How much assistance should a trial judge provide a self-represented litigant [SRL] before the judge’s impartiality will be reasonably questioned? This question has been of continuing concern to both the bench and bar ever since the rise of the pro se litigation movement in the late 1990s, particularly in the context of “mixed” cases involving an SRL and a represented party. Case law and ethics codes provide inconsistent decisions and vague guidelines for judges, who must balance their duty to provide reasonable assistance with their duty to ensure a fair trial for all parties. This paper reports the results of a survey administered to 210 Canadian family law practitioners who were presented with 16 hypothetical scenarios involving an SRL and a represented party. Respondents indicated their views regarding the impartiality and helpfulness of the trial judge in each scenario, involving various procedural defaults by the SRL and different forms of judicial assistance or lack thereof. The results indicate that lawyers’ perceptions of a judge’s impartiality are affected, inter alia, by the favourability of the outcome for the SRL, and whether the assistance provided dealt with procedural or substantive matters. Future research is needed to determine whether a consensus can be established regarding perceptions of lawyers, lay persons, and judges regarding which forms of assistance are reasonable and required, permissible, or impermissible.

Jusqu’à quel point un juge de première instance peut-il venir en aide à une partie qui se représente elle-même sans que son impartialité puisse raisonnablement être mise en doute? Cette question ne cesse de préoccuper les juges et les avocats depuis l’essor qu’a pris le phénomène de l’autoreprésentation à la fin des années 1990, en particulier dans le contexte des cas

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« mixtes », impliquant une partie qui se représente elle-même et une partie représentée par un avocat. La jurisprudence et les codes de déontologie fournissent des décisions contradictoires et des lignes directrices vagues aux juges, qui doivent trouver un équilibre entre leur devoir de fournir une aide raisonnable et leur obligation d’assurer un procès équitable à toutes les parties. Le présent article expose les résultats d’une enquête réalisée auprès de 210 spécialistes du droit de la famille du Canada, auxquels on a soumis 16 scénarios hypothétiques impliquant une partie se représentant elle-même et une partie représentée par un avocat. Les répondants ont indiqué leur point de vue quant à l’impartialité et à l’aide accordée par le juge de première instance dans chacun des scénarios. Les scénarios comportaient diverses erreurs de procédure commises par la partie se représentant elle-même et différentes formes d’aide judiciaire ou l’absence d’aide de cette nature. Les résultats indiquent que la façon dont les avocats perçoivent l’impartialité d’un juge est affectée, entre autres, par la mesure dans laquelle l’issue est favorable pour la partie se représentant elle-même et par le fait que l’aide a porté sur des procédures ou sur des questions de fond. Il faudra d’autres recherches pour déterminer si un consensus peut être atteint relativement à la façon dont les avocats, les non-initiés et les juges perçoivent les formes d’aide qui sont raisonnables et requises, autorisées ou interdites.

I. INTRODUCTION

How much assistance should a trial judge provide a self-represented litigant [SRL], or a self-represented defendant [SRD] in a criminal case, before the judge’s impartiality is reasonably questioned? This question has been of continuing concern to both the Bench and Bar in America, Canada, and other Commonwealth countries since the rise of the *pro se* litigation movement in the late 1990s. The question is of even greater concern given the recent global economic downturn, and the expected increase in the rate of self-representation.

1 Unless noted otherwise, this acronym will be used throughout to refer to both self-represented civil litigants and self-represented criminal defendants.

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
In America, SRLs are generally entitled to liberality in the interpretation of their legal papers, but judges have no further duty to provide reasonable assistance or personal instruction about the law at other stages of the litigation. Appellate decisions and ethics codes provide American judges mixed messages about the propriety of different forms of assistance through inconsistent decisions and vague ethical guidelines. Canadian law, in contrast, requires the trial judge to provide “reasonable assistance” to ensure fairness, as guaranteed by both case law and provisions of the Charter of Rights and Freedoms (hereafter Charter).

Ultimately, the question is where to draw the line between assistance to ensure a fair trial to the SRL and assistance that results in improper bias in his or her favour. The answer depends upon one’s definition of “assistance,” and the related problem of how to determine – as judicial disqualification standards in both countries require – whether a reasonable person with knowledge of the circumstances would question the impartiality of the judge rendering assistance.

Whether or not there exists an expressed judicial duty of reasonable assistance to SRLs, judges in both countries should be and indeed are concerned with balancing their duties to ensure trial fairness and to provide each party with a meaningful opportunity to be heard. At the heart of this difficult judicial balancing act is an attempt to maintain the appearance of a fair process to third party observers. Justice is, after all, a matter of both fact and appearance.

In this paper we explore reasonable persons’ – in this case lawyers’ – perceptions of the fairness of a variety of judicial assistance methods (or instances of lack of assistance) in the context of a family law case. To do so, we report the results of a survey of Canadian lawyers administered at a family law refresher program at Lake Louise, Alberta, in May 2009. The lawyers evaluated (as third party observers) the actions of a trial judge in a series of hypothetical scenarios involving an SRL in a divorce case. The scenarios (Appendix 1) include different forms and degrees of judicial assistance – or refusals to assist – that might typically be rendered in such a case. Some of the scenarios presented arise in the context of common forms of SRL rule noncompliance.

Part II begins with a review of the legal and ethical standards applicable to the issue of judicial assistance to SRLs in civil, criminal, and family law cases. As previously mentioned, unlike American practice, which imposes no judicial duty 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.

at 23.

Justice Adele Kent, judge on the Court of Queen’s Bench of Alberta in Calgary, recently wrote that the first of three “significant challenges that judges face in providing the people they serve with appropriate access to the courts” is “the increasing number of people who come to court without counsel.” Adele Kent, “A Behind-the-Bench Look at the Canadian Judicial System” (2011) 50 The Judges’ Journal 8 at 11.

4 Haines v Kerner, 404 US 519, 520 (1972) (allegations of pro se prisoner’s civil rights complaint are held “to less stringent standards than formal pleadings drafted by lawyers”).

5 See discussion infra, Part II (B).

6 Most courts cite the comment of Lord Hewart C.J. in R v Sussex Justices, Ex parte McCarthy, [1924] 1 KB 256, at 259, for the proposition that justice must not only be done; it must be seen to be done. See infra, note 125 discussing the American source for this maxim.
of assistance, Canadian judges are required to provide reasonable judicial assistance to SRLs to ensure fair trials. The parameters of the assistance to be provided are set by case law and guidance from the Canadian Judicial Council’s 2006 Statement of Principle on Self-represented Litigants and Accused Persons.

The parameters of the assistance to be provided are set by case law and guidance from the Canadian Judicial Council’s 2006 Statement of Principle on Self-represented Litigants and Accused Persons.

The guiding principle is that justice must not only be done, but be seen to be done, while avoiding the appearance of bias or undue advantage toward the SRL.

Part IV describes the procedural justice literature that informs this study. First, it explains the importance of fairness perceptions of disputants. It then notes the dearth of research focusing on fairness perceptions of third party observers of dispute processes, such as lawyers’ observations of judicial assistance provided to or denied by trial judges. It argues that observers’ perceptions of justice are as important as the disputants’ in the context of questions about the fairness of judicial proceedings.

Part V describes the method used in our study of lawyers’ perceptions of fairness on the part of the judge in the 16 hypothetical divorce case scenarios. It describes the survey instrument administered, the respondent sample, and the method of data collection and analysis. It then describes the variables of interest, namely, lawyers’ perceptions of judicial (1) impartiality and (2) helpfulness to the SRL in each scenario. The latter variable is salient because we believe (and most judges before whom SRLs regularly appear will attest) that most SRLs – justifiably or not – come to court expecting the court to provide them with some level of instruction, assistance, or other accommodations due to their lack of legal information, knowledge, and skill. If “reasonable” assistance is permitted or required, then surely “helpfulness” is as significant an element of fairness as is impartiality.

Part VI presents the results of the survey by categorizing the forms of judicial assistance provided (or refused) in the scenarios into those that are (1) required or expected, (2) permissible, and (3) impermissible or questionable. Perceptions of the fairness of certain adverse rulings made against the SRL in the hypothetical scenarios are also presented.

Part VII discusses the relevance of public opinion data for deciding issues of disqualification. It notes that such data have been used by courts in the resolution of other issues, and should also be considered in the judicial assistance context.

The conclusion summarizes the findings of the study, noting that lawyers’ fairness perceptions appear to vary depending on whether a judge provides substantive or procedural forms of assistance, and whether the SRL has been prejudiced thereby. Unexpectedly, in some situations, lawyers believe that judges should provide more – not less – assistance to the SRL.

II. STANDARDS FOR JUDICIAL ASSISTANCE TO SELF-REPRESENTED LITIGANTS

Is it enough for courts to recognize the right to self-representation, without

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7 The leading case establishing the right to representation is *Vescio v The King*, [1949] SCR 139. [Vescio] (self-representation is a paramount right of an accused), which relied on the English
providing the means of assisting persons without lawyers to navigate the legal system? Under American law and practice, SRLs are not entitled to judicial assistance. In contrast, as explained in Part II(A), Canadian law recognizes that SRLs in civil cases and SRDs in criminal cases are entitled to “reasonable” judicial assistance, a right (or judicial duty) that is — like the right to self representation itself — a composite of different sources including case law, Charter rights, judicially-created guidelines, and judicial ethics principles. It is surprising that American and Canadian case law deviates on the issue of judicial assistance to self-represented litigants, given that courts on both sides of the border share a common legal heritage, share the same bedrock values of justice, fairness, and equality before the law, and rely upon the same English decisions for recognition of the right to self-representation. Why this would be so is a question, which must be left for another day.

A. Rights to Fair Trial and Reasonable Assistance

The relevant case law establishes that certain forms of judicial assistance in civil and criminal cases are required or expected, and others are permissible, as set forth in Appendices 2 and 3. For criminal cases, the more recent source of the decision in R v Woodward, [1943] 1 All ER 159 (refusal of court to allow defendant to represent himself was an injustice, requiring conviction to be reversed). See also R v Romanowicz, 178 D.L.R. (4th) 466, 1999 (Ont SC) (“The respect for individual autonomy within the adversarial system forecloses the court from forcing counsel upon an accused even where it may clearly be in the interests of the accused.”). The right applies in civil cases as well. See Children’s Aid Society of Halifax v CV, 2005 NSCA 113 (available on CanLII); Lienaux v Nova Scotia Barristers’ Society, 2009 NSCA 11, 274 NSR (2d) 235. Infringement of the right of self-representation can be viewed, like unreasonable court fees, as a denial of access to courts and justice. BCGEU v British Columbia (Attorney General) 2 SCR 214 (SCC) (holding that the Constitution of Canada protects access to the court in civil and criminal cases as a foundation for the rights protected under the Charter of Rights and Freedoms).

American judges have no legal obligation (constitutional, statutory, or common law) to assist SRLs. While, the U.S. Supreme Court in Faretta v California, 422 U.S. 806 (1975) recognized the right to self-representation, it also held that, “The right of self-representation is not a license ... not to comply with relevant rules of procedural and substantive law.” at 834, n 46. Faretta was followed by McKuske v Wiggins, 465 US 168 (1984) at 183-184:

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.

Professor Strier notes: “The theoretical cornerstone of the adversary system is that the opposing sides are roughly equally matched. Critics refer to this dubious supposition as the adversary myth. Franklin Strier, “The Real Crisis in the Courts” (1988) 48 The Humanist 5, 6-7.

Both Vescio supra note 7, and the U.S. Supreme Court in Faretta v California, 422 US 806 at 824 (1975), relied upon the English case of R v Woodward, supra note 7 at 160, which held that "no person charged with a criminal offence can have counsel forced upon him against his will."

"It is generally recognized that the court should provide some assistance to an unrepresented litigant..." A (JM) v Winnipeg Child & Family Services, [2004] 190 Man R 2d 298, at para 32 (Man CA), available at 2004 CarswellMan 522 (WL Can) [A (JM)]; see also, ACM v PFM, [2003] MBQB 244, sub nom. Magda v Magda, [2003] MBQB 244, paras 1–15.

Reasonable assistance is a duty consistent with the duty to ensure a fair trial in criminal cases. See e.g R v McGibbon, [1988] 45 CCC (3d) 344, at para 32. The degree of assistance depends on the particular case. R v Callow, [2000] 3 CTC 427, at para 9 (available on WL Can) [Callow].

...
right to reasonable assistance is found in the Charter’s guarantee of a fair trial. 12
An additional source of the right to reasonable assistance is the common law right to a fair trial, a hallmark of which is protection of the right to self-representation, and every defendant’s right to present his or her own defense. 13

We anticipate that some might object to the assumption made here, that, in cases where persons are subject to loss of life, liberty, property, or family law rights, judicial assistance methods and the extent thereof should be no different in civil and criminal cases. The objection may be based on the arguments that (1) the Charter right to a fair trial does not apply to civil cases, and (2) that criminal trials in serious and complex cases normally require counsel and involve various Charter rights, such that judicial assistance may be required there, which is not true in civil cases. There are several responses.

First, most people would argue that “fairness is fairness,” and that by extension a fair trial means the same thing regardless of the adversarial context, or whether the proceedings involves risks to life, liberty, property, or family law rights. 14

Those familiar with Canadian jurisprudence know that the words “fair trial” are also often used interchangeably with – or in discussions about the meanings of – the words fundamental justice, “fair and public hearing,” 15 natural justice, 16 and procedural fairness, 17 or in connection with discussions of the meaning of the rule of law, 18 the right not to be deprived of life, liberty, security or the person, and property without due process of law, 19 and rights to equality before and under the law. 20

One court has specifically held that “the right to a fair trial is common to all types of cases. Determinations in criminal cases about the steps required to ensure a fair trial are, therefore, applicable with necessary modification, when determining the steps required to ensure a fair civil trial.” 21

The concept of fairness applies broadly: it is “pivotal in maintaining respect for the

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12 The right to a fair trial is a matter of fundamental justice guaranteed under s. 7 of the Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”), and under s. 11(d) (“Any person charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal...”).

13 Vescio, supra note 7.

14 R v McAvena, [1987] 4 WWR 15, 56 CR (3d) 303, at 21-22 (“The case concerned a civil dispute, but fairness is fairness.”).

15 Canadian Bill of Rights (1960), c. 44, s. 2(e); s. 7, Charter.

16 Bill of Rights, ibid at S. 2(f).

17 Farrow v Butts, [2010] NSSC 387 at para 7 (“Fundamental to natural justice is the notion that a party gets to ‘have its say’.”). It is “simply fairness, including procedural fairness.” Shannon v Forsyth (1995), 145 NSR (2d) 118, (NSSC) at para 16.

18 “The concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.” Dunsmaur v New Brunswick, [2008] 1 SCR 190 at para 79. Procedural fairness “requires that self-represented litigants receive whatever assistance can be provided by the Court.” CLH v SAC, [2010] A.J. No. 324, 2010 ABPC 98 at para 65.

19 Bill of Rights, supra note 15 at “Preamble”.

20 Ibid at s. 1(a).

21 Ibid, s. 1(b), Charter, supra note 12 at s. 15.

22 Barrett v Layton, [2003] 69 OR (3d) 384 at para 38 (available WL Can)
administration of justice. In addition to criminal defendants and civil litigants, parties in family law cases are also entitled to a fair trial. Natural justice, as such, is a term of "elusive definition," but has been held to mean that parties are entitled to a fair process. The right to "procedural fairness" has been held to extend beyond civil and criminal cases, to any quasi-judicial body.

Descriptions of the scope of the right to reasonable assistance in civil cases and criminal cases most often cited by appellate courts show them to be equivalent. Thus, in Davids v Davids, the Ontario Court of Appeal held that trial fairness requires that an SRL "have a fair opportunity to present his case to the best of his ability...[and] that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants’ unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge must, of course, respect the rights of the other party." The duty of reasonable assistance in criminal cases requires that the trial judge, “within reason [...] 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." Common to both definitions of trial fairness is, first, a fair opportunity to present either one’s civil case (or a defense thereto), or one’s criminal defense. Wisely, appellate courts have recognized that, in the case of SRLs or SRDs with literacy, language, informational, or mental or physical disabilities, judges have a duty to provide reasonable assistance. Secondly, common to both definitions is the use of a contextual approach to determine the scope of the duty in any given case.

Further support for the right of fair trial in civil or family law cases arises from numerous decisions that, while not explicitly saying that fairness requires the same accommodations in both civil and criminal cases, they recognize common elements of fairness in both categories of cases. Thus, courts have explicitly held that fairness in civil and criminal cases requires: (1) the opportunity to cross-examine witnesses; (2) application of the hearsay rule; (3) the right to “full discovery;” (4) the rule that evidence may be given that a party has attempted to suppress the evidence; (5) the rule that the test of the admissibility of evidence is relevancy to the matters in issue; (6) the obligation to provide reasons for judicial decisions; and, most
importantly to this study, (8) the rule that justice must be done and seen to have been done. In addition to providing reasonable judicial assistance to ensure a fair trial, the duty of reasonable judicial assistance is also an extension of the traditional judicial power “to elicit evidence not otherwise led, by [for example] questioning witnesses.” Ultimately, judicial assistance in civil or criminal cases may be necessary to enforce the rule of law, which obliges courts to ensure the access to justice that is necessary if any laws and a written constitution are to be given effect. The test for undue intervention, and – one would assume – the converse, is not prejudice, but “whether the image of impartiality, the absence of which deprives the court of jurisdiction, has been destroyed.”

Thus, to argue that judicial assistance in non-criminal cases is not constitutionally required (or available under the Charter), warranted, or necessary is to ignore the foregoing authorities, and creates an artificial distinction between types of cases which is itself unsupported by the law. No case has held that judicial assistance is not required in non-criminal cases. Rather, the courts have held that the extent of assistance depends on the circumstances of the particular case, and the characteristics of the SRL.

B. Forms of Judicial Assistance

One court has described the challenge of providing a meaningful hearing and maintaining impartiality as “a judicial tightrope.” Determination of the degree of assistance required or permitted in any given case requires a contextual approach. It has been described as being based on a combination of factors:

a) Context – often dependent on all the circumstances including the nature and gravity of the charges, the nature and complexity of defence, the issues raised by the

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36 Shoppers Mortgage & Loan Corp. v Health First Wellington [1995] 23 OR (3d) 362, 124 DLR (4th) 440 [Shoppers Mortgage]. The Ontario Court of Appeal in this case found the trial judge had unduly interfered in the trial to the prejudice of one party, requiring a reversal. But the court noted that the judge’s responsibility at the trial was to ask questions which ought to be asked, and might not have been due to the absence of counsel, and to otherwise interject himself into the examination of witnesses to a degree that he might not otherwise choose, citing R v Torbiak and Campbell, [1974], 26 CRNS 108.
37 Barrett, supra note 22 at para 38.
39 Shoppers Mortgage, supra note 36 at para 44.
40 Callow, supra note 11 at para 9; Family and Children’s Services of Cumberland County v DMM, 2006 NSCA 75 at para 27 [Cumberland County]. See also, Planchot and Planchot, 2009 SKQB 396 (2009) (SRLs are “entitled to some assistance, especially in family matters... They cannot be left to simply muddle about to the prejudice of their cases”).
41 R v Harris, [2010] 331 Sask R 283, 2 WWR 477 at para 30 [Harris]: the SRD was “no stranger to court rooms or criminal trials,” and “needed less assistance from the trial judge than might have been required by some other individual with less experience or less ability,” citing R v Phillips, 2003 ABCA 4 172 CCC (3d) 285.
42 R v Williams, 2010 BCPC 16, at para 238 [Williams]. The Supreme Court of Nova Scotia stated, “It is akin to walking a high-wire without the security of a safety net or even a guarantee that the wire will remain taut.” Brown v Newton, 2009 NSSC 388 at para 22 [Brown].
evidence, the accused’s sophistication, intelligence and understanding of the process;
b) The facts in each case;
c) What is reasonable does not and cannot extend to the kind of advice that counsel would be expected to provide;
d) Guidance to the accused throughout the trial in such a way that the defence is brought out with its full force and effect; and
e) A matter of judicial discretion. 43

Judges are to provide a measure of assistance 44 and guidance to the SRL that is “no more than necessary to ensure that the trial proceeds fairly and efficiently.”45 A judge may not be an “advocate or tactical advisor” to an SRL, and “the level of assistance expected of the court need not rise to the standard expected with representation by competent legal counsel.”46 In balancing the issues of fairness, judges must be mindful of both or all parties’ rights.47 Many of the relevant decisions arise from SRLs’ claims on appeal that they had inadequate assistance at trial.48

43 Williams, ibid at para 236. Instead of making distinctions between different forms of judicial assistance (which is not permitted), American courts in contrast refer to the degree of “leniency” that should be imposed in the case of self-represented litigants, i.e., a “sliding scale” approach. See, Holsey v Bass, 519 F Supp 395, 407, n. 27 (D Md 1981). It should also be noted that another difference between Canadian and American law is that the latter permits (but the former prohibits) an SRD’s capacity to self-represent to be considered a factor that might permit a trial judge to impose unwanted counsel. Jona Goldschnidt, “Autonomy and ‘Gray Area’ Pro Se Defendants: Ensuring Competence to Guarantee Freedom” (2011), 6 Northwestern Journal of Law & Social Policy 130 at 157-160.


45 See Murphy v Walkowicz, [2006] 238 NSR 2d 304, at para 37, (available onWL Can) (NS CA).


48 For examples of cases rejecting claims of inadequate assistance, see e.g., R v Jayne, 2008 ONCA 258 (available on CanLII) (claim rejected); Papadopoulos v Borg, 2009 ABCA 201 (available on CanLII) (claim rejected); R v Tymo, 2008 ABQB 445 (available on CanLII) (claim rejected); Douglas v Mitchell, 2009 CanLII 47611 (Ont SC). Cf. Dew Point Insulation Systems, Inc. v JV Mechanical Limited, [2009] 67 CLR (3d) 138 (ON Sup Ct (Civ Div)) (claim allowed); Brown, supra note 42 (claim allowed). Examples of judicial assistance are also derived from trial and appellate decisions involving claims by represented parties—or even a disgruntled SRL—of excessive judicial intervention that denied the appellant (represented or not) a fair trial. See e.g., Preddie v Graf, 2009 CanLII 23383 at para 11 (ON SC) [Preddie] (undue intervention claim rejected where judge “went past assistance and should not have intervened to the extent that she did,” but her interventions did not amount to an unfair trial, or create a “reasonable apprehension of bias”); McPhee v Canadian Union of Public Employees, 2008 NSCA 104 at para 61 (available on CanLII), (holding that judge exhibited bias and “unduly intervened” in SRLs’ case by making certain adverse rulings, but finding that “There is not the slightest whiff of bias in this record. The judge on the contrary was scrupulously fair and did everything one could reasonably expect to assist these self-represented appellants during the trial”). See also, Cumberland County, supra note 40 (claim of undue interference rejected); R v West, [2010] NSCA, 252 CCC (3d) 23 (same).
Courts have held that some forms of assistance are required or expected. And, since courts do not distinguish between fairness in civil and criminal cases, it is not unreasonable to apply the criminal case rulings to civil and family law cases by substituting “claims” or “causes of action” for references to “charge” and “offences.” Some of the required or expected forms of judicial assistance in civil cases include making the SRL aware of the “nature of the proceedings,” ensuring that the SRL “shows sufficient capacity to self-represent to ensure adjudicative fairness” and directing SRL’s attention to salient points of law and procedure. Additional methods are enumerated in Appendix 2.

The forms of permissible judicial assistance are, like the required and impermissible forms, derived largely from a variety of cases in which a reviewing court rejects an SRL’s complaint of inadequate judicial assistance. In their opinions rejecting such claims, courts enumerate with approval (or acquiescence) different forms of assistance rendered by the trial judge, thus permitting us to characterize these forms as permissible assistance methods. In essence, these methods are a matter of judicial discretion. Examples of permissible judicial assistance in civil cases in particular include intervening for the purpose of refocusing the proceedings, prompting the SRL during her testimony to address an issue raised in her pleadings but not addressed in evidence; suggesting or illustrating to the SRL the type of issue which might be the subject of cross-...

49 The only manner in which a “fair trial” has been distinguished in civil and criminal cases is in reference to the right to appointment of counsel at state expense. See, e.g., British Columbia (Attorney General) v Christie, [2007] 1 SCR 873 (holding no right to counsel under Charter in proceeding to challenge a tax law). But see New Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46, 177 DLR (4th) 124 (upholding right to SRL’s right to state-funded counsel in child custody case).


52 Wagg, supra note 31 at para 32. This general statement was made in the context of an appeal via an informal procedure in the tax court, and the Canadian Federal Court of Appeals cited a decision arising from a small claims court of appeals, Earthcraft Landscape Ltd. v Clayton, [2002] NSJ 516 (available on WL Can) (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, which was 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.

Wagg, supra note 31 at para 33.

53 It should be noted that, while reasonableness is the measure of the nature and extent of the judicial assistance required, reducing this principle into practice is not easy. Some courts analyze the question of the appropriate nature and extent of reasonable judicial assistance by acknowledging the duty to do so, but only to a point which would be “objectionable” were litigants represented by counsel. Ibid at para 31. This, of course, unfairly places the represented party’s attorney in control of the reasonableness question.

54 Ibid.

55 Barrett, supra note 22.
examination, and questioning the SRL to clarify the meaning of her testimony. See additional methods approved for civil and criminal cases in Appendix 3.

Finally, courts have used a variety of tests in determining whether a particular judicial assistance method (or combination thereof) is impermissible or questionable in terms of fairness and the need to avoid prejudicial effect on the SRL’s opponent. In general, judges may not go so far as to assume the role of counsel for the SRL. Courts have for example condemned the following forms of judicial assistance rendered to SRLs: rewriting the SRL’s insufficient pleadings, adjourning the case for one week after the SRL announced she had not subpoenaed a crucial witness, and instructing the SRL on “nuances and subtleties of an extremely complicated body of knowledge.” See Appendix 4 for additional forms of impermissible and questionable assistance.

Judicial assistance is also measured by rulings made by the court, as distinguished from active assistance. These may be in response to a request by the SRL, his or her opponent, or by a sua sponte ruling. For example, some SRLs may complain that the court’s adverse rulings exhibit bias in favour of the represented party. The law, however, is that “[j]ust because a number of rulings are made against [an SRD] during the course of the trial does not mean that there was an unfair trial.” Likewise, “[t]he 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] or that a new trial is appropriate.” Appendix 5 contains examples of cases in which courts held that

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56 Ibid at para 35.

57 See e.g., Connor v Township of Brant, [1914] OLR 274 at 279–80 (upholding trial judge’s discretionary right to recall and question two plaintiff witnesses at the end of the case); French v McKendrick, [1931] 1 DLR 696 (upholding trial judge’s authority at the close of the evidence to recall and question witnesses as to missing damages testimony); see also Cumberland County, supra note 40 at para 28, (“It has always been accepted that on occasion it is not only desirable but necessary that the trial judge question a witness for the purpose of clarification of the evidence.”).

58 A (JM), supra note 10 at para 38.

59 We omit cases in which the claims of judicial bias which would be more accurately categorized as judicial misconduct. These include cases of a judge stating to the SRL that “she was treated extremely shabbily” by the defendant or making other comments evidencing favoritism toward her: Limoges v Investors Group Financial Services, Inc., [2003] ABQB 757 at paras 8, 14 (available onWL Can) [Limoges]; making findings of fact based only on SRL’s incomplete direct testimony and stating at this stage that she would be entitled to punitive damages, Ibid. at para 18; and, finding in favour of a sympathetic SRL that she was not an independent contractor, despite the terms of her contract and her own pleadings, Kelly v Nova Scotia (Police Commission), [2005] NSJ No. 284, at para 40 (available on WL Can).

60 Lieb v Smith, [1994] 120 Nfld & PEIR 201, at para 75 (available on WL Can) (“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.”).

61 Bidart v MacLeod, [2005] 234 NSR 2d 20, at paras 9-10 (available onWL Can).


64 Alpha Manufacturing Inc. v British Columbia, [2005] BCSC 773, at paras 123, 126, 150 (available onWL Can) (finding that two disgruntled SRLs did not establish bias against them by the trial judge by mere suspicion, and that credibility determinations themselves do not establish bias).
the judicial rulings were adverse, but neither unfair nor prejudicial to the SRL, and did not constitute a denial of reasonable judicial assistance.

In addition to the foregoing decisions, judges are guided by the *Statement of Principle on Self-represented Litigants and Accused Persons* issued in 2006 by the Canadian Judicial Council [CJC]. It is a fairly detailed, 11-page document that includes: “Statements,” “Principles,” and “Commentary” directed to judges, court administrators, members of the Bar, legal aid organizations, and government funding agencies on the subject of SRLs. The CJC recognizes that SRLs present “special challenges” to the courts, and that the aforementioned groups “each have [a] responsibility to ensure that self-represented persons are provided with fair access and equal treatment by the court.”

In addition to setting out general principles, such as those regarding the duty to provide all parties with an opportunity to meaningfully present their case, and ensuring access to justice, the *Statement*’s provisions pertaining to judges’ courtroom assistance methods: (1) that “It is important” that judges and others “facilitate, to the extent possible, access to justice for self-represented persons;” (2) Judges “should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons;” (3) “Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case”; and, (4) “When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants’ equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:

- a) explain the process;
- b) inquire whether both parties understand the process and the procedure;
- c) make referrals to agencies able to assist the litigant in the preparation of the case;
- d) provide information about the law and evidentiary requirements;
- e) modify the traditional order of taking evidence; and
- f) question witnesses.”

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66 Ibid at 1.
67 Ibid.
68 Ibid.
69 “Courts,” as distinguished from judges, have programmatic obligations under the *Statement*, such as to institute alternative dispute resolution programs and self-help support centres. *Ibid* at 2.
70 Ibid, Comment 4, at 3.
72 Ibid, Principle 2. Neither the Statement nor case law defines what is meant by a “minor or easily rectified deficiency.”
With the exception of the last point, the other principles recited in the Statement provide little guidance for judges regarding judicial assistance to SRLs. Even the last point does not do much more than to require judges to inform SRLs of “the process,” “procedure,” the “law,” and “evidentiary requirements.” Judges require much more guidance in order to meet their obligations to SRLs to be just in appearance and in fact.

The aforementioned case law and other sources of guidance regarding what constitutes reasonable judicial assistance can be seen as a constellation of affirmative acts, information transmission, and decisions that a judge might make during the course of litigation involving an SRL. Since these may affect the rights of a represented party, they must be considered in the context of judicial ethics principles governing the duty of impartiality.

III. JUDICIAL ETHICS AND DISQUALIFICATION

The principle found in case law that justice must not only be done, but be seen to be done, governs the basis of the ethical duty of judicial impartiality. Canadian judges’ conduct is measured against one of two codes of judicial ethics, depending upon the court in which the judge sits. The first, applicable only to federally appointed judges, CJC’s “Ethical Principles for Judges.” Provincial and territorial judges are bound by separate codes established at those levels.

The “Ethical Principles”, the most comprehensive of the codes and the one on which we focus, contains several references to appearances. It notes that one of its

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74 Compare Cumberland County, supra note 41 at para 26 (listing the Full Court of the Family of Australia’s guidelines to assisting courts with SRLs in the family law context). These guidelines were characterized as “a useful compilation” of methods of judicial assistance which “complies with the general thrust of Canadian case law on the subject.” Ibid at para 27. See also, Re F, 161 FLR 189, 27 Fam LR 517; [2001] FLC 93-072; Fam CA 348 (Family Court of Australia, (available onWL Can) (revising the guidelines first enunciated in In Marriage of Johnson, [1997] 139 FLR 384 (Austl)).


78 The “Ethical Principles” are “advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited
purposes is to further “the rights of everyone to equal and impartial justice administered by fair and independent judges.” Judges “must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence.” They 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.” Statement 6 requires that “[j]udges must be and should appear to be impartial with respect to their decisions and decision making.”

The “Ethical Principles” also require that 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.” The “appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.” Judges must not only be “diligent in the performance of their judicial duties,” they must strike a balance among the duties of impartiality, even-handed application of the law, thoroughness, decisiveness, promptness, prevention of abuse of the process and improper treatment of witnesses; “[s]triking this balance may be particularly challenging when one party is represented by a lawyer and another is not. While doing whatever is possible to prevent unfair disadvantage to the unrepresented party, the judge must be careful to preserve his or her impartiality.”

behaviours. They do not set out standards defining judicial misconduct.” Ibid, Statement 1 (Purpose), Principle 2, at 3.


Ibid., (emphasis added).

Ibid.

Ibid., Statement 6 (Impartiality) at 27 (emphasis added).

Ibid., Principles A(1).

Ibid., Principles A(3). (emphasis added). The emphasis on fact and appearance mirrors the American judicial ethics principles. Canon 1 of the new ABA Model Code of Judicial Conduct, supra note 76, provides that “A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” (emphasis added). Rule 1.1 provides: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” (emphasis added). MCJC Rule 2.11 states the standard for disqualification: “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances [examples omitted].” Ibid., Rule 2.11(A). See also, Rule 2.3(B): “A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice...” The comment to the preceding rule states: “A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.” Ibid., cmt. 2. The recently revised Code of Conduct for American federal judges tracks the ABA Model Code by providing: “A judge should avoid impropriety and the appearance of impropriety in all activities.” See “COCC” supra note 76 Canon 2. The commentary to that canon states, in relevant part: “An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. ...Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.” “Ethical Principles”, supra note 76 Statement 4 (Diligence), at 17.

Ibid. cmt. 7. The American analog is the recently-adopted MCJC commentary, that “It is not a violation of this Rule 2.2, requiring judges to perform their judicial duties ‘fairly and impartially’ for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have
A judge balancing the parties’ rights to be heard and the duty of impar
tiality is naturally concerned that the assistance he or she may provide
SRLs may appear to give them an unfair advantage — appear, that is, to
reasonable, third-party observers — resulting in a motion by the
represented party to disqualify the judge from presiding over the matter.87
The “Ethical Principles”, however, while recognizing the fundamental
nature of the impartiality requirement,88 and formulating multiple
guidelines to ensure it, specifically states: “The Statement and
Principles do not and are not intended to deal with the law relating to
judicial disqualification or recusation.”89 Nevertheless, they are cited by
the Supreme Court of Canada in its decisions regarding issues of dis quali
fication.

87 The Supreme Court of Canada has held that “[a]t base, a fair trial is a trial that appears fair, both
from the perspective of the accused and the perspective of the community.” R v Harrar, [1995] 3
SCR 562, at para 45. As the Supreme Court of Nova Scotia noted, this and related comments
were made in the context of a criminal case, but “they still have application to a civil proceeding.”
Brown, supra note 42 at para 23.

88 “Ethical Principles”, supra note 76, Statement 6 (Impartiality), cmt. A.1, at 30: “From at least the
time of John Locke in the late seventeenth century, adjudication by impartial and independent
judges has been recognized as an essential component of our society…” citing Peter H. Russell,
The Judiciary in Canada: The Third Branch of Government (Toronto: McGraw-Hill Ryerson:
1987).

89 Ibid, Statement 6 (Impartiality), cmt. A.1, at 30. The Statement, however, contains a commentary
quoting language from R v Lippe discussing the relationship between judicial independence,
impartiality, and the appearance thereof:

The overall objective of guaranteeing judicial independence is to ensure a
reasonable perception of impartiality; judicial independence is but a “means” to
this “end.” If judges could be perceived as “impartial” without judicial
“independence” the requirement of “independence” would be unnecessary.
However, judicial independence is critical to the public’s perception of
impartiality.

In contrast, both the American MCJC and the COC contain disqualification standards. The COC’s
disqualification provision states, in relevant part, that “[a] judge shall disqualify himself or herself
in a proceeding in which the judge’s impartiality might reasonably be questioned, including but
not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a
party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” “COC”,
supra note 76, Canon 3 (C)(1). The ABA Model Code requires disqualification when a judge’s
impartiality might reasonably be questioned, except that a judge’s “reasonable accommodations”
to a pro se litigant are insufficient grounds. The Federal Code of Conduct, in contrast, requires
disqualification when either (a) “reasonable minds” would conclude that a judge’s impartiality is
impaired, or (b) where the judge’s impartiality might be reasonably questioned. See “MCJC”,
supra note76. Cynthia Gray, Reaching or Overreaching: Judicial Ethics and Self-Represented
Litigants (2005) online: American Judicature Society <http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf> provides an excellent review of both case law and judicial ethics
opinions concerning treatment of SRLs.
The fundamental principle guiding judicial disqualification is that noted in *Samson Indian Nation and Band v Canada*, where the court quotes Lord Hewart’s, C.J., well-known maxim that “[i]t is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”\(^9^0\) 

Another court held, “The independence and impartiality of the judiciary lie at the heart of procedural fairness. Any allegation of judicial bias imperils the fundamental interests of justice.”\(^9^1\)

The Supreme Court of Canada established a test for judicial disqualification based on claims of an “appearance” of bias, the form most relevant to the discussion of assistance to SRLs. In *Committee for Justice and Liberty v National Energy Board*, the court described it as follows:

> [T]he 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. … 
> [The] test is “what would an informed person, viewing the matter realistically and practically” and having thought the matter through “conclude...”\(^9^3\)

The reasonable person must be an informed person, with knowledge of all the relevant circumstances.\(^9^4\) These include “the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is

\(^{90}\) See e.g., *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259, at para 59 [*Wewaykum Indian Band*]: “’[I]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary’ (Canadian Judicial Council, Ethical Principles for Judges (1998), at p. 30). It is the key to our judicial process, and must be presumed.”


\(^{93}\) [1978] 1 SCR 369, at 394 (available on CanLII) (SCC).

\(^{94}\) “As many cases have said (including those just cited), the test is what a reasonable observer would think who is fully informed and has thought the matter through, not an observer with a suspicious mind or a mind too sensitive.” *R v A (JL)*, 2009 ABCA 344, 21 Alta LR (5th) 143, at para 18 (citations omitted). *The court in Neville v Fitzgerald*, 2009 NLTD 176, 291 Nfld & PEIR 282, recently summarized the reasonable person inquiry as follows:

Drawing from the various authorities I have cited, it can be seen that the reasonable person, the fictional arbiter of this disqualification motion, is and is expected to be:

- (i) fair-minded;
- (ii) one who does not possess a very (in the sense of “unduly”) sensitive or very scrupulous conscience;
- (iii) fully informed of and conversant with all relevant context and circumstances;
- (iv) one who will reserve judgment until fully informed;
- (v) one who will consider all relevant context and circumstances thoughtfully, realistically and practically before reaching a decision;
- (vi) one who, in the specific circumstances of a motion to disqualify a judge, recognizes and accepts the fundamental value of a strong presumption of judicial impartiality and acknowledges the need for cogent evidence to displace this presumption.
one of the duties the judges swear to uphold.” Lord Denning, in *Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon*, comments as follows on the “reasonable person” part of the appearance-of-bias test:

> In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand [cited cases omitted]. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough [cited cases omitted]. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: “The judge was biased.”

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96. [1968] 3 All ER 304 (CA), at 310. The foregoing comment – with respect to the test not being what was on the judge’s mind – is clarified in the view expressed in *Wewaykum Indian Band*, supra note 90 at para 67, where the court states that the test, envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge’s state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the decision-maker’s state of mind, under the circumstances. In that sense, the oft-stated idea that “justice must be seen to be done”,..., cannot be severed from the standard of reasonable apprehension of bias.

In comparison, the American federal disqualification statute provides that a United States Judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 USC § 455(a). The “actual bias” (“automatic disqualification” under Canadian law) provision requires disqualification when the court acts with “personal bias or prejudice” toward a party. 28 USC § 455(b)(1). A judge must have departed from the judicial role and become an advocate for one side or another in order for an American court to find disqualification is necessary. See, e.g., *Crandell v United States*, 703 F. 2d 74, 77 (4th Cir. 1983) (due process denied where judge “simply assumed the role of an advocate” for the prevailing party); *Reserve Mining Co. v Lord*, 529 F. 2d 181, 185 (8th Cir 1976) (due process denied where judge “seems to have shed the robe of the judge and to have assumed the mantle of the advocate”); *Knapp v Kinsey*, 232 F. 2d 458, 467 (6th Cir.), cert. denied, 352 U.S. 892 (1956) (due process denied where judge “figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff”). *Margoles v Johns*, 660 F. 2d 291, 296 (7th Cir 1981). The Margoles Court added: “Those few cases in which due process considerations were the basis for reversal involved serious facts supporting a finding of prejudice, not mere speculation and ‘appearances.’”
Judges are typically disqualified due to an appearance of bias where there is a relationship involving kinship, friendship, partisanship, professional, or business relationships with one of the parties, or involve animosity towards a party, or where the judge has a predetermined mind as to the issue involved. Courts disfavour motions to disqualify, and hold that they should not be liberally granted:

A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to ensure that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to insure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price.

As the British Columbia Court of Appeal put it:

[A] trial is not a tea party. But bias does not mean that the judge is less than unfailingly polite or less than unfailingly considerate. Bias means a partiality to one side of the cause or the other. It does not mean an opinion as to the case founded on the evidence nor does it mean a partiality or preference or even a displayed special respect for one counsel or another, nor does it mean an obvious lack of respect for another counsel, if that counsel displays in the judge's mind a lack of professionalism....Bias does not equate with what might be found in the end to be an unsatisfactory trial.

As one court explained the practice, “[J]udges determine appearance of impropriety – not by considering what a straw poll of the only partly-informed man-in-the-street would show – but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.”

Thus, we see that the question of “appearance” of bias to the reasonable person, as described by the “Ethical Principles”, is inexorably tied to the broader good of maintaining public trust and confidence in the courts. The accused judge (or a second neutral judge) has traditionally made the recusal decision based upon

98 GWL Properties Ltd. v WR Grace & Co. of Canada Ltd, (1992), 74 BCLR (2d) 283 (CA), at 287. See also, Blanchard v Canadian Paper Workers' Union, Local 263 et al. reflex, (1991), 113 NBR (2d) 344 (CA), at 351 (a decision to disqualify should “only be exercised sparingly and in the most clear and exceptional cases”).
99 Middelkamp v Fraser Valley Real Estate Board, (1993), 83 BCLR (2d) 257 at 261 (CA).
100 In re Drexel Burnham Lambert, 861 F. 2d 1307, 1313 (2nd Cir. 1988). The language of the court evidences the interchangability of the references to appearances of questionable impartiality and impropriety.
what he or she thinks a reasonable person would think about the judge’s impartiality under the circumstances. Why not in addition ask reasonable, third-party observers, and consider their views on the issues of fairness and judicial impartiality?

IV. PROCEDURAL JUSTICE RESEARCH

Over the last three decades there has been an “explosion” of research on procedural justice. It shows that individuals place more importance on the perceived fairness of the process (procedural justice) than on the favourability of the outcome when making their decision to comply with an adjudicated decision, such as an arbitration award, as well as in forming attitudes about the legitimacy of legal institutions. The impartiality of the decision maker, whether an explanation for a decision is provided, and the respectfulness of treatment are also important criteria that people use in forming judgments about the fairness of a dispute resolution process.

This study is informed by a growing empirical literature studying the relationship between the legitimacy of an authority, like courts, and perceptions of fairness of the process by which it reaches its decisions. For example, research has shown that people are more likely to follow and accept decisions of the court and to forgo appealing decisions against them when they see courts as legitimate.

Perceptions about the impartiality of a judge are central in judgments about procedural fairness, as evidenced by both the language of disqualification statutes and judicial ethics impartiality requirements, as well as empirical studies.

102 See e.g., E Allan Lind et al, The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences (Santa Monica, CA: Rand Corporation, 1989) [Perception of Justice] (This study compared litigants’ perceptions of procedural justice and outcome satisfaction with civil trials, arbitration, and judicial settlement conferences).
104 Lind, & Tyler, ibid at 109.
105 Hon. Kevin Burke & Hon. Steve Leben, “Procedural Fairness: A Key Ingredient in Public Satisfaction, A White Paper of the American Judges Association”, The Voice of the Judiciary 4 (26 September, 2007) online: American Judges Association <http://aja.ncsc.dni.us/htdocs/AJA-WhitePaper9-26-07.pdf>, (reviewing the social science research on procedural justice, recommending that it guide judicial conduct to enhance public satisfaction with courts); [Note that their organization includes some 150 Canadian members, and that “we believe the baseline social-science research upon which this paper is based would also be applicable there, given the similarities between the legal systems of these two countries.” Ibid at 4.
107 See Part III. In the U.S., to ensure due process, “[t]he [disqualification] inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the
Previous research on perceptions of procedural justice has, however, largely focused on fairness perceptions of the disputants in litigation, arbitration, or mediation, or of persons interacting with the police or in business settings rather than on third-party observers.

Not only has most research on procedural justice been focused on measuring perceptions of fairness from the perspective of individuals directly involved in dispute processes or encounters with authorities, we know little about the situational and case characteristics that contribute to a third-party’s judgments about a judge’s impartiality or bias. We do know that SRLs, like all litigants, are concerned with having a voice in the process and want to be treated fairly, with dignity, and given the respect to which all who seek justice in our courts are entitled. Their perception of procedural justice is affected by whether they had an opportunity to be heard, received an explanation for a decision, and the favourability of the outcome. They expect to walk onto a “level playing field” before a benevolent judge who will act fairly and who they can trust. Judges know that citizens, including SRLs, “have high expectations for how they will be treated before a benevolent judge who will act fairly and who they can trust. Judges know that citizens, including SRLs, “have high expectations for how they will be treated during their encounters with the judicial system.”

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110 See e.g., Lind, et al., supra note 102, at 65; Tyler, “Legitimacy”, supra note 106 at 22-23 (four basic expectations encompassing perceptions of procedural justice are voice, respectful treatment, trustworthy decision making authorities, and “neutrality,” defined as consistently applied legal principles, unbiased decision makers, and a “transparency” about how the decisions are made); Tom R. Tyler & E. Allan Lind, “A Relational Model of Authority in Groups” (1992) 25 Advances in Experimental Social Psychology 115 at 150-162; M Somjeb Frazer, “Examining Defendant Perceptions of Fairness in the Courtroom” (2007) 91 Judicature 36 at 37; Rashida Abuwala & Donald J. Farole, “The Perceptions of Self-Represented Tenants in a Community-Based Housing Court” (2007) 44 Court Review 56 at 59 (finding that SRLs’ perceptions of fairness were stronger where their cases were processed in a “community justice center,” as compared to a “downtown” housing court; the former the SRLs felt more strongly that they were treated with respect, the judge listened to them, they were treated fairly, the judges greeted the litigants in the beginning of the court appearance, summarized the case history and current case status, and described the available resolution options, court procedures, and other matters).

109 For a review of the earlier studies, see E Allan Lind, “Early Research in Procedural Justice,” in Lind &Tyler, supra note 103 at 7; John Thibaut & G Laurens Walker, Procedural Justice: A Psychological Analysis (Hillsdale, NJ: L Erlbaum Associates, 1975); Lawrence Erlbaum & Stephen LaTour, “Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication” (1978) 36 Journal of Personality & Social Psychology 1531. The primary work has been collected in Tyler, Procedural Justice supra note 101, which contains an introduction summarizing the vast research on this subject.

111 Erlbaum & LaTour ibid., “More recently, Lind and colleagues have found that obtaining information that another person who received an unfair procedure lowered individuals’ judgments of procedural fairness as much as when they personally experienced the unfairness. See E Allan Lind, Laura Kray & Leigh Thompson, “The Social Construction of Injustice: Fairness Judgments in Response to Own and Others’ Unfair Treatment by Authorities” (1988) 75 Organizational Behavior and Human Decision Processes 1; Kees Van den Bos & E Allan Lind, “The Psychology of Own Versus Others’ Treatment: Self-oriented and Other-oriented Perceptions of Procedural Justice” (2001) 27 Personality and Social Psychology Bulletin 1324; Larry Heuer, “What’s Just About the Criminal Justice System? A Psychological Perspective” (2005) 13 JL & Pol’y 209 at 215 and 226 (noting that “the overwhelming majority of procedural justice research focuses on the reactions of subordinates, or decision recipients,” and arguing that decision makers, e.g., judges, lawyers, and law enforcement officers, “may hold different notions of procedural fairness than subordinates and decision recipients, such as [criminal] defendants”).

111 Burke & Leben, supra note 105 at 5. It is plausible that SRLs also have a sense of “deserviness” in terms of a belief that they are entitled to receive from the court whatever
As relevant case law and judicial ethics have noted, the appearance of fairness to third parties is a crucial part of a fair trial. So, what criteria can be used to assess the impartiality of judicial assistance, and the related question of whether judicial helpfulness was about right or biased toward one of the parties? In our survey we systematically varied the aforementioned justice perception criteria as well as whether the assistance concerned procedural, substantive, or mixed legal issues. Relevant case law, judicial ethics standards, and empirical research on perceptions of fairness enabled us to create realistic case scenarios to assess lawyers’ perceptions of the impartiality and helpfulness provided or withheld by a judge when an SLR needs guidance.

While courts have not provided definitive or clear guidelines regarding the important question that guides our study, i.e., how much assistance should a trial judge provide a self-represented litigant to both ensure a meaningful opportunity to be heard, while at the same time avoiding the judge’s impartiality being reasonably questioned?, our study will hopefully contribute to its resolution.

A. The Sample and the Survey Instrument

The survey instrument (Appendix 1) on the subject of self-representation was administered to 210 family law practitioners as part of a continuing legal education (“family law refresher”) program conducted by the Legal Education Society of Alberta [LESA] in May, 2009. Given that there were 266 attendees, 28 of whom were faculty, the response rate was a respectable 88 percent. The relatively small sample size does not permit us to generalize to all family lawyers in Canada, but the data do reflect the universe of those self-selected family lawyers in attendance at the law refresher.

A real-time electronic “responder” system was used by each attendee to answer questions regarding a series of scenarios in a hypothetical pro se divorce. The survey scenarios were designed so that they varied on the basis of 1) different stages of a divorce case that arose in the pre-trial, trial, settlement, and appellate stages; 2) the SRL’s violation of procedural or evidentiary rules that might be interpreted as non-compliance, or imperfect compliance; 3) scenarios in which information, accommodations, and assistance is necessary for them to establish their claim or defense given their disadvantaged status. Previous research indicates that this factor is relevant to fairness perceptions, in that “respectful treatment will affect perceived fairness most strongly when individuals feel that they deserve respectful treatment.” See, Heuer, ibid at 219; Larry Heuer et al, “A Deservingness Approach to Respect as a Relationally Based Fairness Judgment” (1999) 25 Personality & Social Psychology Bulletin 1279.

At the time, there were 7,460 members in the Alberta Law Society. Of these, 7,081 were located in Alberta, E-mail to first author from Jessica Arts, Information and Privacy Officer, LESA (July 12, 2011). According to the Canadian Bar Association, in 2009 there were 168 members in the Family Law Section from Alberta (E-mail to first author from Linda Chapman, Member Services, CBA (August 18, 2011), many or most of whom were probably in attendance.

E-mail to first author from Dawn Ofner, Associate Director, LESA (July 5, 2011).

Because the LESA conference organizers did not have enough responders for all the attendees, some respondents used paper copies that were distributed at the meeting and collected after the discussion.

See, Rebecca A Albrecht et al, “Judicial Techniques in Cases Involving Self-Represented Litigants” (2003) 42 The Judges’ Journal 17 at 44 (noting that courts differ in their resolution of issues involving SRLs’ lack of legal knowledge and non-compliance with procedural rules based on whether a “hard” or “soft” procedural bar is involved, where “hard” bars refer to statutes of limitation, exhaustion of administrative remedies, and time limits for filing appeals, and “soft”
the judge provided instruction to the SRL on an issue, and others where he did not;
4) scenarios in which the outcomes for the SRL were either favourable or unfavourable, and 5) which may be either neutral or favourable to the represented party; and, 6) scenarios involving assistance that could be characterized as “procedural” or “substantive” (recognizing that some might arguably be characterized as “mixed”).

In order to measure their perceptions of the impartiality of the judge in each hypothetical, the lawyers used a 7-point scale of impartiality which appeared after each scenario. The scale ranged from a low of 1, which respondents could select to indicate the judge was “Very biased in favour of the SRL,” to a high of 7, indicating their view that the judge was “Very biased in favour of the represented party.” The middle position of 4 was labeled as “Impartial to both parties.” A second “helpfulness” scale was inserted below the impartiality scale under each scenario. There, we asked respondents to indicate how helpful the judge was to the SRL. The lowest value, 1, was labeled as “Should have done more to help SRL,” the highest value of 7 was labeled as “Gave too much help to SRL,” and the middle position was labeled “Help was just about right.”

The analysis of the lawyers’ responses was intended to determine which forms of assistance were perceived as reflecting what we call “tolerated bias,” i.e., responses on the impartiality scale ranging from 3 to 5 (where 4 equals “perfect” impartiality), and those corresponding values which measured whether the judge was perceived as helpful to the SRL to an appropriate degree, i.e., values on the helpfulness scale of between 3 and 5 (where 4 equals helpfulness to the SRL that is “just about right”). The methods falling into these categories should be considered by judges as acceptable, and should inform the development of guidelines on the issue of reasonable judicial assistance to SRLs.

B. Data Collection and Analysis

Our sample consisted of 210 family law attorneys who practice in Alberta and who attended a meeting that included law refresher courses. The program organizers provided us with the data set consisting of all responses anonymously made via the electronic responder system provided. The responses to each of the two questions regarding impartiality and helpfulness for each of the 16 scenarios bars include failing to make a contemporaneous objection to offers of evidence, raising issues on appeal, or vacating a default judgment).

116 These would involve evidentiary issues or assistance that would be considered strategic or tactical suggestions.

117 All the lawyers responded to the same scenarios. They were displayed individually on a large screen and read aloud. Then, the impartiality question was displayed (“The judge was…”), and respondents each entered their response on their responder unit indicating the extent of the judge’s impartiality or lack thereof. After the respondents entered their response, the distribution of responses was displayed on a bar chart projected for all to see. This was followed by a display of the helpfulness question (“How helpful was the judge to the self-represented litigant?”), an opportunity for responses to be entered for that question, and then a bar chart was displayed showing the distribution of responses to that question, etc. Discussion ensued after the last scenario was presented.

118 There is research showing that significant differences exist when respondents are asked to evaluate scenarios from someone else’s perspective, such as one of the parties or from their own perspective. See supra note 110. In this study, however, respondents were not instructed to answer the questions from any particular perspective because we wanted to collect data reflecting the reasonable lawyer-observer’s perspective.
were recoded (regrouped) for analysis. The data reflecting the lawyers’ perceptions of impartiality were first cross-tabulated with the data for reflecting their perception of helpfulness.

The responses regarding impartiality and helpfulness were divided into three categories for each of the 16 scenarios. Data Category 1 consisted of responses at the low end of the scales (1 & 2) on each of the questions presented for each scenario. These data reflected a perception of judicial bias toward the SRL and too much assistance. Category 2 consisted of responses at the high end of the scales (6 & 7), reflecting a perception of bias toward the represented party, and inadequate assistance to the SRL. Category 3 consisted of responses in the middle of the scales (3 to 5), reflecting a perception of impartiality and an appropriate level of assistance. We also identified those rulings made by the judge in the scenarios which reflect fair or unduly harsh rulings against the SRL. These data are presented in four tables, described below.

VI. RESULTS

This Part describes the results of the Alberta family lawyers’ responses to questions posed to them regarding their perceptions of the degree of judicial impartiality and the appropriateness of the assistance given (or not given) to the SRL in each of the scenarios in our survey. We grouped the scenarios based on the lawyers’ responses into four categories: required or expected, permissible, and impermissible or questionable forms of assistance, and fair or unduly harsh rulings made by the judge in the hypothetical SRL’s divorce case.

A. Required and Expected Assistance

In this study we define “required” judicial assistance quantitatively as those actions or rulings in the scenarios in which the total percentage of lawyers believing that the judge was perfectly impartial and the assistance she gave was just about right under the circumstances is greater than 70%.

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119 We decided to include the “slightly” biased perceptions (i.e., responses of 3 and 5) with the impartiality perception (response 4). This reflects the reality that every observer will have some emotional reaction to any judicial act or omission. A perception of “some” bias would not, under current U.S. or Canadian law, be sufficient to require disqualification. See supra, notes 93-99, and accompanying text. An alternative recode for analysis was examined, i.e., Category 1, combining responses 1, 2, and 3, representing perceptions of bias toward the SRL; Category 2, combining responses 5, 6, and 7, representing perceptions of bias toward the represented party; and Category 3, including response 4 only, representing perceptions of “pure” impartiality and exactly the right amount of help. The results do not vary when this alternative recode is used; thus, individuals were firm in their views of impartiality and helpfulness. The only exception is for Scenario 2 where the judge granted the SRL motion despite her failure to amend the petition; only 36% gave a response of 4 and perceived the judge as absolutely impartial, and having given the right amount of help.
Table 1. Required and Expected Assistance

<table>
<thead>
<tr>
<th>FORM OF ASSISTANCE</th>
<th>Judge biased in favour of SRL, and too much help given (%)</th>
<th>Judge impartial &amp; assistance appropriate (%)</th>
<th>Judge biased in favour of represented party and should do more to assist SRL (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Granting motion to file amended complaint, despite failure to attach copy (#2)</td>
<td>2</td>
<td>80</td>
<td>10</td>
</tr>
<tr>
<td>Accepting petition, despite incorrect title (#3)</td>
<td>2</td>
<td>88</td>
<td>7</td>
</tr>
<tr>
<td>Refusing request for information regarding procedure to enforce money judgment (#11)</td>
<td>1</td>
<td>70</td>
<td>26</td>
</tr>
<tr>
<td>Failing to explain tactical disadvantage of calling adverse party as her own witness (#12)</td>
<td>1</td>
<td>71</td>
<td>26</td>
</tr>
<tr>
<td>Instructing SRL re: appeal procedure and providing copy of rule (#14)</td>
<td>6</td>
<td>84</td>
<td>1</td>
</tr>
<tr>
<td>Permitting filing of amended, ghostwritten brief on appeal (#16)</td>
<td>1</td>
<td>97</td>
<td>1</td>
</tr>
</tbody>
</table>

NOTE: Values reflect proportions of lawyers responding. They may not add up to 100% due to rounding.

The data in Table 1 reflect the case law to the extent that relief from technical requirements, such as pleading rules, is viewed as impartial and an appropriate degree of informational assistance is given. But, somewhat surprisingly – given the duty of reasonable judicial assistance – the lawyers approved of a ruling adverse to the SRL which also involved conveying information, i.e., providing information about how to enforce a judgment and how to appeal. And they also approved of a judge’s failure to explain to the SRL certain tactical and evidentiary advantages of her having failed to call her husband as a witness in her case. It appears that, where the assistance of the court affects procedural issues, lawyers are more tolerant of judicial assistance and information. But, where the assistance favourably affects the substance of the SRL’s case by way of introduction of evidence, or enforcement of a judgment in the SRL’s favor, then lawyers are opposed to such assistance.120

B. Permissible Assistance

In addition to the decisions reviewed in Part I, the data collected here reveal two additional forms of assistance (Table 2) which more than 50% of the lawyers perceive as reflecting both impartiality and an appropriate degree of helpfulness to the SRL in the scenarios presented.

120 During a break in the program one attendee said to the first author: “It’s not that we oppose a judge’s help for these people in procedural matters, but I think I speak for most of those here when I say we oppose help that goes to the substance of the case.”
Table 2. Permissible Assistance\(^{122}\)

<table>
<thead>
<tr>
<th>FORM OF ASSISTANCE</th>
<th>Judge biased in favour of SRL, and too much help given (%)</th>
<th>Judge impartial &amp; assistance appropriate (%)</th>
<th>Judge biased in favour of represented party and should do more to assist SRL (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Providing instructions to SRL regarding hearing procedures (#5)</td>
<td>22</td>
<td>65</td>
<td>0</td>
</tr>
<tr>
<td>Granting adjournment at trial to allow SRL to subpoena witness (#8)</td>
<td>30</td>
<td>56</td>
<td>0</td>
</tr>
</tbody>
</table>

As expected, the lawyers generally (65%) agree that providing the SRL with instructions regarding hearing procedures reflects impartiality and an appropriate degree of assistance. Surprisingly, almost a quarter of the group thought that providing bare procedural information showed judicial bias toward—and too much help for—the SRL.

In the second action, granting an adjournment on the trial day to subpoena a witness whom the SRL failed to subpoena, almost 10% fewer lawyers (56%) considered the action permissible. This shows greater lawyer concern about the extent of such an accommodation to the SRL in the context of a procedural default that may substantively affect the outcome of the proceedings.

These forms of assistance and accommodation, combined with the required or expected methods,\(^{122}\) reflect a wide range of actions that offer judges some additional guidance on the parameters of reasonable assistance beyond the existing case law and other guidelines. Because of their acceptance by courts, and approval by a majority of the lawyers in our study, they should never—absent prejudice to the other party—become the basis of a claim of bias against a judge for disqualification or judicial disciplinary purposes.

C. Impermissible and Questionable Assistance

The responding lawyers identified both impermissible or questionable judicial actions with respect to the SRL in the survey. “Impermissible” judicial actions are defined here as those in which more than 50% of lawyers believed that the judge should have done more to assist the SRL, regardless of whether she acted impartially or was biased in favour of the represented party (Column 3 in Table 3).\(^{123}\) Table 3 shows that the lawyers in our survey found two of the judicial actions as impermissible. Impermissibility was of two types. On the one hand, a majority (56%) found that a judge’s approval of a child support settlement below statutory guidelines is improper as reflecting bias toward the represented party (not to mention a legal error, absent circumstances permitting a deviation from the guidelines, which were not included in the scenario). On the other hand,

\(^{121}\) “Permissible” judicial actions are defined as those in which the total percentage of lawyers who believe that the judge was impartial, and the assistance he gave was just about right (Column 2) is greater than 50% but less than 70%. Percentages may not add up to 100% due to rounding.

\(^{122}\) Part VI (A), above.

\(^{123}\) Percentages may not add up to 100% due to rounding.
impermissibility also included the judge providing no accommodation to the SRL when strictly enforcing the rule on requests to admit, to the SRL’s serious disadvantage. The former is a statutory violation by the court that benefits the represented party, while the second is a rule violation by the SRL that is strictly enforced against her, and also benefits the represented party. Lawyers, therefore, can perceive unfairness to an SRL whether caused by the judge in disregarding the law, or by the judge’s overly-strict enforcement of a court rule.

Table 3. Impermisssible and Questionable Assistance

<table>
<thead>
<tr>
<th>IMPERMISSIBLE ASSISTANCE</th>
<th>Judge biased in favour of SRL, and too much help given (%)</th>
<th>Judge impartial &amp; assistance appropriate (%)</th>
<th>Judge biased in favour of represented party and should do more to assist SRL (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approving settlement of support issue that violates statutory guidelines (#6)</td>
<td>1</td>
<td>38</td>
<td>56</td>
</tr>
<tr>
<td>Strict enforcement of rule on requests to admit (#7)</td>
<td>0</td>
<td>31</td>
<td>62</td>
</tr>
<tr>
<td>DIVIDED OPINIONS</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suggesting question for cross-examination (why husband’s response was not sworn to) (#4)</td>
<td>45</td>
<td>29</td>
<td>2</td>
</tr>
<tr>
<td>Suggesting SRL ask witness questions on an issue noted in her pleadings, but which she overlooked (#13)</td>
<td>36</td>
<td>43</td>
<td>1</td>
</tr>
<tr>
<td>Dismissal of appeal for failure to cite authorities in brief as required (#15)</td>
<td>3</td>
<td>45</td>
<td>43</td>
</tr>
</tbody>
</table>

We describe other actions as “questionable” because of the lawyers’ divided views about their propriety. “Divided Opinions” refers to judicial actions about which the lawyers opinions did not meet the criteria for any of the preceding categories, and those opposed (Column 1 in Table 3) were greater than 30%, but less than 50%.

Table 3 shows greater disagreement among the lawyers about the fairness of other actions, such as suggesting a question on cross-examination, suggesting a question on an issue noted in the SRL’s pleadings which she had overlooked, and dismissing an appellate brief for failure to cite authorities in support. Of these three, the first is viewed by almost one-half (45%) of the lawyers as exhibiting bias toward the SRL, while about a third (29%) see it as fair. In contrast, the proportion of the lawyers’ responses reverses where the judge suggests questions about matters pled but overlooked. Here, 36% perceive bias in favor of the SRL, but 43% perceive impartiality and appropriate assistance.

The last action, being the appellate court’s dismissal of an appeal for failure to file authorities as required by court rule, reflects a different sort of division among
the lawyers. Here, failing to accommodate the SRL after a technical default divides the lawyers almost equally between those who see the action as fair (45%) and those who perceive it as bias in favour of the represented party (43%).

D. Fairness of Adverse Rulings

Three rulings adverse to the SRL in the scenarios presented were categorized by the lawyers as either fair or unduly harsh. Table 4 includes an instance of a fair adverse ruling against the SRL, where the judge in Scenario #10 permits the introduction of irrelevant evidence against her due to her failure to object. A sizeable majority (64%) found this an impartial ruling, while almost a quarter (23%) found the ruling a reflection of bias in favour of the represented party and inadequate assistance to the SRL.

<table>
<thead>
<tr>
<th>FAIR ADVERSE RULING</th>
<th>Judge biased in favour of SRL, and too much help given (%)</th>
<th>Judge impartial &amp; assistance OK (%)</th>
<th>Judge biased in favour of represented party and should do more to assist SRL (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permitting introduction of irrelevant evidence due to SRL’s failure to object (#10)</td>
<td>1</td>
<td>64</td>
<td>23</td>
</tr>
<tr>
<td>UNDULY HARSH ADVERSE RULING</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judge dismissed SRL petition that failed to allege place of marriage (#1)</td>
<td>0</td>
<td>14</td>
<td>88</td>
</tr>
<tr>
<td>Strict enforcement of best evidence rule (#9)</td>
<td>1</td>
<td>16</td>
<td>81</td>
</tr>
</tbody>
</table>

Two rulings adverse to the SRL were considered too harsh, being the dismissal of the divorce petition for failure to comply with a technical pleading rule requiring such petitions to contain the place of marriage, and the judge’s strict enforcement of the best evidence rule that barred evidence favourable to the SRL regarding her husband’s income. In both cases, large majorities (88% and 81%, respectively) of lawyers perceived judicial bias in favour of the represented party and a want of reasonable judicial assistance.

E. Use of Empirical Data for Disqualification Decisions

We anticipate that some may object to the use of public opinion data (including that of lawyers, judges, or lay persons called for jury duty; the latter traditionally considered the “reasonable persons”) in determining the reasonableness of any particular form of judicial assistance. The question of using public opinion data for judicial decision making was recently discussed by Frederick Schumann in a thoughtful analysis of “public repute discourse,” referring to those many instances in Canadian law in which courts consider how the idealized reasonable person or
reasonable observer would view the courts’ action.\textsuperscript{124} His main argument is that the determination of what a reasonable observer would decide regarding the “public repute” of courts is a non-empirical question due to courts’ traditional role of protecting parties from the majority.\textsuperscript{125} “It would seem unfair if mere public attitudes could render meaningless what would otherwise be one’s legal rights.”\textsuperscript{126} This is especially true in a constitutional democracy, “where the purpose of the relevant legal regime is, in some sense, anti-majoritarian.”\textsuperscript{127}

Schumann argues that, while public confidence in the justice system is the primary instrumental rationale for concern about the public’s reaction on an issue such as judicial impartiality (and others involving the objective, reasonable person or observer), the existing case law correctly holds that there is no need to consult public opinion about these subjects because (1) the “average person on the street,” is not necessarily “right-minded” or “reasonable,” (2) he may not have the required information, and (3) “actual members of the public may expect certain substantive results from the justice system depending on their diverse sympathies, and (4) they are often difficult to ascertain, shifting, and volatile.”\textsuperscript{128}

\textsuperscript{124} Frederick Schumann, “‘The Appearance of Justice’: Public Justification in the Legal Relation” (2008) 66 U T Fac L Rev 189. Examples include our topic here, judicial impartiality and independence, as well as participatory procedural rights at trials, the misconduct of non-judicial actors in the legal system (i.e., lawyers, prosecutors, and police). \textit{Ibid} at 192.

\textsuperscript{125} Essentially, the reasonable observer has to adopt the point of view of a reasonable judge. Schumann explains that the “reasonable apprehension of bias” test, similar to the American test, reflects the importance of the maxim that justice should not only be done, but be seen to be done, citing Lord Hewart C.J. in \textit{R v Sussex Justices, Ex parte McCarthy}, [1924] 1 KB 256, 259 (Justice must not only be done, it must “manifestly and undoubtedly be seen to be done.”). \textit{Ibid} at 192. The classic expression under American law is Justice Frankfurter’s, when he explained his recusal from a case challenging an ordinance permitting radio broadcasts into buses on grounds that his feelings about these broadcasts were “strongly engaged,” as he himself had been “a victim of the practice.” \textit{Public Utilities Comm’n v Pollak}, 343 U.S. 451, 467 (1952). He elaborated on judicial disqualification by noting that judges “must think dispassionately and submerge private feeling on every aspect of a case”:

This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested, as well as be so in fact.

Interestingly, the British common law test for determining whether justice is not only done, but seen to be done, established “in a long line of cases,” is “whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair hearing . . . would not be possible.” \textit{R v Crown Court at Bristol}, [1990] 2 All ER 193, [1990] 1 WLR 1031.

\textsuperscript{126} Schumann, supra note 124 at 42.

\textsuperscript{127} Ibid.

\textsuperscript{128} \textit{Ibid} at 41. Schumann takes the “average person on the street” expression from \textit{United farm Workers of America, AFL-CIO v Superior Court (Maggio, Inc.)}, 170 Cal. App. 3d 97, 104 (4th Dist. 1985), which he cites for the proposition that courts raise dual rationales for considering the public’s attitude (as determined by the judge accused of partiality) in the law of bias, i.e., (1) the instrumental, for the purpose of effectiveness enforcement of its decrees and public cooperation, and (2) as an “evidentiary shortcut” to prove actual bias. The applicable test was stated, in part,
His secondary argument against courts’ use of empirical data for disqualification questions is that lawyers’ or laypersons’ judgments about judicial impartiality will be biased by self-serving interests. However, some of our results directly contradict this claim. For example, the majority of lawyers believed that the judge was biased toward the represented party when he accepted a child support settlement below statutory guidelines, and did not inform the SRL of the statutory minimum guidelines.

Schumann’s argument has some merit for certain areas of law, especially those where there are divided views about moral concerns. Lawyer or public views, however, are not the only consideration in questions of social (or socio-legal) reform. For example, Lind and Tyler argue that, when disputes involve substantial societal interests, public preferences for procedures should not be the sole consideration in policy formation or social reform, but are important considerations in private disputes. Most cases involving SRLs concern private disputes, such as divorce, that do not have wider policy implications. Thus, the SRL assistance situation does not resemble those from which courts are intended to protect the individual from the majority, such as Schumann’s example in the case of bail decisions in Canada, involving the requirement that judges take public confidence into account.

We take the view that public opinion (as well as those of lawyers and judges) is relevant to the assessment of judicial impartiality and fairness in general. It is particularly relevant in the context of conduct amounting to assistance – or failing to assist – SRLs in presenting their claims or defences in an adversarial court. Noting that American and Canadian case law supporting the connection between “the idealized reasonable observer of judges and the ideal of the judge,” Schumann describes Canadian and American courts’ reasoning for linking the perceptions of the reasonable observer to the judge:

The facts known by the reasonable observer are facts in evidence

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129 See Table 3. In future research we will collect responses using a “veil of ignorance” procedure, a term borrowed from Rawls’ normative theory of social justice, John Rawls, A Theory of Justice (Cambridge, MA: Harvard University Press, 1971), where different groups of respondents will be instructed to make judgments from their own point of view, or that of the SRL, or the represented party. Prior research indicates responses differ when respondents are instructed to respond from a particular point of view. See e.g., C Daniel Batson et al., “...As You Would Have Them Do Unto You: Does Imagining Yourself in the Other’s Place Stimulate Moral Action?” (2009) 29 Personality Social Psychology Bulletin 1190 at 1200 (imagining oneself in another’s position stimulates moral sensitivity, and prompts one to act as they wish the other to act had the roles been reversed, “just as the Golden Rule prescribes”); Jeffrey Shaman & Jona Goldschmidt, “Judicial Disqualification: An Empirical Study of Judicial Practices and Attitudes” (Chicago: American Judicature Society, 1995) at 65 (“[J]udges are more willing to disqualify themselves when confronted with ethical dilemmas raising the possibility of the need to disqualify than when making recommendations to their colleagues regarding these same issues”).

130 Lind & Tyler, supra note 103.

131 Ibid at 45-48.
in court. In their factual knowledge, the ideal judge – only considering the facts in evidence – and the reasonable observer are identical. ... The reasonable person personifies the ideal of the judge. ... [This] boils down to judicial discretion. The reasonable observer will never disagree with the judge, since he is a fiction whom the courts define as they wish. ... 

This, however, is a tautology, in that the reasonable person becomes the judge him or herself. 133  This approach evolved in part because of the concern of the tyranny of the majority, as Shumann points out, and because public opinion data were simply not available. If empirical data are available, there is no reason they should not be used to enlighten the court. 134  Public opinion has, of course, historically been used in adversarial courts in the form of juries, a form of focus group, in which members determine non-constitutional issues such as reasonable doubt, reasonable mistake, reasonable care, etc. Why, therefore, shouldn’t their views, in the form of a social science survey, be considered for questions involving a judge’s impartiality? This question was addressed by the Saskatchewan Court of Appeals in *R. v Iron*, 135  a case involving the issue of whether the *Charter* prohibits roadblocks by the police, or whether these constitute “arbitrary detentions:”

I recognize that the usual approach to judicial interpretation of a statute seldom involves a determination of the public's perception of the meaning to be attributed to a word or phrase. I therefore acknowledge some further justification is necessary for my conclusion that a concern for the public perception is appropriate in this instance. I am encouraged to believe we are entitled to have serious regard for what the public expects of the *Charter* by the comments of Le Dain J. in *R. v Therens*, [1985] 1 S.C.R. 613 at 653:

> There is no reliable evidentiary basis for determining what the actual effect on public opinion would be of the admission of evidence in the circumstances of a particular case. The suggestion of opinion polls (see D. Gibson, “Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms” (1983). 61 Can. Bar Rev. 377) encounters, in my opinion, two fatal objections. The first is the requirement which

132  Schumann, supra note 124 at 28-29.

133  Compare *R v Bertucci* (1984), 11 CCC (3d) 83 (Sask CA), at 90 and 91 (“[T]he circumstances are such that an objective court-watcher would feel that the proceedings were so tainted that a new trial was mandated. The failure to do so would be inconsistent with the rudimentary demands of fair procedure”) (emphasis added).

134  Cf. Vincent Samar, “The Analytic Aposteriori and a New Understanding of Substantive Due Process that is Exhibited in the Lived Experiences of Those Seeking to Marry Someone of the Same Sex, (2011) 30 St Louis U Pub L Rev 377 (arguing that courts, in deciding whether same-sex marriages are constitutionally protected, should incorporate “lived experiences” of gay and lesbian couples in their analysis).

Professor Gibson refers to as “specificity”. How could “all the circumstances” of a case and the necessary balancing exercise be conveyed in an opinion poll or survey? The second objection is the cost of requiring such evidence, which, since it would have to be borne by the person whose constitutional right or freedom had been violated, would surely be a further factor reducing availability of the remedy provided by s. 24(2).

It is clear that the decision of what constitutes a breach of the *Charter* is one necessarily left for the courts. But a poll of public opinion was considered worthy of mention and its expense and impracticality is what made it inappropriate. I did not conclude that Le Dain J. felt a concern for public expectation was inappropriate.

...  

If the traditional methods of interpretation are not the only tools now available for the interpretation of the *Charter*, I see no reason why in circumstances such as this, it would be inappropriate to consider what might be reasonable public expectation of the application of the words “arbitrarily detained” in s. 9 of the *Charter*.

The U.S. Supreme Court has referred to public opinion in support of some of its decisions, with the cruel and unusual punishment jurisprudence being a prime example. The “evolving standards of decency that mark the progress of a maturing society” has long been the guidepost for judgments in this area of law, which the court has defined in terms of the prevailing “national consensus.” Public views were also considered when the Court ruled that the death penalty for mentally ill persons and minors constitutes “cruel punishment.” One state supreme court

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138 As the court explained in *Kennedy*:

> The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. (emphasis added)

*Ibid* at 2653. The Court has been guided by “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions.” *Roper v Simmons*, 543 U.S.551, 563, (2005). [Roper]

139 *Atkins v. Virginia*, 536 U.S. 304, (2002); The Supreme Court cited a consensus of opinion based on the majority of states passing legislative statutes that prohibited the death penalty for mentally retarded offenders, and *amicus curiae* briefs from several groups which relied in part on opinion poll data. It goes without saying that legislators consider public views in enacting criminal statutes.

140 *Roper*, supra note 138 (“As in *Atkins*, the objective indicia of consensus in this case-the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice-provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as ‘categorically less culpable than the average criminal’.”) (citation omitted).
cited judicial opinion data when considering a question of disqualification for lack of impartiality.

We do not advocate the routine taking of public opinion polls to guide the judiciary on disqualification questions based on an “appearance” issue. Consideration of the best available social science and other public opinion data (including comparative analyses), however, on the issue of what constitutes impartial judicial assistance to SRLs should be considered by the bench and bar when formulating policy to guide judges on this subject. Likewise, such data should be considered in the resolution of any bias complaint by a represented party against a judge who provides assistance to an SRL.

VII. SUMMARY AND CONCLUSION

This study of Alberta family lawyer’s perceptions of the impartiality and helpfulness of the judge in hypothetical scenarios arising from a pro se divorce case resulted in several interesting findings. Those lawyers did not see a lack of impartiality when a judge provides SRLs with assistance by way of procedural instructions. Nor did they perceive judicial bias when a judge assisted the SRL by way of accommodations that cure imperfect compliance (as distinguished from non-compliance) with procedural rules.

Lawyers, however, perceived judicial bias in favour of the represented party in instances where the judge’s strict enforcement of procedural rules (in the face of the SRL’s procedural default) caused harsh results to her. Conversely, a large proportion of the lawyers saw bias in favour of the SRL when the judge’s assistance involved strategic, evidentiary (substantive) matters. Opinions regarding the judge’s impartiality were divided in cases involving the court’s grant to the SRL of an adjournment to subpoena a witness, and when the judge elicited testimony from the SRL on an issue that was in her pleadings but omitted from her testimony.

Surprisingly, with respect to their perceptions of the helpfulness of the judge toward the SRL in the scenarios presented, large proportions of the lawyers believed that the judge should have provided more assistance where her petition lacked an essential element, or where he or she failed to cite authorities in her appellate brief. And, even larger proportions of lawyers believed the judge should have offered more assistance when called upon to strictly apply the rules regarding requests to admit facts and the best evidence rule to the SRL’s detriment. Interestingly, the sympathy shown by the lawyers to the SRL in cases of strict

141 See e.g., Shaman & Goldschmidt supra note 129 as cited in Reems v. St. Joseph’s Hospital and Health Center, 536 N.W.2d 666, 676 (N.D. 1995) (finding no violation of the duty of impartiality based upon adverse rulings). Had public or lawyers’ opinion data been available, it is reasonable to assume it would also have been cited. See also, Caperton, supra note 107 at 2258, where the majority, in describing the procedural posture of the case, noted that “Caperton also included the results of a public opinion poll, which indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial. Justice Benjamin again refused to withdraw, noting that the ‘push poll’ was ‘neither credible nor sufficiently reliable to serve as the basis for an elected judge’s disqualification.’” (citations omitted) The court in Caperton held that recusal was required where the State Supreme Court Justice received disproportionately large campaign contributions from a party in a case before the court.

142 We recognize that the data reported here are from a sample of Alberta family lawyers, and may not be generalizable to all lawyers, or even to all family lawyers.
judicial application of evidentiary rules that were to the SRL’s detriment was much stronger than those cases where the judge provided strategic advice or evidentiary assistance to her during a cross-examination.

These findings suggest the complexity of lawyer-observers’ perceptions of judicial impartiality and helpfulness during litigation by SRLs. The nature of the procedural or substantive rules applicable, the favourability of the outcome to the SRL, and whether harsh results are produced by the court’s action or inaction, all contribute to lawyers’ fairness perceptions. Differences also appear among lawyers based on whether the judge acts *sua sponte* or in response to a request, but these too depend on the favourability of the outcome or lack thereof for the SRL. Future research will tell us whether these and other factors also influence judicial and lay persons’ perceptions of the fairness of different forms of judicial assistance.

Traditionally, the judge in the adversarial system has been characterized as a passive, disinterested, and impartial third-party who serves as a referee to insure that the opposing parties follow relevant procedural rules. The adversarial system, with its complex procedural and evidentiary rules, is believed to increase the quality and reliability of the evidence available to the third-party decision maker. In cases involving an SRL and a represented party, judges are faced with the difficulty of providing impartial justice on an uneven playing field. The SRL, who often represents herself out of necessity due to insufficient funds, must navigate a confusing legal process without the same familiarity or expertise about the rules of game that will allow her to present her issues effectively and substantiate her case. If judges remain passive and merely rule on procedural violations, SRLs have a substantial disadvantage and the truth-finding function of the hearing is severely curtailed.\(^{143}\)

Judges, however, despite their awareness that the law imposes a duty to provide self-represented litigants reasonable assistance, are uncertain about how much engagement is too much, and may constrain their behaviour to conform strictly to the passive, disinterested model of judicial behaviour in order to avoid the potential appearance of judicial bias. Such a strict adherence may, however, be at the cost of the truth-finding function of the court. Truth-finding suffers even more when parties are SRLs, which is perhaps the best justification for the duty of reasonable assistance. The question is, how broadly or narrowly will the duty be interpreted?

The scope of reasonable assistance, as noted above, depends on a number of factors, with the ultimate goal of ensuring a fair trial to self-represented litigants in all adversarial justice systems, judicial or quasi-judicial.\(^{144}\) Not only must justice be done, it must be seen to be done by impartial spectators with knowledge of the circumstances. Judicial ethics principles demand the same image of justice that is seen to be done by reasonable, informed persons.\(^{145}\) If case law is used to create standards for understanding when judicial assistance crosses the line from

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\(^{144}\) See supra note 43.

\(^{145}\) See supra notes 78-84, and accompanying text.
reasonable to bias, appellate judges often may make erroneous assumptions about how both lawyers and the public perceive the fairness of specific forms of assistance. Case law and standards developed through judicial committees do not allow the perspective of the observer, which is critical for understanding whether an action appears to be fair. That is why the empirical approach to the question of fairness has the advantages of (1) identifying forms of judicial engagement that are seen by observers as impartial and helpful, which can allay the concerns of judges about their appearance of impartiality, and (2) of informing the development of policies and practices which best reconcile the duties of impartiality and providing a meaningful hearing, which furthers the truth-seeking function of the court.

As additional data are collected on the forms of judicial actions that are seen as helpful and impartial, more effective and informative judicial education strategies and protocols can be developed. Empirical research like this may also be used to inform law societies and judicial ethics committees considering such guidelines, or in deciding particular ethics cases to determine whether a judge’s assistance creates an appearance of bias. We believe that public opinion data will reveal that there are many forms of judicial assistance that could and should be provided to SRLs beyond those already found permissible in current case law and other judicial guidelines. American courts, in particular, have a lot of catching up to do with Canadian courts in this area, given the U.S. Supreme Court’s well established no-assistance rule.

The current lack of uniformity in the provision of judicial assistance, that is, the differences in judicial philosophy about the scope of that duty, causes some judges to hesitate when an SRL requests their assistance. This adversely affects the quality of justice in a system that espouses “equal justice under the law.” Some standardization and further guidance to trial judges will enable judges to balance their duties to remain impartial and to provide meaningful hearings, and will serve to ensure all SRLs the maximum degree of access to justice.

**APPENDIX 1**

**SCENARIOS**

These scenarios involve a divorce petition brought by Mary against her husband John. Mary is a self-represented litigant [SRL] because she can’t afford an attorney. John is represented by an attorney. The parties have two children. They were unable before going to court to agree on the issues of child custody, child support, and property division.

After reading each scenario based on Mary and John’s divorce case, please rate the judge on the extent of his (1) impartiality and (2) helpfulness in this case to Mary, using the 1 to 7 scales that follow, indicating the number that represents your opinion.

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146 Empirical research need not be confined to public opinion surveys. It could include, for example, focus groups consisting of a small sample of citizens from the community, or other multiple methods. See e.g., John W Creswell & Vickie L Clark, *Designing and Conducting Mixed Methods Research* (Thousand Oaks, CA: Sage, 2010).

147 See supra note 8 ff.
1. Mary filed her petition for divorce based upon instructions she received from the court clerk’s office. Court rules require that a divorce petition state where the parties were married. Mary failed to include that fact in her petition. The judge dismissed the petition, stating only that it was “insufficient.”

The judge was:

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2. A “motion” is a request made by a party to the court. Mary filed a motion requesting permission to file an amended (corrected) divorce petition. Court rules require that the proposed amended paper be attached to the motion. Mary failed to attach the proposed amended petition. Without explaining how to correctly file the motion, the judge granted her motion anyway, and allowed her to file the amended petition within 10 days.

The judge was:

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3. In the court where Mary filed her amended petition for divorce, court rules require that the petition be called a “Petition for Dissolution of Marriage,” not a petition for “divorce.” Without explaining to Mary why the title to her petition was incorrect, the judge overlooked this deficiency and set the case for a hearing (trial) on all issues.

The judge was:

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4. Before the trial date, the parties are permitted to conduct “discovery,” a process for requesting information from the other party. When a party submits his or her information in response to a request, it must be signed and “sworn to under oath” (i.e., notarized), stating the response is true and made under penalty of perjury. Mary requested that John produce certain financial information. John’s response was not sworn to. At a later hearing on the issue of child support, John testified to the information in the paper he filed. The judge then suggested to Mary that she ask John why his responses were not sworn to.

The judge was:

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5. At the hearing on custody, the judge took time in the beginning of the hearing to explain to Mary (a) what she needs to prove to gain custody of her children, (b) the procedure to be followed in terms of the order of witnesses, (c) the kinds of questions that are allowed when she questions her own witnesses, and (d) the kinds of questions that she can ask of witnesses on the other side, including her husband John.

The judge was:

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6. During a recess at the trial, John’s attorney proposed a settlement of the child support portion case. Mary was not aware that there are certain child support
guidelines the court is required to follow, unless the parties agree to another
amount per child. Mary stated that she would agree to a certain monthly child
support payment to be paid by John for the children’s support, which was lower
than what she would receive under the guidelines. When John’s attorney
presented the settlement paper which the parties had both signed, the judge said he
was pleased that the support issue was settled, and didn’t ask Mary or John’s
attorney any questions about the fairness of the agreement.

The judge was:

1 2 3 4 5 6 7
Very biased in favour of SRL
Impartial to both parties
Very biased in favour of represented party

How helpful was the judge to the self-represented litigant?:

1 2 3 4 5 6 7
Should have done more to help SRL
Help was just about right
Gave too much help to SRL

7. One of the ways a party can prove certain facts before a trial begins is to send a
document listing certain facts, and requesting the other party to admit or deny
those facts within 28 days. If the party receiving the request fails to file a response
within the required time period, the listed facts are considered to be true
(admitted). Mary received such a request to admit, but due to her unfamiliarity
with court rules, she filed her response on the 40th day after receiving the request.
At a later hearing, John’s attorney stated that Mary had admitted all the facts in
John’s request to admit because they were filed late. The court politely told Mary
that she had to follow the same rules which lawyers must follow. The court ruled
that all the facts in John’s request would be considered to be true (admitted).

The judge was:

1 2 3 4 5 6 7
Very biased in favour of SRL
Impartial to both parties
Very biased in favour of represented party

How helpful was the judge to the self-represented litigant?:

1 2 3 4 5 6 7
Should have done more to help SRL
Help was just about right
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8. Mary was never informed before the hearing on child custody that she could
subpoena her witnesses to compel them to appear in court. At that hearing, Mary
said an important witness on her behalf had said that she would be present to
testify that Mary was a good mother. But this witness, however, did not appear at
the hearing. The judge asked Mary whether she had subpoenaed the witness. Mary
said she didn’t know how to do that, and asked that the case be adjourned
until she was able to subpoena the witness. The judge granted her request, over John’s attorney’s objection.

The judge was:

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9. Before the hearing on spousal support Mary was not informed about the rules of evidence. One such rule (the “best evidence” rule) requires that the original of every document be offered into evidence unless it was shown to be unavailable. At a part of the hearing on spousal support (i.e., alimony), Mary submitted a copy of John’s pay check stub to show what he earned monthly. John’s attorney objected, saying the copy violated the best evidence rule. Mary told the judge that she was not aware of this rule of evidence. The judge granted John’s attorney’s objection, and refused to admit the copy of John’s pay stub into evidence.

The judge was:

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10. Before the hearing began, the judge instructed Mary on various rules of procedure to be followed by the court. He instructed her also about how to raise an objection if she believes some testimony or other evidence is inadmissible, and should not be considered by the court. On the issue of spousal support, John testified that, since he moved out of their marital home, Mary had acquired a very wealthy boyfriend, and thus didn’t need any money from him (John) to support her. Mary was so upset about John’s testimony that she failed to make a formal objection. The judge knew that part of John’s testimony was irrelevant, but he did not strike it because Mary failed to raise an objection to it.
The judge was:

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11. At one point in the case, the judge entered a money judgment against John and in favour of Mary in the amount of $10,000, which the judge found that John had improperly taken from Mary’s half of their joint bank account when he left their marital home. Mary asked the judge, “How can I collect this judgment?” The judge said, “I’m sorry, I cannot give you legal advice.”

The judge was:

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12. During the part of the trial on their property division, Mary decided to call John as one of her witnesses. The judge did not advise her that she may be putting herself at a tactical disadvantage by doing so. If she waited for John to testify for himself first, she could hear what he had to say and then be able to cross-examine him with certain facts and documents to show he was not believable. But, if she called him first, he John would be able to limit and shape his testimony, and Mary might not be able to show he was not believable as well as if she waited for him to testify first. Not knowing any of this, Mary called John as her witness, which eventually hurt her case.

The judge was:

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How helpful was the judge to the self-represented litigant?:

1 2 3 4 5 6 7
Should have done more to help SRL

Help was just about right

Gave too much help to SRL

13. Mary was questioning John at the trial and asked what she believed to be all the necessary questions to prove her case. The judge then suggested that she ask some more questions on a certain subject matter that was referred to in her court papers, but which she had overlooked in her questioning. Mary did so, and this helped her case.

The judge was:

1 2 3 4 5 6 7
Very biased in favour of SRL

Impartial to both parties

Very biased in favour of represented party

How helpful was the judge to the self-represented litigant?:

1 2 3 4 5 6 7
Should have done more to help SRL

Help was just about right

Gave too much help to SRL

14. When the judge entered a final judgment in the case, Mary was unhappy about the amount John was ordered to pay for spousal support, and did not like the extensive visitation rights John was given with his children (who were placed in Mary’s sole custody). She asked the judge how she could appeal the ruling. John’s attorney objected to the judge instructing Mary on the procedure for appeals. Nevertheless, the judge explained that she had to file a notice of appeal within 30 days, and gave her a copy of the court rule describing the appeals process.

The judge was:

1 2 3 4 5 6 7
Very biased in favour of SRL

Impartial to both parties

Very biased in favour of represented party

How helpful was the judge to the self-represented litigant?:

1 2 3 4 5 6 7
Should have done more to help SRL

Help was just about right

Gave too much help to SRL

15. Mary went to the appellate court clerk’s office and filled out a form which started her appeal. She was given a handout showing the court’s website, where she could look up the rules for appeals. It also provided the names of libraries in her town which had copies of the rules. Mary read all the rules. One of the many
rules was a requirement that she file a brief, a document telling the appellate court why she thought the judgment of the trial judge was unfair. The rule required her to (a) state each reason the judgment should be reversed, (b) point to parts of the trial record (which she would have to order from the court reporter’s office), and (c) include references to prior court decisions that would support her case on appeal. Mary did the best she could to follow the rules, but because she didn’t know how to do legal research, she did not include any prior court cases in her brief. The appellate court dismissed her appeal for failure to follow the rule of procedure.

The appellate court was:

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How helpful was the appellate court to the self-represented litigant?:

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16. When Mary read the appellate court order dismissing her case she was very upset. She contacted a lawyer friend of hers for help. He told her he did not have the time to handle the entire appeal for her, but that he would be willing to “ghost write” a corrected brief (meaning he would not put his name on it) that complied with the appellate court rules, and a motion to the appellate court asking that she be allowed to file a corrected brief. Mary paid him to do that, and she filed the motion and brief her attorney prepared in her name. The appellate court accepted her papers and took her case under consideration.

The appellate court was:

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<td>Very biased in favour of SRL</td>
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APPENDIX 2

Required or Expected Forms of Judicial Assistance

- Providing the minimum of assistance required to ensure fair trial, i.e., explaining 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.
- Informing SRD at preliminary hearing and at trial of his right to cross-examine witnesses.
- Instructing and assisting the SRD throughout the course of the trial.
- Granting an adjournment to allow the SRL an opportunity to subpoena the maker of a document where the SRL mistakenly believed he could introduce the document him or herself.
- Explaining how the trial will proceed, being conscious of the need to protect the SRD’s rights, and intervening to ensure that questionable prosecutorial evidence is not admitted.

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148 In Appendices 2, 3, and 4, SRL refers to a self-represented litigant in a civil case, and SRD refers to a self-represented defendant in a criminal case.
151 R v Bitternose, [2009] SKCA 54, 244 CC (3d) 218 at para 91.
152 R v Husain, No. SCA(F) 7502/04 at para 39 (available on WL Can); R v Payton, [2003] AJ No. 1425 35 Alta LR (4th) 340 at para 110 (available on WL Can) (“In dealing with an unrepresented accused in this situation, any such doubt on the value of disclosure must be resolved in his favour”).
153 McGibbon, supra note 11 at para 32:
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.
154 McGibbon, Ibid. (“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.”).
156 R v Wood, [2005] 196 CCC (3d) 155 (available on WL Can); see also R v Dzabic, 2008 CarswellOnt 6089 at para 19 (Ont Sup Ct) (“The trial judge was aware of his obligation to intervene on occasions to ensure that questionable Crown evidence was not admitted. He was also aware of trial fairness and took steps to ensure that no miscarriage of justice occurred as a result of an accused being unrepresented.”).
Preventing the SRD from asking objectionable questions, and preventing the prosecution from seizing upon such error and introducing prejudicial character evidence. 157

APPENDIX 3

Permissible Forms of Judicial Assistance

- Interrupting questioning of witnesses on numerous occasions “to clarify matters to ensure that the trial was fair to both parties.” 158
- Providing certain indulgences to SRD which would not ordinarily be given to defendant represented by 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 have begun putting on their defence, and re-opening their cross-examination after they have signaled that they finished their cross-examination). 159
- Permitting the SRD to make his opening statement out of turn. 160
- Explaining the need for a transcript or a mutually agreed upon statement of facts with regards to the procedural history of the case for purposes of supporting a speedy trial challenge. 161
- Providing SRD with daily transcripts. 162
- Directing prosecutor to have witnesses subpoenaed for the SRD. 163
- Explaining to SRD how to make use of a preliminary hearing transcript in cross-examining the complainant. 164
- Intervening during testimony of officer to suggest areas for cross-examination by the SRD and suggesting a line of inquiry regarding a tape recording offered into evidence against the SRD. 165
- Reviewing trial procedures, describing the different types of questioning, and explaining the process by which evidence is called, and submissions are made. 166

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158 McGibbon, supra note 11 at para 34.
162 R v Innocente, [2000] 185 NSR (2d) 1 at para 169 (available onWL Can).
163 McGibbon, supra note 11 at para 34.
164 Ibid.
165 R v Hyman, [2008] No. 06-01910, at para 11 (available onWL Can). Also permissible was the trial judge’s suggestion to the SRD that, if he had concerns about the recording device used by the arresting officer, then he should ask questions not just about the recording, but about the device itself. Ibid.
• Providing SRD with memoranda explaining the trial process, the jury selection process, the elements of the offenses charged, prosecutor’s burden of proof, relevant legislation, and the hearsay rule.  

• Assisting the SRD “in formulating questions for cross-examination ... when it appear[s] he might ask something that would elicit an unhelpful response,” intervening “to prevent a witness from answering a question in a prejudicial manner.”  

• Permitting SRD to consult with duty counsel regarding the meaning of a Charter issue voir dire, and offering to let him consult further with senior counsel upon request.  

• On appeal, raising issue of prejudgment interest to which prevailing SRL may be entitled.  

APPENDIX 4

Impermissible or Questionable Methods of Judicial Assistance

• Advising SRL at start of trial that she would do better to cast her complaint as one cause of action rather than another.  

• Providing substantial legal advice and guidance to SRL in the course of a lengthy trial.  

• Putting words into the mouth of SRL.  

• Suggesting theories in the SRL’s case, or weaknesses in the adversary’s case, that ought to be pursued.  

• Intervening in the “cross-examination of witnesses, to such an extent that [the judge] projects himself into the arena, . . . [and thus] adopts a position which is inimical to the interests of one or other of the litigants.”  

• Locating experts for the SRD’s defence.  

168 Ibid at para 43.  
171 Limoges, supra note 59 at paras. 4, 6.  
172 See Laycock, supra note 62 at paras 1–30. See also, R v Taubler, [1987] 20 OAC 64, 71 (Can.), available on WL Can) (improper to provide the same level of assistance to SRD as an attorney would provide).  
173 ACM v PFM, supra note 10.  
174 Laycock, supra note 62 at para 22.  
175 Majcenic v Natale, [1968] 1 OR 189, at para 47 (available on WL Can). One court found that a judge’s actions “went past assistance” and had “unduly interfered” with the conduct of a (small claims) trial, but that the interference amounted to neither reversible error, nor the creation of a reasonable apprehension of bias. Preddie supra note 48 at para 11.  
176 R v Steinhubl, [2008] ABQB 546 (available on WL Can). The SRD, on trial submitting false information to banks in mortgage applications, requested the court to find him experts on “the Current State of ethics compliance and enforcement within the Alberta’s Real Estate Council and the business practice of its members,” and on “the affect [sic] of authoritative hatred in the
Reviewing the prosecution’s disclosures, recognizing the importance of an occurrence report, and advising the SRD about how to use the report in the prosecution of his case.  

Destroying appearance of fair trial by a combination of different types of intervention.

APPENDIX 5

Judicial Rulings Adverse to Self-represented Litigant Held Not to Constitute A Denial of Reasonable Judicial Assistance

- Denying SRL’s request for an adjournment during trial to let him consult with counsel regarding advice given him by judge.
- Dismissing an SRL’s second action where issues could and should have been raised as a defence or counterclaim in first action.
- Denying SRL a second opportunity to file additional affidavit where her first affidavit contained improper matters not within her personal knowledge.

177 Community.” Ibid at para 34. The court, in finding no denial of reasonable judicial assistance, held:

It is not the role of the Court to locate experts to assist the defense in a criminal prosecution. Indeed, because an accused is not required to disclose his or her defense in advance of trial it would not be possible for me to identify who might be able to have something relevant to say. Only the accused has the information available to retain such an expert.

Ibid at para 35.

178 Harris, supra note 40 at paras 35-36.

179 See Limoges, supra note 59 (finding that the trial “was conducted in such a manner that both sides were denied a fair trial”). 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 had heard it all. The trial judge’s many departures from appropriate judicial conduct rendered this hearing unfair.

Ibid at para 6.

179 Wagg, supra note 31 at para 36. This was found by the reviewing court to be a consequence of his choice to represent himself:

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.

See also Schurman v Canada, [2003] FCJ No. 1573 at para 6 (available on WL Can) (“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.”).

• Requiring the SRL to comply with previous support order as a condition of adjournment of divorce hearing.
• Admitting a doctor’s letters into evidence over SRL’s (non-hearsay) objection, where she declined invitation for an adjournment to prepare response to the evidence.
• Dismissing SRL’s complaint where the court was left to extract the alleged misconduct from the narrative as a whole and to somehow relate the misconduct to an unspecified cause of action.
• Striking a pleading where there had been a “repeated and wholesale disregard of the rules of pleading [that] override the defendant’s rights.”
• Failing to inform an SRD of her remedy of moving for adjournment in the face of the non-appearance of a subpoenaed witness, where she was previously informed of that remedy with respect to a previous non-appearing witness.

181 Kemp v Wittenberg, [2001] BCSC 273, at paras 7–8 (available on WL Can). 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 which SRLs are entitled in the summary judgment process discussed earlier. See Timms v Frank, 953 F.2d 281, 285 (7th 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”).
182 Davids, supra note 27 at para 40WL Can.
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.
185 Ayangma v Prince Edward Island, [2005] 249 Nfld. & PEIR 34 at para 56 (available on WL Can) (“This is not the court’s job [to redraft pleadings]. It is not up to the Court to do the plaintiff’s editing for him.”).
186 R v Merkas-Wilson, [2007] 56 M.V.R. (5th) 299 at para 51 (available on WL Can): [T]he appellant was not an unsophisticated witness and…she was not an individual who was uncomfortable when speaking. She knew that the remedy of adjournment was available to her in respect of calling [the subpoenaed witness] to give evidence. However, she failed to advise the Court that this was what she wanted to do when asked at the close of her case.