims might be "particularly weak," and because time-specific investigations would be required of trial judges to calculate whether the AEDPA statute of limitations has run, a matter that would be burdensome, time-consuming, fact intensive, and raise the possibility of judicial error.

The court in *Pliler* distinguished *Castro* , in which it held the judge must inform a petitioner of its intent to recharacterize a pleading, because there an opt-out provision was created. In *Pliler*, the court said the issue is a pro se litigant's options "before a voluntary dismissal," and that *Castro's* reasoning "sheds no light on the question we confront."<sup>17</sup> Some might argue the latter is a distinction without a difference, in that both cases resulted in a dismissal, and that the claims in each case were of rights-preserving options.

Justice O'Connor, concurring, joined the majority because the decision was "limited to the narrow question whether the notifications crafted by the Ninth Circuit Court of Appeals must be given."<sup>18</sup> Justice Ginsberg and Breyer, however, in dissent wrote that the magistrate erred in not informing the petitioner that "stay and abeyance" was a "rights-preserving" option (although they stated there was no need for the option to be "augmented by 'advisements'"), and that the judge's characterization of the dismissal "without prejudice" was misleading.<sup>19</sup> The latter shows the difficulty even the supreme court has in meaningfully parsing legal information from legal advice.

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<sup>17</sup> *Id.* at (\*18),

<sup>18</sup> *Id.* at (\*18-19).

<sup>19</sup> *Id.* at (\*28-29).

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Thus, while grasp of the procedural complexities in this series of decisions is itself “exhausting,” the review of these authorities shows that the supreme court itself is struggling – if not vacillating on – the extent to which a court should provide legal information or warnings, short of legal advice, to pro se defendants. The dissenters in *Pliler*, as sympathetic to federal pro se prisoners (and presumably all self-represented litigants) as they are, do not themselves go so far as to acknowledge any judicial “advisement” is proper. Thus, it may be decades or more before the American judiciary receives a signal from the supreme court that it may ensure a meaningful hearing by providing reasonable assistance to self-represented litigants, much less clarification of the distinction between legal information and legal advice.<sup>20</sup> The lower courts will continue

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<sup>20</sup> Two state appellate cases illustrating the conceptual problems of distinguishing legal information from judicial assistance (or “advisement,” in Justice Ginsberg’s terms) are *People v. Barnum*, 86 Cal. App. 4<sup>th</sup> 731, 2001 Cal. App. LEXIS 67 (2001) and *Fekete v. Fekete*, 1000 Ohio App. LEXIS (2000). In *Barnum*, a criminal case, the defendant claimed that the trial court, which granted him leave to proceed pro se, should have informed him of his right not to testify, as guaranteed by the self-incrimination clause of the Fifth Amendment. The court rejected the claim, disagreeing with other appellate courts in the same state which had found such a duty on the part of trial judges. Those courts had found a duty to inform an accused of his right to testify, and not to testify, based on a prior decision by the California Supreme Court in which it had held it was error for a trial judge to allow a pro se defendant’s grand jury testimony to be admitted into evidence or used by the state to impeach him. The *Barnum* court held that “Excluding statements compelled during a grand jury proceeding is not the same as forcing a trial court to give legal advice,” 2001 Cal. App. LEXIS at (\*\*19), citing *United State v. Wong*, 431 U.S. 174, 97 S.Ct. 1823 (no warning, false grand jury testimony admissible). It noted that the cases requiring judges to inform self-represented defendants of their right not to testify create an exception to the rule “that litigants who choose to appear in court without counsel are not entitled to special privileges,” but that neither these precedents nor statements of commentators make any effort “to analyze it or defend it” *Id.* at (\*\*21). In disassociating itself from these precedents, the *Barnum* court reasoned:

Assuming it was ever a correct statement of the law, the vestigial exception to the rule that a self-represented litigant is not entitled to legal assistance from a trial court makes no sense after *Faretta v. California*, . . . in the modern legal universe. . . . But once the right to counsel is properly waived . . . we must recall the right of self-representation is not “a license not to comply with the relevant rules of procedural and substantive law” [. . .] “Respect for the dignity and autonomy of the individual is a value universally celebrated in free societies and uniformly repressed in totalitarian and authoritarian societies. Out of fidelity to that value defendant’s choice must be honored even if he opts foolishly to go to hell in a handbasket. At least, if the worst happens, he can descend to the netherworld with his head held high. It’s called, ‘Doing It My Way.’” [citing *People v. Nauton*, 29 Cal. App. 4<sup>th</sup> 976, 981 (1994)]. This defendant was an experienced felon and got what he wanted: A trial *his* way. Nothing in common sense or *Faretta*

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entitled him to press the trial court into service as a legal advisor. . . [The Fifth Amendment] does not place upon the court the duty of informing a pro se defendant of his rights and privileges. In fact, the courts in this State have held that a defendant who knowingly and intelligently elects to proceed pro se, ‘cannot expect the trial judge to relinquish his role as impartial arbiter in exchange for the dual capacity of judge and guardian angel of defendant’” [citations omitted] . . . Once a trial court provides the *Faretta* warnings about the dangers of self-representation and grants a defendant’s motion therefore after eliciting a voluntary waiver of his rights, the defendant is not entitled to further special admonishment or legal advice.

*Id.* at (\*\*21-26).

At this point, the court is equating information about the consequences of a possible unintentional waiver of constitutional rights with judicial assistance, and holding that the election to proceed pro se disentitles the litigant to *any* legal information or legal advice about the legal process. But, in the next paragraph, the court curiously evidences some discomfort with the decision reached, by adding

We hasten to add that this does not *preclude* a trial court from offering assistance (without abandoning neutrality) in order to facilitate the orderly conduct of the trial. “It is in the highest tradition of American jurisprudence for the trial judge to assist a person who represents himself as to the presentation of evidence, the rules of substantive law, and legal procedure, and judges who undertake to assist, in order to assure that there is no miscarriage of justice due to litigants’ shortcomings in representing themselves, are to be highly commended.” [citing *People v. Redmond*, 71 Cal. 2d 745, 758-759, 457 P. 2d 321 (1969)] In this case, the trial court (and the prosecutor) helped defendant at several points during the proceedings and we commend such efforts.

What we *condemn* is the paternalistic (and, hence, anti-*Faretta*) view that a defendant can be deemed capable of representing himself, but a trial court must nevertheless watch out to make sure he (the defendant) does not do too bad of a job asserting his constitutional rights. An indigent defendant who does not want to risk making a mistake can avail himself of the beneficence of the State (as federally mandated by the decision in *Gideon v. Wainwright* (1963) . . . and accept a free lawyer.

*Id.* at (\*\*26-27)

The decision, therefore, reflects both the ambiguity between the concepts of legal information and advice, as well as the concepts of “assistance” in the form of “facilitating the orderly conduct of the trial” and other prohibited forms of judicial assistance.

In *Fekete, supra*, an appeal of a divorce judgment, the defendant former husband claimed the trial judge had erred by failing to assist him, where such assistance was needed by virtue of his being ignorant of the law and needing a French-English interpreter. The court rejected that claim, explaining that the defendant misplaced his reliance upon a provision of the Ohio Code of Professional Responsibility, which governs lawyers’ conduct, which does not govern judges, and because “To construe an Ethical Consideration to oblige a *trial judge* to assist a litigant in presenting his claim or defense not only misinterprets its intent, but would cause that judge to violate the clear mandate in canon 3 of the Code of Judicial Conduct to “perform the duties of judicial office impartially and diligently.” 2000 Ohio App. LEXIS at (\*19-20).

In addition to citing the duty of impartiality as a bar to assistance, the court cited with approval the following portion of the trial court’s order, which reflects the kind of antiquated judicial philosophy that needs to be changed if access to justice is to be achieved (as well as illustrating the injustice of applying the rule of non-intervention by the adversarial judge):

The Court further finds that the trial of this matter proved difficult due to the Defendant’s election to represent himself. This is a growing trend which this and other Courts must deal with in the future. Given a pro se litigant’s lack of training in the law and the procedures used at trial, courts must face difficult decisions as to how to proceed with such trials. Initially a court must decide whether to elect to completely disregard the Ohio Rules of Civil Procedure and the Ohio Rules of Evidence and permit the unrepresented litigants to simply state anything they believe to be

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to pragmatically require some forms of minimal assistance in the form of

accommodations for imperfect rule compliance, but not much more.<sup>21</sup> The only

possibility of reform in the short term in my judgment may lie in a broader interpretation

by state courts of their state constitutional and statutory rights of self-representation and a

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important and to present documents by just giving them to the judge. As an example, in this matter the Defendant elected not to offer testimony or documents as to his living expenses during his narrative testimony. Instead, a list of his current expenses was attempted to be used as he cross-examined his wife. If procedures and evidentiary rules are to be used in trial this document and inquiry cannot be permitted and it wasn't in this case. To rule otherwise would create two types of trials, those with attorneys where mandatory procedures are followed, and uncontrolled free-for-alls where pro se litigants say and do anything they feel is important to their cases. The second alternative available to the trier of fact is to assist the pro se litigant in presenting evidence by conducting extensive inquiry of witnesses and requesting documents which might support this testimony. Unfortunately this approach to trial would require that the trier of fact also be the attorney for the unrepresented litigant and thus destroy the concept of the independent trier of fact which is the foundation of our legal system. The only other alternative is to fully enforce the mandatory evidentiary and procedural rules and leave unrepresented litigants to the often harsh consequences of their voluntary choice to enter trial without the benefit of counsel. While this is not a desirable choice, it is the only choice which maintains the concept of the independent judiciary.

*Id.* at (\*17-18).

In addition to illustrating the "harsh consequences" to self-represented litigants when trial courts slavishly follow the supreme court's ruling in *Faretta, Fekete* shows the need for guidance to judges, which will never be satisfactory until judicial ethics codes are amended to recognize the judicial duty to provide reasonable assistance to ensure a meaningful and fair trial. Such guidance would include instructions to trial judges to conduct one or more pretrial conferences, where the rules of evidence and the litigants' burdens of proof would be explained in order to avoid wasted judicial resources and unfair results.

<sup>21</sup> While some lower courts continue in their refusal to assist self-represented litigants, *See e.g.*, *Barret v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4 Dist. Ct. App. 1999) (affirming dismissal of third amended complaint where trial judge refused to inform pro se plaintiff of the elements of the cause of action he sought to pursue; "the court cannot assist the pro se litigant to the detriment of the opposing party or to the point that the impartiality of the tribunal can be called into question"), others are softening their position on the issue. *See e.g.*, *Cincinnati M.H.A. v. Morgan*, 155 Ohio App. 3d 189,194 (2003) (trial court "should make clear to [a pro se litigant] . . . that he or she has a right to cross-examine the opposing party"); *Salley & Salley v. Stoll*, 864 So. 2d 698 La. Ct. App. 2003) (judge has power to question pro se civil plaintiff in non-jury trial, but has no duty to do so); *Gordon v. Leeke*, 574 F. 2d 1147, 1152-53 (4<sup>th</sup> Cir. 1978) (upon determining that pro se prisoner plaintiff filed a civil rights action against the wrong party, court has duty to assist him by advising him how to proceed and to direct or permit amendment of pleadings to bring that person before the court, and pro se should be advised of the proper procedures to develop his claim); *Valentin v. Dinkins*, 121 F. 3d 72, 76 (2d Cir. 1998) (district courts must assist pro se prisoners with their inquiry into the identities of unknown defendants); *Garrett v. Miller*, Memorandum Opinion, No. 02 C 5437 (N.D. Ill. 2003) (non-prisoner pro se plaintiff entitled to assistance from the court in ascertaining proper defendants and obtaining proper service, by ordering attorneys for defendants to provide plaintiff with their addresses); *Pettus v. Deputy Bartlett*, Memorandum Opinion, No. 04-CV-6260Fe (W.D. N.Y. 2004) (court will assist pro se prisoner plaintiff by ordering prematurely-filed interrogatories to be served upon named defendants, along with non-frivolous complaint allegations);

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fair trial.

## **B. Canadian Rule**

Perhaps the most interesting difference between American and Canadian law is that Canadian – but not American – judges have a duty to provide pro se litigants reasonable assistance in the litigation process.<sup>22</sup> This will come as a surprise to American judges and practitioners, who have staunchly resisted the notion of such a duty on grounds that it gives the appearance of a lack of impartiality.<sup>23</sup> As stated by the Alberta Court of Appeals in *R. v. Rain*,<sup>24</sup>

Representation by a lawyer is not a prerequisite for a fair trial. A person is entitled to represent himself or herself and when he or she does so, there are other means which are intended to protect the right to a fair trial, the foremost being the duty of every trial judge to ensure that all persons receive a fair trial.<sup>25</sup>

Likewise, in *R. v. McGibbon*,<sup>26</sup> the court described the duty of the trial judge in a pro se case as including the duty of providing “reasonable assistance” in the presentation of evidence and in putting any defenses before the court, and to guide the accused in such a way that his or her defense is brought out with its “full force and effect”:

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<sup>22</sup> I have been calling for just such a duty since publication of MEETING THE CHALLENGE OF PRO SE LITIGATION, *supra* note \_\_\_ at . See also Jona Goldschmidt, “The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance,” \_\_\_ FAM. CT. REV. \_\_\_ (2002). See also the discussion below regarding the duty of judicial impartiality, *infra* notes \_\_\_ to \_\_\_ and accompanying text.

<sup>23</sup> I have argued elsewhere that impartiality and proactive judicial assistance to ensure a meaningful hearing as guaranteed by the due process clause are not mutually exclusive. Goldschmidt, *The Pro Se Litigant’s Struggle*, *supra* note \_\_\_ at 48-49. That paper notes that active judges, such as in the inquisitorial system of justice or in certain areas of law in our own adversarial system (e.g., family, mental health, juvenile), an active judge ensures a more just result than that obtained in a pure adversarial process. The first scholarly response to this suggestion was not a rejection of the concept of a duty to assist, but, rather, a substitution of terminology used to describe the needed judicial assistance by use of the euphemistic phrase “engaged neutrality,” a phrase that the author presumably believes would be more palatable to the American judiciary. 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 422-454 (2004).

<sup>24</sup> [1988] 130 C.C.C. (3d) 167, application for leave to appeal dismissed, [1988] 61 C.R.R. (2d) 375.

<sup>25</sup> *Id.* at [36-43](178-180).

<sup>26</sup> [1988] 45 C.C.C. (3d) 334.

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Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. 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 matter of discretion.<sup>27</sup>

The duty in Canadian law to provide reasonable assistance to assure the defendant receives a fair trial is no different in a case where a defendant is represented. For example, where counsel fails to object to the admission of inadmissible evidence, it is still the duty of the trial judge to exclude it in order to ensure a fair trial.<sup>28</sup> But in cases of self-representation, Canadian law places a heavy onus on a trial judge to assist an unrepresented accused, the duty being one of two “traditional common law rules which have been so firmly imbedded in our judicial system that a conviction is very difficult to sustain on appeal if they are not observed.”<sup>29</sup>

The extent of assistance from the judge will depend on the particular circumstances of each case.<sup>30</sup> Depending on the nature of the charge, the complexity of the evidence, and the sophistication, education, and experience of the defendant, the court in its effort to assure a fair trial may be required to explain basic information about the trial process,<sup>31</sup> and matters of procedure and rules of evidence to an unrepresented defendant.<sup>32</sup> The duty to provide reasonable assistance also takes into account the

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<sup>27</sup> *Id.* at 347.

<sup>28</sup> *R. v. D.(L.E.)*, [1989] 50 C.C.C. (3d) 142, 161 (S.C.C.).

<sup>29</sup> *R. v. Darlyn*, [1946] 88 C.C.C. 269 (B.C.C.A.). The other rule 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 271-272.

<sup>30</sup> *R. v. Callow*, [2000] 2000 W.C.B.J. LEXIS 10659, 2000 W.C.B.J. 515016, 46 W.C.B. (2d) 363.

<sup>31</sup> *R. v. Jones*, [1994] 154 A.R. 118 (Q.B.).

<sup>32</sup> *R. v. Romanowicz*, [2000] 138 C.C.C. (3d) 225, 238 (Ont. C.A.).

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judge's traditional latitude to participate in the examination of witnesses when necessary to ensure the fairness of the trial. This duty also applies whether the accused is represented or not.<sup>33</sup>

A series of recent cases illustrate the scope and limits of the duty to provide judicial assistance. In *R. v. Payton*, the Alberta Provincial Court stated the general rule that the judicial duty to assist "does not go so far as providing the same assistance as would be given by counsel . . . . [The] scope of assistance . . . is limited to what is reasonable and cannot and does not extend at each stage of the trial to provision of the kind of advice that counsel is expected to provide."<sup>34</sup> In *Payton*, the court granted a motion for mistrial made by counsel who appeared after the self-represented defendant's trial resulted in his summary conviction (a non-jury trial) for assault. The court agreed to grant a new trial because both the court itself and the Crown should have, but did not, properly notify the defendant of his right to disclosure (discovery):

In the circumstances of this trial, it is the absence of evidence that the applicant waived his right to disclosure, combined with the uncertainty of the potential impact on the trial had the applicant received disclosure, mindful that disclosure is almost always useful and may even be negligent of defence counsel who chooses not to seek it, that leads me to conclude, on a balance of probabilities, that the applicant's right to a fair trial, as guaranteed by s. 7 of the Charter, was violated. In dealing with an unrepresented accused in this situation, any such doubt on the value of disclosure must be resolved in his favour. The assurance of that right must be provided by means of an appropriate remedy, and the applicant seeks such relief from this court.<sup>35</sup>

The duty to provide reasonable judicial assistance was also found to have been

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<sup>33</sup> *R. v. Valley*, [1986] 26 C.C.C. (3d) 207, 230 (Ont. C.A.): "The judge, however, is not required to remain silent. He may question witnesses to clear up ambiguities, explore some matter which the answers of a witness have left vague or, indeed, he may put questions which should have been put to bring out some relevant matter, but which have been omitted."

<sup>34</sup> [2003] A.J. No. 1425, 2003 ABPC 194, 2003 AB.C. LEXIS 2465.

<sup>35</sup> *Id.* at [110>(\*67).

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breached in the following circumstances:

- where the trial judge failed to intervene to rule on the admissibility of evidence obtained as a result of a warrantless search that violated a pro se defendant's section 8 Charter rights<sup>36</sup>;
- where the trial judge failed to explain to a pro se criminal defendant his obligation to present "sentencing submissions" (i.e., evidence in mitigation of the penalty)<sup>37</sup>;
- where the trial judge failed to explain to the appellant the purpose of expert testimony or afford him an opportunity to participate in a *voir dire* concerning the qualifications of an expert witness<sup>38</sup>;

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<sup>36</sup> *R. v. Travers*, [2001] 55 O.R. (3d) 161, O.J. No. 3056 (C.A.), at [35]: "In my view, the evidence at trial was more than sufficient to alert the trial judge that he should raise the question of the admissibility of evidence in light of possible Charter infringement. The trial judge should have conducted an inquiry into whether there had been any violation of the appellant's Charter rights. At that time, after hearing submissions from the appellant and the Crown, the judge should have considered any argument by the Crown based on exigent circumstances. If he found any infringement of rights, he should have then determined whether the evidence obtained pursuant to it, namely the clock radio, should be excluded under s. 24(2) of the Charter." See also *R. v. Fraillon*, [1991] 62 C.C.C. (3d) 474, 476 (Que. C.A.), holding that the trial court properly raised the issue of delay in bringing charges:

Generally, it is open to the judge to point out to the parties that, in his mission to do justice, he is troubled by a point in the facts or in the law which neither one raised. *This is especially the case where it is a right recognized by the Charter.* But again, he must point it out to the parties and give them all the time necessary to completely argue the question before he rules on it. Here the parties to their great astonishment learned during the rendering of judgment that it was based, and based solely, on a question that the judge had only raised and resolved *proprio motu* (emphasis added).

See also *R. v. Tran*, [2001] 2001 Ont. C.A. LEXIS 449 (failure to raise issue of admissibility of blood sample obtained without a warrant). The court in *R. v. Arbour*, [1990] 4 C.C.R. (2d) 369 (Ont. C.A.) at [37], after noting that this type of intervention is even required where defendants are represented, stated that it "is equally applicable, if not more so, to proceedings involving a self-represented litigant, who is unfamiliar with the law." But see *R. v. Kane*, [1998] N.S.J. No. 557 (S.C.) (improper for trial judge to raise Charter issues), because some judges have been found to have erred when they did so, not only where the accused was represented by counsel but also where the accused was self-represented. See *R. v. Sheppard*, [1990] N.J. No. 76 (S.C.); *R. v. Sveinson*, [1990] M.J. No. 671 (Q.B.).

<sup>37</sup> *R. v. Callow*, *supra* note \_\_\_\_: "It is clear from the transcript that the Appellant very likely did not understand what sentencing submissions were, and what relevant facts he should provide to the Court." *Id.* at [35>(\*18).

<sup>38</sup> *R. v. Tran*, *supra* note \_\_\_\_.

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- where the trial judge failed to intervene in the introduction of an accused's statements to the police without a voir dire, or an informed waiver of the accused's right to have the voluntariness of his statements tested<sup>39</sup>;
- where the trial judge did not even provided "a minimum of assistance that is required in order to ensure that the defendant obtains a fair trial," a standard that has not been met where the judge does "little or nothing to assist" the unrepresented defendant, and provides "questionable advice" and "perfunctory comments" regarding his right to testify in his own defense, or not to do so.<sup>40</sup>

In the following case, a Canadian court articulated the limits of the duty to assist. In *R. v. McGibbon*, a case cited earlier that describes the duty of judicial assistance, the trial judge "took great pains to assist the appellant" by (1) directing the Crown Attorney to have witnesses subpoenaed for the defendant, (2) allowing the defendant to make an

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<sup>39</sup> *Park v. R.*, [1981] 59 C.C.C. (2d) 385, 389-392 (S.C.C.). See also *Korponev v. Canada (Attorney General)*, [1982] 65 C.C.C. (2d) 65 (S.C.C.)

<sup>40</sup> *R. v. Tran*, *supra* note \_\_\_, at 22-23. The unfairness of the defendant's trial was aggravated by the fact that the judge knew he did not have a command of the English language and needed a Cantonese interpreter. In addition, the court held that:

the exchange between the trial judge and the appellant at the outset of the trial . . . alerted the trial judge that the appellant was ignorant of the most basic stage of his trial—his arraignment. This is highlighted by the fact that in addition to being incumbent upon 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. . . . [T]he trial judge should have explained to the appellant the course which the trial was to take, beginning with his arraignment, followed by the Crown Attorney calling her witnesses, his right to cross-examine the witnesses and to object to irrelevant evidence, his right to call witnesses and to testify, the risks inherent in testifying and not testifying, and finally, the right to make closing argument. Regrettably, throughout the trial [the judge] appeared insensitive to the appellant's right to a fair trial and failed to fulfill his duty to ensure that the appellant received a fair trial.

*Id.* at 23-24.

Finally, the court also criticized the trial judge's failure to raise the issue of the contradiction between the defendant's testimony of the quantity of alcohol he consumed with the inconsistent toxicologist estimate of defendant's blood/alcohol concentration. *Id.* at 24.

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opening statement out of turn, (3) pointing out to the defendant the effect of an admission that identification is not at issue, and making sure that he knew what he was doing in making the admission, (4) explaining to the defendant how to make use of the preliminary inquiry transcript in cross-examining the complainant, and (5) assisting in numerous other ways.<sup>41</sup>

The court, therefore, rejected the defendant's claim on appeal that the trial judge erred in failing to identify and bring out on the record the discrepancies between the complainant's trial testimony and her preliminary inquiry/hearing testimony:

It would have been appropriate to have the above discrepancies drawn to the attention of the complainant in the course of her cross-examination at trial. It seems to me, however, to place far too heavy a burden on the trial judge, where the accused is unrepresented, to expect the trial judge to review the transcript of evidence and to pick out discrepancies in the evidence from that given at trial. A judge is not required to become the advocate for the accused. Moreover, there may be matters contained in the transcript of the preliminary inquiry that the trial judge should not be aware of.

Here the appellant had the transcript of the preliminary inquiry and the trial judge explained how it might be used to cross-examine. In my view, the trial judge was not obligated to go further. Moreover, the appellant's successful efforts to challenge the accuracy of the transcript of the preliminary inquiry manifested his appreciation of the importance of any discrepancies.<sup>42</sup>

Another example of a case in which a court rejected a claim of breach of the duty

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<sup>41</sup> The trial judge also cautioned the defendant about the effect of his putting his character at issue, told the defendant his testimony regarding unrelated police misconduct was not relevant or helpful to his cause, took a recess at the end of the defendant's case to give the defendant an opportunity to add further testimony, gave the defendant the opportunity to conduct re-examination after cross-examination and explained the difference between re-examination and argument, gave the defendant an opportunity to interview his common-law wife before calling her as a witness, ordered a hearing on defendant's contention that the court preliminary hearing transcript was erroneous (and found that corrections were necessary), and warned defendant that bringing out allegations that he had molested his own children (which the Crown had abandoned) was not advancing his case. *Id.* at [34>(\*19-20).

<sup>42</sup> *Id.* at [37>(\*32-33).

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to assist was *R. v. Innocente*,<sup>43</sup> where – like *R. v. McGibbon* – the trial judge had provided “a series of accommodations” to the defendant. These included (1) providing daily transcripts; (2) allowing an excess of two full days recess to prepare for cross-examination of a witness, (3) ordering that defendant be provided a daily list of the crown’s witnesses to be called that day, the order in which they would testify, and an update on a daily basis, (4) warning defendant about the risk in use of tape recordings of a certain witness’s testimony for impeachment in the event they contained prejudicial evidence against him, (5) granting an adjournment for further defense preparation when certain defense witnesses did not show up, (6) having a continuing dialogue throughout the trial with the defendant regarding a number of issues, and (7) raising the issue of prior consistent statements which resulted in a ruling to eliminate the audio portion of a video.<sup>44</sup>

The *Innocente* court held that, “Throughout, a reading of the transcript of this trial reveals that the trial judge was sensitive to the interests of the appellant as an unrepresented litigant at every turn of the trial.”<sup>45</sup> Further, the court found that the trial judge had met the requirements of Salhany’s *Criminal Trial Handbook* (1992) because the defendant was:

1. able to cross-examine the witnesses for the prosecution and did so effectively;
2. advised of the right to remain silent or given evidence on his own behalf;
3. permitted to and did call witnesses in his own defense;
4. permitted to and did address the court on the issues in the course of the trial;

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<sup>43</sup> [2000] 2000 W.C.B.J. LEXIS 10674, 2000 W.C.B.J. 515031, 46 W.C.B. (2d) 386.

<sup>44</sup> *Id.* at [170-171](\*74-75).

<sup>45</sup> *Id.* at [171](\*75).

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and,

5. was able to make submissions to the jury at the end of the trial.

Finally, the court in *R. v. Tauber*,<sup>46</sup> described the limits to judicial assistance to a self-represented defendant as follows:

While it is undoubtedly true that a trial judge has a duty to see that an unrepresented accused person is not denied a fair trial because he is not familiar with court procedure, the duty must necessarily be circumscribed by what is reasonable. Clearly it 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>47</sup>

A denial of the right to a fair trial under section 11(d) of the Charter by the failure of a trial judge to provide reasonable judicial assistance may be remedied by the appeals court: “The trial judge is not the lone guardian of the right to a fair trial. That right can be protected retrospectively as well. . . [U]pon appeal, a court is in a position to determine if the conduct of the trial without counsel breached the accused’s right to a fair trial.”<sup>48</sup>

A new trial is ordinarily ordered when a defendant’s rights to a fair trial are abridged. In *R. v. Ford*, however, a trial judge erroneously dismissed criminal charges against an unrepresented defendant who was not able to counsel with duty counsel on the day set for his trial.<sup>49</sup> In granting the Crown’s appeal from the dismissal, the court first

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<sup>46</sup> [1987] 20 O.A.C. 64, 71.

<sup>47</sup> *Id.* at [163](\*71). See also *R. v. Turlon*, [1989] 49 C.C.C. (3d) 186, 191. This is of course the argument made by the American bench and bar against any judicial duty to provide reasonable assistance, which erroneously assumes assistance and impartiality are mutually exclusive.

<sup>48</sup> *R. v. Tauber*, [1987] 20 O.A.C. 64.

<sup>49</sup> [2001] 2001 W.C.B.J. LEXIS 1997, 2001 W.C.B.J. 614903, 49 W.C.B. (2d) 47. Duty counsel in Canada – similar to what in Cook County, Illinois, are known as “bar attorneys” or “attorney of the day” in some jurisdictions – are legal services attorneys who are present in some criminal courts to consult with self-

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acknowledged that the trial judge was unhappy with the fact that duty counsel had failed

to appear when he was needed to consult with the defendant about his trial set for that

day. The trial judge stated, “I am now left with two people for trial, representing

themselves, who wish to speak to duty counsel. They are entitled to speak to duty

counsel and I am now going to call on the Crown to submit to me why I should not

dismiss these cases because, through no fault of their own, the administration of justice

has let these people down.”<sup>50</sup>

Rather than adjourning the case, appointing another lawyer to perform duty counsel’s function, directing duty counsel to appear, or handling the matter in any other

manner, “the trial judge adopted a remedy of systemic proportions to address the failure

of an individual lawyer to honor his obligation to the court.”<sup>51</sup> The court,

made no attempt to determine whether duty counsel services were required in light of the court’s own obligation to itself assist a self-represented defendant. Without opting for the last resort remedy, and quite apart from the trial judge’s duty to assist an unrepresented litigant, the court either failed to consider other reasonable alternatives or failed to afford adequate weight to such alternatives.<sup>52</sup>

The court, in reversing the conviction and remanding the case for a new trial before a different judge, found that the absence of duty counsel “did not rise to the level

of creating irreparable prejudice to the integrity of the judicial system were the

prosecution continued”; and “there was simply no reason to visit government with

responsibility for the fault or shortcomings of the private sector lawyer having the daily

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represented defendants. They do not represent the defendants, but consult with them about the wisdom of entering a guilty plea, request continuances on their behalf, explain their Charter rights, make sentencing arguments, and otherwise assist the court in processing a daily criminal docket.

<sup>50</sup> *Id.* at [16](\*9).

<sup>51</sup> *Id.* at [45](\*20).

<sup>52</sup> *Id.* at [39](\*19).

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assignment of counsel.”<sup>53</sup>

American lawyers and judges will also be surprised to learn that some Canadian courts have extended the duty of reasonable judicial assistance to civil cases. The best discussion of the issue is found in *Barrett v. Layton*,<sup>54</sup> where the defendant appeared pro se and plaintiff (her sister) was an attorney represented by counsel. In this opinion the court denied plaintiff’s motion for mistrial based on the judge’s giving a “preliminary summary of procedure and process, my drawing aspects of the defendant’s statement of defence to her attention, either during her cross-examination of the plaintiff or during her testimony in chief, and my explanation to her of the doctrine of laches.”<sup>55</sup>

This assistance, plaintiff claimed, constituted an “unjustifiable attempt to provide the defendant with counsel-like assistance,” an “unjustifiable intrusion into the adversarial process which denies to the plaintiff the advantage of being represented by counsel,” a reasonable apprehension that the judge “already decided that those points are significant to the outcome, and perhaps decisive,” and, “as a result of the foregoing, I have entered into the fray and am no longer impartial.”<sup>56</sup>

In denying plaintiff’s motion for mistrial, the court began its analysis by noting

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<sup>53</sup> *Id.* at [45](\*20).

<sup>54</sup> [2003] O.J. No. 5572, 2003 ON.C. LEXIS 4796, a decision of the Ontario Superior Court of Justice, a trial court.

<sup>55</sup> *Id.* at [15](\*5). Raising legal issues not even pleaded is also a form of assistance. See e.g., *Halifax Insurance Co. v. Killick*, [2000] 2000 N.S.R. (2d) LEXIS 194, 187 N.S.R. (2d) 131, 585 A.P.R. 131, at [40], where the Nova Scotia Supreme Court, in an opinion granting judgment to the self-represented plaintiffs, raised the issue of pre-judgment interest: “I feel compelled to raise this issue because the Killicks are self-represented.”

<sup>56</sup> *Id.* at [15](\*5-6). As to the denial of plaintiff’s claimed “advantage of being represented by counsel,” the court noted her attorney’s rhetorical question, “Why would any one retain counsel if the court properly may take such steps?” *Id.* Self-represented litigants struggle for access to justice will continue for the foreseeable future to confront the legal profession’s opposition, as reflected by the latter comment. See Goldschmidt, *The Pro Se Litigant’s Struggle*, *supra* note \_\_\_\_ at \_\_\_\_.

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that the adversarial system is “at the heart of our trial process,” and it operates whether or not the parties to a civil action are represented; “it is, therefore, not simply an adjunct of legal representation.”<sup>57</sup> The opinion is worthy of extended quotation:

Counsel is clearly entitled to make use of his or her forensic skills to advance the client’s case whether or not the party opposite is legally represented. That is not to say, however, that a person appearing on his or her own behalf must be left to suffer the consequences of unfamiliarity with both the process of the court and procedural and substantive law, and the additional consequences of stress, which is often caused by appearing in court in such daunting circumstances

The adversarial system in its purest form and the advantage which accrues to a legally represented litigant who is opposing an unrepresented litigant are modified, in my opinion, by the supervening principle that trials must not only be fair, they must appear to be fair to reasonable and informed observers of the trial process.

It is well-established that all persons presiding over adjudicative tribunals owe a duty of fairness to the parties who appear before them. See, for example, *Newfoundland Telephone Co. v. Newfoundland (Bd. of Commissioners of Public Utilities)*, [19922] 1 S.C.R. 623 at page 636. . . . The moderation of the adversarial system, including the adversarial opportunities of counsel, by the supervening principle of trial fairness is also found in the Rules of Civil Procedure [citing rules requiring fair notice to a defendant of material facts plaintiff relies upon, disclosure of relevant documents, submission to oral examination]. All of these requirements dilute pure adversarial advantage. They do so in the name of fairness and in the interests of justice. . . .

Litigants have the right to appear in court without counsel, and the right to a fair hearing regardless of whether they are legally represented. . . . [S]ince it is the trial judge who is required to give effect to these rights, doing so cannot amount to abandonment of the role of the trial judge and assumption of a counsel-like role. For the same reason, giving effect to these rights cannot amount to diminution of the role properly played by counsel opposing the unrepresented person.<sup>58</sup>

The court then pointed out that ensuring unrepresented persons receive a fair trial is not only an aspect of access to justice, but of *effective* equality of access. With

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<sup>57</sup> *Id.* at [21>(\*8-9).

<sup>58</sup> *Id.* at [21-27>(\*8-11).

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dwindling funds available for legal services, “the absence of adequate legal advice and legal representation for those appearing before the court is highly likely to impede their ability to conduct their trial on the merits. Thus, it is highly capable of impairing their right to a fair trial. The result, inevitably, will be the erosion of the high degree of public confidence in this system of providing justice, unless remedial steps are taken,”<sup>59</sup>

In response to the claim that he showed a lack of (or the appearance of a lack of) impartiality by the assistance he provided, the trial judge first cited the principle that a system of justice that would have public confidence must ensure that trials are fair and – like judicial impartiality – that they *appear* to be fair to the informed and reasonable person. After citing many of the foregoing authorities describing the duty to refrain from assisting to the extent that counsel would be expected to provide if the accused were represented, the court stated that,

The role of counsel in advising and representing a client at trial is much more intensive than the basic information which was provided, and the prompting from the bench which occurred when the defendant overlooked cross-examining and testifying in respect of issues which she had intended to raise in her own defence.

It should be noted that I referred her to what her lawyer [who had earlier withdrawn] had pleaded and asked if she wanted to cross-examine on those issues. I left the process of cross-examination up to her, on one occasion illustrating the type of issue which might be the subject of questioning. I also left the testimony in-chief up to the defendant and did not elicit from her the testimony which she wished to give. I clarified what she meant by certain of her testimony.<sup>60</sup>

Having described in detail its intervention, the court then explained that “the right to a fair trial is common to all types of cases,” and the foregoing determinations in criminal cases about the steps to ensure a fair trial are applicable, “with necessary

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<sup>59</sup> *Id.* at [30](\*13).

<sup>60</sup> *Id.* at [36](\*16).

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modification, when determining the steps required to ensure a fair civil trial.”<sup>61</sup>

In rejecting the argument that the assistance given the defendant evidenced bias in her favor, the court stated:

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.

....

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 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>62</sup>

Finally, on the issue of whether the judge’s acts of assistance in this case placed him into the fray between the parties, the court cited language from *R. v. Brouillard*, wherein the court stated: “Judges are no longer required to be as passive as formerly. Judges are entitled to intervene in the adversarial debate and it is sometimes essential that

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<sup>61</sup> *Id.* at [37>(\*17). At this point, the court discussed the additional basis for its opinion, being the rule that it is within the discretion of the trial judge to elicit evidence by questioning witnesses, from which it follows that prompting a pro se litigant “to have regard for issues pleaded on her behalf by counsel, either when eliciting evidence by means of cross-examination, as she sees fit, or in presenting evidence in-chief, as she sees fit, cannot be beyond the discretion of a trial judge.” *Id.* at [38>(\*17).

<sup>62</sup> *Id.* at [45-48>(\*20-22).

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they do so for justice to be done.”<sup>63</sup>

Whereas the court in *Barrett v. Layton* ruled that the assistance given to a civil pro se litigant was not unreasonable, and required to ensure a fair trial, the Alberta Court of Appeals found the opposite to be true in *Limoges v. Investors Group Financial Services, Inc.*<sup>64</sup> This was a contractual dispute in which the self-represented plaintiff, who was the defendant corporation’s former employee, sued to recover commissions owed. The court of appeals reversed the trial court’s judgment in favor of the plaintiff due to numerous rulings that amounted to assistance that went far beyond what was reasonable.

The trial judge had provided the following “assistance” to the unrepresented plaintiff, albeit that most of these actions – which the court called “some of the more serious transgressions” – were not merely unreasonable but rather fall into the category of blatant judicial misconduct:

- at the start of the trial, advising plaintiff she would do better to cast her action as one for unjust enrichment rather than wrongful discharge;
- stating, at an early point in plaintiff’s testimony, that she had “been treated very shabbily” by the defendant, and made other comments evidencing favoritism toward the plaintiff;
- coercing settlement discussions by, first, threatening sanctions in costs, and later by a statement the implication of which “was that if counsel did not capitulate and offer more than what it had previously thought was reasonable, the trial judge would make them pay for it at the end of the case”;

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<sup>63</sup> [1985] 1 S.C.R. 39, \_\_\_ ([add factual description]

<sup>64</sup> [2003] A.J. No. 1113, 2003 A.B.Q.B. 757, 2003 AB.C. LEXIS 2082.

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- during the plaintiff's direct testimony, stating that the defendant was "one of these corporations that treats employees as independent contractors, which is a bunch of nonsense";
- adjourning the case for one week after plaintiff announced she had not subpoenaed a crucial witness;
- making findings of facts regarding plaintiff being fired without notice based only on plaintiff's incomplete direct testimony, and stating at this preliminary stage that plaintiff is entitled to punitive damages;
- finding that plaintiff was not an independent employee, despite the terms of her contract and her own pleadings;
- awarding a higher-than-usual sum for costs against the defendant because of its conduct which the trial judge found to be "despicable"<sup>65</sup>; and,
- stating at the end of the trial, after awarding her \$7,500 plus costs and interest, that he would have given her punitive damages but for the court's monetary jurisdictional limit.

The court of appeals concluded:

I fully appreciate that strict compliance with the rules of evidence and procedure is not always necessary or efficacious. I also fully appreciate the difficulties attendant with conducting a trial where one or both of the parties are unrepresented by counsel. However, certain basic standards must be maintained in order to ensure that the trial was fair, appeared to be fair, and that the result was just. That did not happen here. The numerous statements made by the trial judge throughout the trial demonstrated not only a reasonable apprehension of bias, but bias itself. Any reasonable observer would have concluded that the trial judge had decided the case in favour of the plaintiff before the defendant had an opportunity to present its case, or even cross-examine the plaintiff. None of the

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<sup>65</sup> *Id.* at [7-29)(\*3-11).

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hallmarks of a fair trial by an impartial tribunal where present in this case.<sup>66</sup>

This is the only case found in which a judge was found to have exceeded the bounds of reasonableness in assisting a self-represented litigant; the overwhelming number of reported cases on the subject reflecting the opposite finding: a failure to provide reasonable assistance, resulting in a denial of a fair trial.

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<sup>66</sup> *Id.* at [30>(\*12). The court interestingly added that it “would like to commend trial counsel, Mr. Findlay, for maintaining a highly respectful and professional demeanour toward the court throughout what must have been for him a very difficult trial.” *Id.* at [35>(\*13).