ACTIVE JUDGING AND ACCESS TO JUSTICE

*Anna E. Carpenter**

"Being a good judge in this environment means unlearning what you learned in law school about what a judge is supposed to do. Fairness is doing things a federal judge would never do."

Active judging, where judges step away from the traditional, passive role to assist those without counsel, is a central feature of recent proposals aimed at solving the pro se crisis in America's state civil courts. Despite growing support for active judging as an access to justice intervention, we know little, empirically, about how judges interact with pro se parties as a general matter, and even less about active judging. In response, this Article contributes new data and a new theoretical framework: three dimensions of active judging. These dimensions capture a judge's role in adjusting procedures, explaining law and process, and eliciting information. The study is based on a District of Columbia administrative court where most parties are pro se and active judging is permitted and encouraged. Using in-depth, qualitative interviews with judges in this court, the study asks: Are the judges active? If so, how? Do views and practices vary across the judges? What factors shape and mediate those views and practices? Results reveal that all judges in the sample are active in some way, but judges' practices vary in meaningful ways across the three dimensions. While all judges are willing to adjust procedures, they differ in whether and how they explain the law or elicit information. These variations are based on judges' different views about the appropriate role of a judge in pro se matters, views that are mediated by substantive law—burdens of proof, in particular. The variations exist though the judges draw on shared sources of guidance on active judging: appellate caselaw, a regulatory body, and one another. This study suggests refinements to current thinking about active judging, offers new insights about the roles procedural rules and burdens of proof play in pro se litigation, and suggests that consistency in active judging may require more substantial guidance than that available to judges in this court.

---

* Anna E. Carpenter is Associate Clinical Professor of Law and Director of the Lobeck Taylor Community Advocacy Clinic at The University of Tulsa College of Law. This Article grows out of a broader civil justice research project where I have had the privilege of collaborating with Colleen F. Shanahan, Associate Clinical Professor of Law at Temple University Beasley School of Law, and Alyx Mark, Assistant Professor of Political Science at North Central College. Professors Mark and Shanahan contributed to the data collection, data analysis, and conceptual development of this Article and were instrumental in reading and commenting on drafts. My thanks to those who commented on drafts of this paper, including Russell Engler, Peter Edelman, and Richard Reuben from the American Constitution Society's 2017 Junior Public Law Scholars Workshop, and participants in the 2016 NYU Clinical Writers' Workshop. Thanks to Kymberli Heckenkemper, Kelsey Holder, Caleb Jones, and Kathleen Rhodes for research assistance and The University of Tulsa College of Law Summer Research Grant Program for support.

Introduction

The adversary process, that core feature of American justice, has all but disappeared from our state civil courts. More accurately, the rules and norms of the adversary system remain in place, but the advocates are largely missing. Our nation's civil courtrooms are no longer the province of lawyers, but of unrepresented people, many of whom are low-income and deeply vulnerable.

Some scholars now refer to our state civil courts as the "poor people's courts."[1] In these courts, cases most often involve family, housing, small claims, foreclosure, and consumer matters.[2] Two scenarios dominate the landscape: cases where only one party has counsel and cases where neither party has counsel.[3] Both represent a serious crisis for our justice system and the people whose rights and lives are at stake as they navigate the complexity of civil litigation on their own.[4]

A critical mass of scholars and experts now argue that court reform, including reform of the judge's role, could help solve the pro se crisis in civil justice.[5] Reform proposals go by different names, such as "active judging,"

---

1 *See, e.g.*, Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 Calif. L. Rev. 79, 83 (1997); Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 Geo. J. on Poverty L. & Pol'y 473, 476 (2015); Jessica Steinberg, *Demand Side Reform in the Poor People's Court*, 47 Conn. L. Rev. 741, 746 (2015).

2 *See* MacDowell, *supra* note 1, at 475.

3 New national research shows that in 76% of nonfamily civil cases (including contract, tort, and property), at least one party has no representation. The vast majority are defendants. *See* Nat'l Ctr. for State Courts, The Landscape of Civil Litigation in State Courts iv (2015). In family law matters, the numbers are even more staggering; in some dockets, 80% to 90% of all litigants are without counsel. *See* Steinberg, *supra* note 1, at 751. For an empirical and theoretical discussion of representation imbalances in civil litigation, see Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 Denv. L. Rev. 469, 484, 505–07 (2016).

4 A significant body of literature explores how pro se litigants experience the civil justice system and the role and effectiveness of legal representation. *See, e.g.*, Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 Am. Soc. Rev. 909, 910 (2015) (using theories of professional expertise to understand how lawyers affect case outcomes based on a meta-analysis of existing studies of lawyers' impact; finding that lawyers may affect case outcomes "less by knowing substantive law than by being familiar with basic procedures"); Shanahan et al., *supra* note 3, at 481–82, 507–12 (reviewing literature on the impact of representation, which generally shows better case outcomes for parties with representation as compared to those without, and proposing a theory of strategic expertise to explain lawyer effectiveness); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 Geo. J. on Poverty L. & Pol'y 453, 456–58 (2011) (examining the effectiveness of unbundled legal services).

5 *See, e.g.*, Cynthia Gray, Am. Judicature Soc'y, Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants (2005) (asserting active judging does not violate ethics or compromise the impartial adjudicator role when judges have guidance); Jona Goldschmidt et al., Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers (1998); Richard Zorza, The Self-Help Friendly Court: Designed from the Ground up to Work for People Without Lawyers

"affirmative judging," "engaged judging," and "engaged neutrality," but all refer to a model of judging that sets aside traditional judicial passivity in favor of some form of judicial intervention or activity to assist people without counsel. I use the term "active judging" to identify such proposals.[6] To illustrate the type of activity contemplated by those calling for judicial role reform, imagine an unrepresented person who fails to lay a proper foundation for a

(2002) (suggesting how to design a court for pro se litigants); Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES' J. 16 (2003) (calling for judicial role reform and proposing best practices); Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659 (2006) (focusing on the New York City Housing Court as an example of the pro se crisis and presenting models for court reform); Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) (arguing the civil *Gideon* movement is misguided and proposing pro se court reform, including an active role for judges, as a better solution); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 985 (2012) (arguing for pro se court reform, including judicial assistance, rather than civil *Gideon*); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999) (calling for pro se court reform and active judging and providing comprehensive analyses of ethical and practical issues); Engler, *supra* note 1, at 83; Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2002) (discussing judicial resistance to assistance for pro se litigants and asserting judicial obligations to provide assistance); Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325 (2010) (charging judges with the responsibility to modify rigid roles); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969 (2004); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009) (asserting that closing the justice gap calls for concerted efforts from all stakeholders, including courts, and calling for pro se court reform); Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 60–61 (2012) (noting self-help reforms and court simplification efforts have "become significant features of the access-to-justice landscape in their own right"); Steinberg, *supra* note 1 (setting out a vision for "demand side" reform in the lower courts); Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004) (arguing judicial assistance to pro se parties is consistent with impartiality and fairness). *But see* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537 (2005) (arguing against pro se assistance); Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591 (2007) (connecting the move toward active judging with judicial activism).

6 A few language notes: I use the term "active judging" as an umbrella term to identify models of judging that involve judges intervening in some way to assist parties in pro se litigation. I use the terms "intervention" and "practice" to identify particular things that judges do when they interact with pro se parties. Finally, I use the terms "pro se," "self-represented," and "unrepresented" interchangeably throughout this Article. In this piece, the term "pro se" appears often for a purely functional reason: it takes up less space on the page. That said, I recognize many access to justice reformers prefer the term "self-represented litigant" over the more legalistic "pro se" and the lawyer centric "unrepresented."

document. A traditional, passive judge might refuse to admit the evidence. In contrast, an active judge might explain the concept of foundation and ask a series of questions to help the pro se litigant lay the proper foundation.

Today, at a moment when calls for active judging are on the rise, it is apparent that our thinking on judicial role reform is still in a nascent stage. Important questions about implementation and effectiveness remain unanswered. Answering these questions requires both theory and empirical data. Currently, we have some of the former but little of the latter.

Despite significant literature that critiques the traditional, passive judicial role in pro se litigation and makes the case for active judging, few empirical studies have examined how judges think about their role in pro se cases, to what extent they are implementing active judging, and the nature of their practices.[7] In fact, we lack basic information about state courts and judges as a general matter.[8] The work of lower court civil judges in the United States is under-researched and under-theorized compared to the vast academic litera-

7 For previous studies of judicial engagement with pro se parties, see generally GOLDSCHMIDT ET AL., *supra* note 5, at 54 (reporting the results of a survey of judges where many judges reported that personal choices guided their approach to pro se ligation); Baldacci, *supra* note 5; Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (empirical study of a Baltimore housing court); Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 J.L. SOCIETY 61 (2014) (study examining the experiences of unrepresented tenants in a landlord/tenant court); Shannon Portillo, *The Adversarial Process of Administrative Claims: The Process of Unemployment Insurance Hearings*, 49 ADMIN. & SOC'Y 257, 257–58 (2014) (sociological study of the District of Columbia Office of Administrative Hearings); Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058 (2017) (reporting observational findings from approximately 300 hearings and review of approximately seventy-five cases regarding active judging practices in a housing court described as "problem-solving").

8 *See generally* Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 DAEDALUS 130 (2014) (outlining the lack of research on state courts). Though legal academia has paid scant attention to the work of lower courts and lower court judges, there are notable exceptions, including those listed in note 7 and Anna E. Carpenter et al., *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 LAW & SOC. INQUIRY 1023 (2017); Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897 (2013) [hereinafter Leib, *Localist*] (exploring how local judges interpret the law); Ethan J. Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 707 (2015) (exploring how local judges view themselves and their crosscutting roles in local and state government); Sandefur, *supra* note 4; Shanahan et al., *supra* note 3; Steinberg, *supra* note 1; Mary Spector & Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*, 67 HASTINGS L.J. 1427 (2016). Following widespread establishment of small claims courts in the 1960s and 70s, there was a burst of academic interest in such courts. *See, e.g.*, JOHN C. RUHNKA ET AL., SMALL CLAIMS COURTS: A NATIONAL EXAMINATION (1978); Arthur Best et al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21 FORDHAM URB. L.J. 343, 346 (1994) (noting the burst of activity around small claims courts a few decades ago); William G. Haemmel, *The North Carolina Small Claims Court—An Empirical Study*, 9 WAKE FOREST L. REV. 503 (1973); Austin Sarat, *Alternatives in Dispute Processing: Litigation in Small Claims Court*, 10 LAW & SOC'Y REV. 339 (1976); Eric H. Steele, *The Historical Context of Small Claims Courts*, 1981 AM. B. FOUND. RES. J. 293 (offering a history of the development of small claims courts).

ture on judges and judging in the federal and appellate courts.[9] We have robust empirical studies and theories to describe and explain the judicial role in complex and appellate litigation, but little comparable scholarship on lower court judges, let alone how they handle pro se litigation.[10] This gap is striking, considering that the overwhelming majority of Americans who access the civil justice system will never interact with a federal or appellate

9 *See* Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57, 57–58 (2015) (discussing the lack of attention to lower courts in legal scholarship); Leib, *Localist*, *supra* note 8, at 898–99 (noting that legal scholars have almost universally ignored local courts, favoring the study of federal courts and state appellate courts); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 836 n.17 (2008) (noting that most empirical legal scholarship in the new legal realism has focused on federal court decisions and that state courts are a "fertile place for study"). For examples of legal scholarship on judges and the federal courts, see LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005) (analyzing judicial decisions to determine the relationship between presidential ideology and appointee voting records); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87 (2008) (examining evidence of bias in judicial citations in federal court opinions); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) (arguing that collegiality plays an important role in judicial decisionmaking); Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004) (examining religious freedom cases to determine the variables that affect outcomes, including the religious beliefs of judges); Cass R. Sunstein et al., Essay, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (examining the role of ideology in federal court of appeals voting patterns).

10 Legal academia's focus on federal and appellate courts is likely driven by a number of factors, not all of which are based in principle. As a matter of principle, the study of higher courts is obviously vital, as they offer the final word on matters of doctrine, decide the most complex cases, and issue holdings with the potential to affect many people. This reality alone justifies a concerted effort to understand these courts and the judges who preside in them, but it does not justify a near-complete focus on such courts to the exclusion of the courts that mete out the vast majority of American justice. There are many barriers to the study of local courts. The work of local courts is transsubstantive, cutting across many areas of law, which is a mismatch given the subject-matter-specific focus of much legal scholarship. *See* Leib, *Localist*, *supra* note 8, at 905. We also tend to write about what we know. Most legal academics have little to no experience with local courts, having served as large law firm associates and federal or appellate court clerks. Finally, studying local courts is a time consuming and often frustrating endeavor, whether one is interested in quantitative data, qualitative data, or both. To name a few issues that complicate the study of local courts, many case types do not involve written final orders, and where written final orders do exist, they are difficult to obtain. Each state has a different case management and data collection system, many of which are shockingly unsophisticated. Thus, obtaining data typically involves creating data sets from whole cloth, a massive undertaking. *See id.* at 907–08 (noting the difficulty inherent in collecting data from state courts). Power, class, and race are an important part of the picture as well. The lower courts are "the poor people's court[s]." *See* Steinberg, *supra* note 1, at 741. Lower court cases, other than criminal matters, are rarely fodder for news coverage or public protest. The work of these courts is largely obscured from public view.

judge.[11] In fact, our state courts, where most parties have no counsel, handle nearly 99% of all civil matters filed in the United States each year.[12] In the absence of data about civil justice in the lower courts, our normative views and prescriptions for change are inevitably incomplete.[13]

In response to the need for data, as well as theoretical and conceptual development, this Article reports results from a study of a majority pro se court where controlling law supports active judging.[14] Using qualitative data from in-depth interviews with twelve judges, the study offers new and much-needed data on the real-world practices of lower court judges and a new conceptual framework for understanding judicial practices in pro se litigation. This study focuses on the point in a civil case when pro se parties interact directly with judges: the courtroom during a civil hearing.[15] It explores whether, how, and why judges use active practices in the courtroom and discusses what the findings suggest for the future of judicial role reform and court reform more broadly. This work responds to questions about the scope

11 *See* Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 BYU L. REV. 899, 919 n.94 (noting that 22.1 million civil cases were filed in state courts in 2013, but only 271,950 were filed in the federal courts the same year). The lack of empirical information about our civil justice system has bedeviled many areas of law and legal scholarship and harms our ability to make policy choices about organization of the legal system. *See, e.g.*, Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 158 (2011) (noting the lack of empirical data to support judicial decisionmaking about the effects of given procedures in a civil justice context: "While one can state the equation, one cannot do the math because the data are missing. Interpretative choices abound."). Gillian Hadfield describes the lack of information about the U.S. legal market, in particular the market for legal services for nonpoor and noncorporate clients, the organized bar's failure to gather such information, and the consequences of this lack of information. *See generally* Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129 (2010).

12 *See* Steinberg, *supra* note 11, at 919 n.94.

13 *See generally* Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101 (setting out an expansive agenda for access to justice research and calling for scholars to make a range of theoretical and empirical contributions to better understand the operation of the civil justice system, including how everyday Americans experience law and the justice system).

14 See *infra* subsections II.A.2–3 for information about District of Columbia unemployment law and judicial ethics.

15 One strength of this study is that the cases do not settle and must end in a hearing, which provides a focus on the judge's role in a civil hearing. In unemployment appeals, the outcomes are binary (benefits granted versus benefits denied), and the litigating parties present and dispute the facts and the law but do not have the power to negotiate a middle-ground outcome. Thus, through these cases, we can understand the role of judges without the complication of settlement. For more on the role of settlement in pro se litigation, see Engler, *supra* note 5, at 2018–21; Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 368, 376 (2008).

and nature of proposed changes to the judicial role and begins to fill gaps in empirical data and theory.[16]

This Article is part of a broader empirical study of unemployment insurance cases conducted by Colleen Shanahan, Alyx Mark, and me. The study includes one of the broadest and deepest data sets ever collected in a U.S. civil justice setting, with 5,150 individual case observations, qualitative interviews with representatives practicing in the court, and qualitative interviews with judges.[17] In previous articles, my coresearchers and I used this data to examine the role of representatives in access to justice including the balance of power between parties to a case,[18] the role of a lawyer's strategic expertise,[19] the development and exercise of expertise by nonlawyer advocates,[20] and the risks of less-than-full representation.[21] In a forthcoming article, Professor Shanahan examines how parties actually gain access to the hearing room and how judges interact with procedural rules to block or grant access

16 Empiricism in legal scholarship has been on the rise for years, and recently scholars have begun to call for, and engage in, research that sheds light on the operation of our lower courts and the civil justice system in the lives of everyday people. Support for this work can be seen in the area of access to justice scholarship. *See generally* Albiston & Sandefur, *supra* note 13. It can also be seen in the area of new legal realism. *See, e.g.*, Howard Erlanger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 337 (describing "new legal realism," a scholarly project that seeks to "bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy"); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 79 (2009) (mapping out the history of "new legal realism," critiquing the varieties of new legal realism, and offering a new framework for future scholarly work).

17 The broader study does not consider a sample of cases, but rather every unemployment appeal case filed in the court over a two-and-a-half-year period. *See* Shanahan et al., *supra* note 3, at 518 & n.109. For other recent studies, see, for example, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007). For an earlier, seminal, mixed-methods study of an unemployment court, see HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998).

18 *See* Shanahan et al., *supra* note 3, at 484–89.

19 *Id.* at 471, 489–505.

20 Carpenter et al., *supra* note 8 (using an empirical study of lawyers and nonlawyer advocates, the authors found that judges play a critical role in shaping nonlawyer legal expertise and nonlawyers develop expertise almost exclusively through "trial and error"; the authors found that, while experienced nonlawyers can help parties through their expertise with common court procedures and basic substantive legal concepts, they are not equipped to challenge judges on contested issues of substantive or procedural law in individual cases, advance novel legal claims, or advocate for law reform on a broader scale).

21 Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L.J. 1367 (2016) (arguing that access to justice interventions involving less-than-full legal representation have risks, including the risk that individual clients will not have the benefit of meaningful legal challenges in their own cases, while the larger legal system loses opportunities for systemic law reform).

for unrepresented parties.[22] Her work examines the judge's role in access to justice outside of the courtroom, while this Article looks at the judge's role inside the courtroom. Taken together, these articles contribute to a deeper understanding of the judge's role in pro se litigation and the potential for court-based access to justice reforms.

This Article proceeds as follows: Part I contextualizes the study by explaining how active judging became part of the conversation about civil justice system reform, including the backdrop of the pro se crisis, how the traditional, passive approach to judging exacerbates challenges facing those without counsel, and recent shifts in judicial ethics in response to the rise of pro se litigation.

Part I also reviews existing scholarship on judicial practices in pro se cases and offers a new conceptual framework to organize proposals for judicial role reform, the "three dimensions of active judging." These dimensions include: (1) adjusting procedures; (2) explaining law and process; and (3) eliciting information. Next, Part I identifies expectations for the qualitative interviews based on existing research, which predicts substantial variations in practice across the judges. Previous research also suggests this study can contribute to our understanding of active judging as an access to justice intervention by identifying how a particular group of judges thinks about their role in pro se cases, whether and how they are implementing active judging, and the factors that influence and mediate active judging. To answer the questions identified in Part I, this Article draws on semistructured qualitative interviews with judges who preside over predominantly pro se unemployment insurance appeals dockets.

Part II describes the site of the study, the District of Columbia Office of Administrative Hearings (OAH); the study subjects, OAH judges; and the study's methodological approach. This Part details the substantive law of unemployment appeals, as this information is critical in understanding the active judging practices employed by judges in this court. It also describes controlling law on judicial engagement with pro se parties and judicial ethics in the District of Columbia, both of which support active judging and provide more detailed guidance than is available in most other jurisdictions.

Part III presents and discusses the findings, which are organized into three categories: (1) whether the judges engage in active judging; (2) variations in active judging practices; and (3) sources of guidance that influence active judging in the court.

First, the findings show a group of judges who see themselves as playing a role in facilitating fairness and access for pro se parties. For all of the judges interviewed, this involves some form of active judging.

Second, while a commitment to assisting pro se litigants through some form of active judging is shared by all judges, individual judges' views and practices vary across three dimensions of active judging. This result aligns

22 Colleen F. Shanahan, *Keys to the Kingdom: Judges and Pre-Hearing Procedure in Access to Justice*, 2018 WIS. L. REV. (forthcoming).

with previous research, which suggests judges have inconsistent and ad hoc approaches to dealing with pro se parties. Looking at the three dimensions of active judging, we see that all judges interviewed are willing to adjust procedures to accommodate pro se litigants, but in the other two dimensions—explaining law and process and eliciting information—judges' practices vary. The variations are shaped by individual judges' senses of what is fair and appropriate in pro se matters, and importantly, by controlling appellate decisions.

The findings of this study suggest there is no single model of, or approach to, active judging. The study shows that active judging, at least in this court, cannot be conceptualized by a single spectrum of active to passive practices. Instead, active judging in this court is best viewed as multidimensional. The findings also suggest that the existing literature has paid insufficient attention to judicial interactions with defendants as opposed to plaintiffs. This is particularly important given that we now know the vast majority of unrepresented parties in nonfamily state civil court matters are defendants.[23]

Third, the variations in active judging persist in this court despite the fact that the judges share sources of guidance about active judging. These sources, identified by the judges, are the District of Columbia Court of Appeals, Department of Labor guidelines (the agency regulates the unemployment appeals system), and other judges on the court, through a peer review process. The findings make clear that judges' views and practices evolved over time and these three sources of guidance have played a critical role in that evolution. Finally, the findings highlight how individual judges are left to make their own decisions about handling pro se cases even in a court where guidance is substantial compared to other jurisdictions. Consistency in active judging may be elusive and may require more or different guidance than that offered to judges in this court.

Part IV presents some implications of this study for civil justice policy and future research. Drawing on the findings, this Part suggests the need for a context-based analysis of the role of substantive law and the burden of proof in active judging and pro se litigation. It then identifies questions related to the interaction of procedural rules, unrepresented parties, and judging, and asks whether we are willing to formalize a two-tier system of justice: one for those who have counsel and one for those who do not. Finally, it raises issues of consistency and accountability for judges in majority pro se courts and asks how we should strike the balance between judicial independence and consistency in active judging practices.

In this Article, my intent is to present and analyze data about a group of judges working in a lower civil court and, based on that data, to offer theory and raise questions about the operation of our lower courts and the future of civil justice reform efforts. Many more are needed to develop a full picture of justice in our state civil courts and to understand the reforms and interven-

23 *See infra* note 29 and accompanying text.

tions that might improve them. Of course, given the depth and severity of the problems facing the civil justice system, we also need experimentation and creativity. Going forward, I hope legal scholars will engage in both types of work.

I. Context of the Study

This study exists in the context of an ongoing conversation about the role of judges in the new pro se reality. To date, legal scholars writing about access to the civil justice system have focused on whether active judging is an appropriate access to justice intervention and have largely answered this question in the affirmative.[24] If we have decided, as it appears we have, that active judging is appropriate, then the value of this study lies in beginning to answer whether active judging is happening and why, what it looks like in practice, and how judges themselves understand it.

Before examining these questions, we should understand how active judging became an important topic in conversations about civil justice reform. To that end, this Part outlines the practical challenges pro se parties face in adversarial civil litigation and how the traditional judicial role—one shaped by the values of passivity and neutrality—contributes to those challenges. Next, it reviews proposals for reform of the judge's role and conceptually organizes these proposals into three dimensions of active judging: (1) adjusting procedures; (2) explaining law and process; and (3) eliciting information. Later, the Article uses this framework to analyze the qualitative data. Although previous studies of lower court judges are limited, this Part also reviews and discusses what the existing literature suggests about expectations for the qualitative interviews.

A. Unrepresented Parties and the Traditional Civil Justice System

America's lower courts are in the fourth decade of what most observers have described as a crisis.[25] Today, a majority of parties in these courts have no legal representation in civil matters.[26] The highest rates of self-representation overall are in cases that implicate basic human needs, such as health, family relations, safety, housing, and income security.[27] In cases related to

24 *See supra* note 5.

25 In addition to the crisis at the courthouse, socio-legal scholars have pointed out that most Americans never take their civil legal problems to a court or lawyer for assistance. Thus, there is much more "need" for civil legal services than is visible in our nation's courtrooms. For more discussion on this point, see *infra* notes 39–41 and accompanying text.

26 Reviewing the research as of 2015, Jessica Steinberg found that "[w]hile a definitive national picture on pro se litigation is lacking, it is not improbable to estimate that two-thirds of all cases in American civil trial courts involve at least one unrepresented individual. In short, the magnitude of the pro se crisis is immense." Steinberg, *supra* note 1, at 751.

27 *See* Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 Fordham Urb. L.J. 1227, 1231 (2014).

family issues, such as divorce, custody, and domestic violence, both parties are often unrepresented.[28] In nonfamily cases, such as contract and tort matters, one-sided representation is the norm, with a recent nationally representative study finding 76% of all nonfamily civil cases involve one party without counsel, almost always the defendant.[29]

In response, access to justice reformers argue that the civil justice system itself must change to confront the new pro se reality. Central to this vision is an active judge, one who maintains impartiality while promoting access and fairness for pro se parties by making procedural adjustments, explaining law and the hearing process, and eliciting information to develop the record. To understand the current interest in active judging it is first necessary to understand how the traditional civil legal system operates and how this system works against pro se parties.

The American civil justice system is adversarial. The impartial judge, whose neutrality is both facilitated and signaled by passivity, sits at the center of this system. The parties, via their skilled advocates, must drive all aspects of litigation. From the inception of a claim to the process of a hearing or trial, parties are expected to identify claims and defenses, develop and present evidence, employ procedural rules, and formulate legal arguments.[30]

In party-driven litigation, the judge is like an umpire. She may respond to pleadings, objections, motions, and arguments by the parties, but should generally not raise substantive or procedural issues sua sponte.[31] She must decide cases based only on the facts presented by the parties, but play no role in eliciting facts.[32] Her primary objective is to ensure a level playing field upon which the skilled advocates battle.

Most pro se parties are simply unequipped to advance their own interests in party-driven litigation. Accounts of their failures abound.[33] Pro se parties do not know or understand substantive law or procedural rules. They struggle to complete or file basic documents. They cannot complete essential procedural tasks such as serving process on the opposing party. They do not appreciate the formal processes or informal norms of courts. They are

28 *See* Steinberg, *supra* note 1, at 743.

29 *See* NAT'L CTR. FOR STATE COURTS, *supra* note 3.

30 *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042–43 (1975); Norman W. Spaulding, Essay, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1391 (2008); Steinberg, *supra* note 11, at 960; Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989).

31 Frankel, *supra* note 30, at 1042 ("The ignorance and unpreparedness of the judge are intended axioms of the system.").

32 *See* Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 204 (2007).

33 *See supra* note 1; *see also* Victor D. Quintanilla et al., *The Signaling Effect of Pro Se Status*, 42 LAW & SOC. INQUIRY 1091, 1094 (2017); Kat Aaron, *The People's Court?*, AM. PROSPECT (Nov. 21, 2013), http://prospect.org/article/peoples-court.

particularly disadvantaged when they must face a skilled advocate on the other side of the case.[34]

Beyond legal and procedural hurdles, basic human and emotional challenges affect pro se parties. For the uninitiated, courts, including administrative tribunals, are deeply intimidating places.[35] Pro se parties experience strong negative emotions including embarrassment and fear.[36] These reactions are driven not only by the formal environment of the courthouse and complexity of the legal system, but also, and perhaps more importantly, by the fact that so many pro se litigants are poor and find themselves facing outcomes that could take away housing, income, or family connections.[37] Many pro se parties enter the courthouse with the firm belief that the system is rigged and unfair, and that they have lost before the case has even begun.[38]

---

34 *See* Shanahan et al., *supra* note 3, at 484–89.

35 Barbara Bezdek's study of tenants in a housing court highlights the psychological effects of being effectively "silenced" by judges. For example, she observes that "the rule-oriented court talk expected and privileged by judges in low-level courts bears little or no relation to people_fs natural narratives. . . . For most tenants, such a court offers a stern lesson that formal rights are for somebody else and not for them." Bezdek, *supra* note 7, at 588–89. The findings of a recent sociological study bring the emotional effects of a court appearance, even in an administrative setting, into stark relief:

> The words "scary," "confusing," and "afraid" were used consistently when respondents described their experiences with administrative hearings . . . :
>
> > I walked in there and man, I was scared. It was all formal and I felt like my life, my earnings, were on the line. They were not nice. Not nice at all, in fact. I honestly found it very confusing.
> >
> > —Tonya
> >
> > Not many things make me afraid, but that sure did. I remember taking the train over there, and my stomach hurt. Had no idea what to expect. I knew it would be bad. And it was. Confusing right from the get go about where to go, and only got worse. I had to wait, wait, wait, and then it was over in a jiffy. No chance to even talk. Wouldn_ft want to do that again.
> >
> > —Monique
> >
> > . . . .
> >
> > Fear. Honest to goodness fear. That_fs how I felt. Fear of what would happen. What they would say. They were tearing apart my life and I wasn_ft even allowed to talk. To defend myself. Honey, let me tell you, it was no fun. Keep me away from all of that. Keep me away.
> >
> > —Mya

Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1296–97 (2016).

36 *Id.*

37 *See* sources cited *supra* note 1. Litigants who are immigrants face additional challenges, such as language barriers, cultural differences, and fears of deportation. *See* MacDowell, *supra* note 1, at 535.

38 *See* Greene, *supra* note 35, at 1266–68, 1276, 1307.

Though a full and nuanced discussion of the troubles facing the civil justice system is beyond the scope of this Article, even a summary discussion of our justice system must acknowledge that access to justice issues do not begin or end at the courthouse doors or in a lawyer's office. Although civil justice problems—problems that can be addressed by the legal system—are common, most Americans never take their civil justice problems to a lawyer or a court. In fact, almost half of the time people respond to civil justice problems by doing nothing at all. A recent national survey of legal needs found that only a quarter of civil legal problems were ever taken to a lawyer, while only fourteen percent were ever taken to a court.[39] Responding to a civil legal problem by doing nothing is more common among low-income people and may be even more common among low-income African Americans.[40] For the first time, new research shows how individuals' negative perceptions and past experiences with the *criminal* justice system influence their views about the *civil* justice system.[41] In the face of such widespread lack of engagement in, and dissatisfaction with, the civil justice system, our courthouses are nonetheless filled to the brim with unrepresented parties. Thus, access to justice problems are deeper, more complex, and more nuanced than even the pro se crisis in our courts (a dire problem in its own right) suggests.

B. Why Not Increase Services?

An obvious first question is why judges and courts should be involved at all in solving the pro se problem. If litigants lack representation, why not simply provide more lawyers? From the early days of the pro se crisis, policymaking, scholarship, and advocacy have focused on increasing the supply of free and low-cost civil legal services, particularly access to lawyers. For decades, advocates have called for and worked to support policy, funding, and doctrinal reform to increase the supply of lawyers in civil matters involving basic needs.[42] In market-based language, such "supply-side" interventions, whether in the form of lawyers, nonlawyer advocates, technology, or self-help services, seek to provide more and better legal services to ensure

39 *See* Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 60 (2010). There are many reasons to believe that the actual number of civil justice problems facing the American public is much larger than existing surveys suggest. *Id.* at 57.

40 Greene, *supra* note 35, at 1301–13; Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, *in* TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 116 (Pasco Pleasence et al. eds., 2007).

41 Greene, *supra* note 35, at 1263, 1267 ("For most respondents, the criminal and civil justice systems are one and the same, and injustices they perceive in the criminal system translate into their belief that the justice system as a whole is unjust.").

42 This movement is often called "Civil *Gideon*," a name meant to invoke the constitutional right to counsel in criminal matters. *See* Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 15 TEMP. POL. & C.R. L. REV. 527 (2006) (articulating the challenges of universal representation in the criminal context and identifying lessons for the civil right to counsel movement).

that individuals who must go to court do not face the complexity of civil litigation without assistance or advocacy.[43]

Unfortunately, efforts to increase the supply of lawyers and other legal services have not succeeded and are not likely to succeed in closing the "justice gap."[44] As Gillian Hadfield has argued, given the extent of the demand for legal services in the United States, increases in civil legal aid funding cannot possibly meet the need.[45] On top of the economic barriers, efforts to secure a limited right to counsel in civil cases have also failed as a doctrinal matter.[46] In light of existing fiscal and political challenges, it is unlikely that funding for civil legal services will increase anytime soon.

C. Move Toward Judicial Reform

Given the failure (and arguable futility) of a single-minded focus on traditional supply-side remedies, a growing chorus of diverse voices in legal academia, policy circles, and the civil justice system are calling for judicial role reform in response to the pro se crisis.[47] Reform proposals seek to improve the extent to which cases involving pro se parties have objectively just outcomes and fair processes, with judges playing a critical role. Rather than defaulting to the passive umpire role and thus allowing pro se parties to flounder, reforms would see judges taking affirmative steps to help pro se parties navigate the civil litigation process. Reformers argue judges can assist

---

43 For a discussion of supply-side issues in access to justice research and legal services delivery, see Albiston & Sandefur, *supra* note 13, at 114–16.

44 *See* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2007); Norah Rexer, Note, *A Professional Responsibility: The Role of Lawyers in Closing the Justice Gap*, 22 GEO. J. ON POVERTY L. & POL'Y 585, 585 (2015) (noting that while "there is one attorney for every 429 people living above the poverty line," "only one legal aid attorney" is available for "every 6415 individuals living in poverty," causing underfunded legal aid programs to turn away persons in need of legal assistance on a daily basis).

45 *See* Hadfield, *supra* note 11, at 152 (making an economic argument that increases in funding for civil legal services cannot possibly meet the need for those services given the extent of the need, and finding even a twentyfold increase in funding would only amount to an hour of additional legal services per household).

46 *See* Turner v. Rogers, 564 U.S. 431 (2011).

47 Another response is to argue, as Deborah Rhode has done most prominently, for expanded roles for nonlawyers to provide civil legal services. *See, e.g.*, DEBORAH L. RHODE, ACCESS TO JUSTICE (2004); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000); Rhode, *supra* note 27; Deborah L. Rhode, Essay, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996); *see also* Stephanos Bibas, *Shrinking* Gideon *and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287 (2013); Hadfield, *supra* note 11, at 153–54. For empirical explorations of nonlawyer practice, see generally KRITZER, *supra* note 17; Carpenter et al., *supra* note 8; Sandefur, *supra* note 4. For a discussion of the risks and benefits of nonlawyer representation and potential for triage in nonlawyer practice, see generally Shanahan et al., *supra* note 21. For arguments in favor of court-based reform and judicial role reform, see *supra* note 5.

pro se parties while maintaining the traditional judicial values of impartiality and neutrality.[48]

One argument in support of judicial role reform is purely practical: the judge is often the only person physically present in the courtroom who has the expertise and ability to help those without counsel.[49] Though other forms of assistance—such as self-help services, limited scope representation, and nonlawyer services—may be available outside the courtroom, within the courtroom the only source of legal expertise is typically the judge. In this way, proposals for judicial role reform appear to be driven less by normative ideas about effectiveness and more by necessity.[50] Efficiency is also a factor, given that one judge can help many unrepresented parties without the need for additional personnel.[51]

Yet another argument is about effectiveness. Ben Barton has made a strong case against the quest for a civil right to counsel, arguing it would be subject to the same failures we see in the criminal justice system and that changes to the judicial role and other court-based reforms would be more effective in providing meaningful assistance to pro se parties.[52] Another important focus of the court and judicial reform literature is the argument that traditional judicial passivity, as a matter of ethics, is not neutral as applied to pro se parties, but is instead affirmatively harmful.[53]

While the active judicial role is widely understood to be a recent development in the context of the pro se crisis, Jessica Steinberg has pointed out that it is not new in the broader civil justice context.[54] As Judith Resnik famously articulated more than thirty years ago, judges handling complex and multiparty cases routinely take on a "managerial" role in the pretrial phases of litigation, while in public law matters judges exert significant control over post-trial remedy enforcement.[55] Steinberg shows how the active judge has long played a role in complex and public law litigation and draws connections between active judging in complex litigation and small, state

48 *See, e.g.*, Engler, *supra* note 15, at 385.

49 *See* Shanahan et al., *supra* note 3, at 507–12 (discussing the role of lawyer expertise in the civil justice system and a new theory of lawyer's strategic expertise).

50 Inevitably, proposals for judicial role reform are not based on empirical arguments about efficacy, as we lack data on the effectiveness of judicial interventions in pro se cases. As this Article illustrates, we lack clarity and consensus about the questions we should be asking.

51 *See, e.g.*, Barton, *supra* note 5, at 1273.

52 *See id.*

53 *See* ZORZA, *supra* note 5, at 18; Engler, *supra* note 15, at 371–79; Goldschmidt, *supra* note 5, at 37, 48–51; Steinberg, *supra* note 11, at 899; Steinberg, *supra* note 1, at 755–56; Sward, *supra* note 30, at 321 n.96.

54 *See generally* Steinberg, *supra* note 11.

55 *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (arguing against the rise of managerial judging). *But see* Paul R.J. Connolly, *Why We Do Need Managerial Judges*, 23 JUDGES' J. 34 (1984) (arguing in favor of managerial judging). *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing the rise of public law litigation in the federal courts and the role of judges in this context).

court matters. She argues that active judging in both contexts is justified insofar as it is needed to manage complexity and the realities of civil litigation. In big cases, active judging is needed to manage the maze of pre- and post-trial procedural issues, extended discovery, and the enforcement of remedies. In small state court matters, active judging addresses the challenge of developing factual and legal issues in a case in the absence of counsel.[56] Of course, there are critical differences between big, complex matters and smaller, lower court matters, as Steinberg acknowledges.[57] Most importantly, in complex litigation, attorney representation for both sides is the norm—a check on judicial behavior that simply does not exist in most state court litigation.[58]

Today, it appears arguments in favor of active judging are having some effect on policy and practice. An official policy shift, albeit tentative in some quarters, is visible in the Model Code of Judicial Conduct, state judicial ethics codes, Supreme Court and other appellate court decisions, and judicial literature.[59] Others scholars have given these developments a thorough treatment and I will review them only briefly here. The important point is this: while some authorities have taken a permissive stance on active judging, there is little in the way of specific guidance on the scope, nature, and objec-

56 *See* Steinberg, *supra* note 11, at 906.

57 *Id.* at 955.

58 Even in the complex litigation context, with skilled lawyers on either side, scholars have roundly criticized the existing managerial judging regime in complex litigation on matters of transparency and accountability. *See, e.g.*, Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995). As the Federal Courts Study Committee has stated:

> There are no standards for making these "managerial" decisions, the judge is not required to provide a "reasoned justification," and there is no appellate review. Each judge is free to consult his or her own conception of the importance and merit of a case and the proper speed with which it should be disposed. This, in turn, promotes arbitrariness.

1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 55 (1990) (citing E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 311 (1986)); *see also* Resnik, *supra* note 55, at 378, 426.

59 Signs of the shift toward active judging include changes in judicial ethics, *see* MODEL CODE OF JUDICIAL CONDUCT Canon 2 R. 2.2 cmt. 4 (AM. BAR ASS'N 2007, amended 2010), the adoption of revised Rule 2.2 verbatim or with minor variations by fourteen states as of 2014, *see* Cynthia Gray, *Pro Se Litigants in the Code of Judicial Conduct*, NAT'L CTR. ST. CTS. JUD. ETHICS & DISCIPLINE BLOG (Nov. 25, 2014), https://ncscjudicialethicsblog.org/2014/11/25/pro-se-litigants-in-the-code-of-judicial-conduct/, and the Supreme Court's decision in *Turner v. Rogers*, 564 U.S. 431 (2011)—though the effects of *Turner* are debated. Some scholars have read the case negatively in terms of its potential impact on access to justice, *see, e.g.*, Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805 (2012), while others have found, at a minimum, the hope for positive effects in the future, *see, e.g.*, Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31 (2013). Many articles published in law reviews and judicial publications over the past two decades have also promoted active judging. *See supra* note 5. For a full review of developments pre-2012, see generally Engler, *supra* note 15.

tives of a judge's role in pro se litigation.[60] Individual judges are left to craft their own approaches, and the limited evidence available suggests they do just that.[61]

A recent critical change was the American Bar Association's (ABA) 2007 revision of the Model Code of Judicial Conduct. The ABA altered Rule 2.2, which governs the judge's duty of impartiality, by adding the following language in a comment to the rule: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[62] The "reasonable accommodations" language certainly appears to permit some level of active judging, but the scope of what constitutes "reasonable" is undeveloped. The ABA's report on the rule change provides little additional guidance. It states, "[B]y leveling the playing field . . . judges ensure that pro se litigants receive the fair hearing to which they are entitled. On the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage."[63] The ABA does not further define what might constitute an unfair advantage or an unreasonable demand. Thus, individual judges are still left to interpret and apply the vague reasonable accommodations standard.

Unfortunately, looking to appellate caselaw provides little additional guidance on the permissible scope of judicial activity. Scholars who have engaged in comprehensive reviews of appellate caselaw share common conclusions. First, the number of decisions that speak to a judge's role in pro se litigation is small.[64] Second, the guidance that does exist is contradictory and vague.[65] Third, few cases speak with any specificity about the concrete, day-to-day tasks that comprise a judge's work.[66]

---

60 *See* GOLDSCHMIDT ET AL., *supra* note 5, at 55–57; Albrecht et al., *supra* note 5, at 43–45; Baldacci, *supra* note 5, at 665; Engler, *supra* note 15, at 370; Engler, *supra* note 5, at 2043; Pearce, *supra* note 5, at 978; Steinberg, *supra* note 11, at 926–31.

61 *See* GOLDSCHMIDT ET AL., *supra* note 5, at 54; Steinberg, *supra* note 11, at 937–38, 946.

62 *See* MODEL CODE OF JUDICIAL CONDUCT Canon 2 R. 2.2 cmt. 4.

63 AM. BAR ASS'N, ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT 47 (2005), https://www.americanbar.org/content/dam/aba/migrated/judicialethics/house_report.authcheckdam.pdf.

64 For the most recent analysis of appellate caselaw related to pro se litigation and judicial engagement, see Steinberg, *supra* note 11, at 927–31; *see also* Engler, *supra* note 15, at 370–71; Engler, *supra* note 5, at 2012.

65 *See supra* note 64.

66 Many cases exhort judges not to assist pro se parties and to treat them the same as represented parties. *See, e.g.*, Steinberg, *supra* note 11, at 927 (citing Fitzgerald v. Fitzgerald, 629 N.W.2d 115, 119 (Minn. Ct. App. 2001), as "an example of the courts' emphasis on the norm of party control," wherein parties are expected to act like lawyers); *id.* (citing Waushara Cty. v. Graf, 480 N.W.2d 16, 20 (Wis. 1992), wherein the court emphasized that a trial judge has no duty to "walk pro se litigants through the procedural requirements or to point them to the proper substantive law"); *id.* at 929 n.136 (citing Jacobsen v. Filler, 790 F.2d 1362, 1366–67 (9th Cir. 1986), in which the Ninth Circuit determined judges could decline to instruct pro se litigants on rules of procedure); *id.* at 933 (citing Bauman v.

On the ground, while many judges likely hew to the passive norm, limited evidence suggests some judges are beginning to alter their practices in response to the rise of pro se litigation.[67] However, given the paucity of official guidance and lack of consensus on the permissible scope and nature of active judging practices, judges are forced to make individual choices about how to respond to pro se litigants.[68] At least one scholar has argued that judges' individual "departures" from adversary procedure are not only widespread, but dangerous, given the inevitable inconsistency in results.[69]

The notion that individual judges are engaging in varied and ad hoc active judging practices is consistent with existing empirical and anecdotal information about state court judges. In fact, inconsistency across judges is a major theme in previous studies of lower courts. Studies have found substantial variation in decisionmaking, judicial style, and adherence to the rule of law across individual judges in the same court, even those who work in the same areas of law. These inconsistencies across judges have been identified in many different civil law settings, from small claims courts to general civil dockets and administrative fora.[70] Such findings appear in a 1998 study of a lower civil court, which noted that "judges vary so much with respect to their views of the law, their manner of dispensing justice, and the remedies they provide that it becomes difficult to appreciate that they are operating within the same legal system."[71] As early as 2002, scholars documented the phe-

---

State, Div. of Family & Youth Servs., 768 P.2d 1097, 1099 (Alaska 1989), as an example of a case in which a court concluded a judge had no duty to provide explanation to an unrepresented individual who had "failed to make at least a defective attempt to comply with procedure"). Others permit or require assistance to pro se parties. For examples of cases permitting, but not requiring, judicial assistance, see *id.* at 929 (citing Austin v. Ellis, 408 A.2d 784 (N.H. 1979), a case in which the New Hampshire Supreme Court noted judges do have a duty to underrepresented parties but failed to prescribe a specific formula for judges to use in determining what the duty requires); *id.* at 930 (citing Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983), to illustrate a case in which the court first indicated its desire for judges to "strike an active stance" with pro se parties, but later "backpedaled" its position, "caution[ing] that a judge is not required to 'translate legal terms, explain legal rules, or otherwise attempt to redress the ongoing consequences of the party's' pro se status" (quoting *Nelson*, 669 P.2d at 1213)) Decisions appear to lack coherent principles. Engler argues appellate case outcomes "may be driven as much by the particular facts of the case as by a given judge's approach." Engler, *supra* note 5, at 2014.

67 *See supra* note 60.

68 *See supra* note 60.

69 *See* Steinberg, *supra* note 11, at 937–43.

70 Annie Decker, *A Theory of Local Common Law*, 35 CARDOZO L. REV. 1939, 1951 (2014) (listing irregularities across courts in New York state, noting that a judge explained, "I just follow my own common sense . . . . And the hell with the law." (alteration in original) (quoting William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), http://www.nytimes.com/2006/09/25/nyregion/25courts.html) (internal quotation marks omitted)).

71 John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 468 (1988) ("These divergences appear not only across different cities and states, but even within [a] single court system[ ]. When seen from this perspective, justice at this level does not comprise a single

nomenon of judges applying inconsistent approaches in pro se litigation.[72] Most recently, Jessica Steinberg drew on examples from her own field research and that of other scholars to argue that civil judges have essentially abandoned the passive judicial role in pro se cases and are instead engaging in ad hoc and varied practices as they cope with the challenges of interacting with pro se parties in the courtroom.[73]

Given the lack of clear or specific directives from caselaw, ethical rules, or other official sources, and faced with the pressure of unrepresented parties on their dockets, judges can take one of two general paths. One path involves attempting to maintain passivity and the appearance of neutrality through nonengagement, leaving pro se parties to fend for themselves and, most certainly, to fail to present their case or defend their interests. The common critique of this approach, one marshaled routinely in scholarship arguing for active judging, calls for a decoupling of passivity and neutrality, with the idea that maintaining passivity in the face of potential miscarriages of justice in pro se litigation is not neutrality at all; rather, it is ultimately bias against the unrepresented party.[74]

Taking the alternative path, judges can choose to engage with pro se parties in an attempt to help those parties navigate the challenges of litigation. Obviously, any attempt must be rooted in the principles of impartiality, neutrality, and fairness. Judges might use a range of strategies and practices, such as questioning parties on factual issues, defining legal issues, raising and sustaining objections, or effectively eliminating certain procedural rules entirely. Here, the details matter. It is one thing to sign on to the broad idea of "questioning parties" to develop the record, but the nature of that questioning, when it is done, and in what form, are complex and nuanced issues. For example, should pro se parties have the opportunity to speak and give narrative testimony during their case-in-chief? Or should the judge begin by conducting an examination? Should the questions be open-ended, as in direct examination, or more leading? Are these distinctions important

process that can be described and evaluated, but rather consists of a broad range of variable processes whose specifics seem to reflect the differing outlooks and practices of individual judges.").

72 For studies and observations about the inconsistency of judicial practice in pro se cases, see, for example, *supra* note 7; *see also* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439 (2009).

73 *See* Steinberg, *supra* note 11, at 937–43. Steinberg draws on existing data and her own field research to make the case that "ad hoc" judging and departures from traditional adversarial procedure are widespread.

> Because adversary doctrine works at odds with the fundamental goal of basing decisions on the relevant law and facts, many judges simply disregard it—and do so completely under the radar. The dockets in most civil courts would grind to a halt if judges did not find ways to assist the unrepresented parties who appear before them.

Id. at 938.

74 *See, e.g.*, Zorza, *supra* note 5.

enough to require guidance? Or should the methods be a matter of discretion?

In light of these critical questions, I turn to the scholarly and policy literature where we see a range of recommendations about active judging practices. This literature helps identify expectations for the qualitative interviews and provides a framework for analyzing the interview data. To that end, the following reviews active judging proposals drawn from legal scholarship and judicial practice materials and discusses key themes on access to justice for pro se litigants that relate to the judge's role.

D. Three Dimensions of Active Judging

Academic and policy work on active judging offers a range of suggestions and best practices for judges. This literature attempts to flesh out, in greater detail than we see in ethics rules and caselaw, the appropriate bounds of judicial intervention in pro se litigation. Despite an expansive body of work on the topic, the literature has not moved toward a shared conceptual framework to organize the range of possible judicial activity in pro se litigation. In response, I have drawn the various threads of the literature together and defined three dimensions of active judging in civil hearings and trials. These include a judge's role in: (1) adjusting procedures;[75] (2) explaining law and process;[76] and (3) eliciting information.[77] Below, I discuss each in turn, while also identifying what the literature suggests about the qualitative interview results.

1. Judges Adjusting Procedures

Procedural rules present a serious and often insurmountable hurdle for pro se litigants. In our party-driven system, most cases in the state courts require some action on the part of litigants to move a case forward. The literature and caselaw are rife with examples of pro se parties failing to understand or comply with procedures, both inside and outside the courtroom.[78] In fact, a recent metastudy on the effectiveness of legal representation finds lawyers' impact may be greatest where they help low-status parties

75 *See* Goldschmidt, *supra* note 5, at 43.

76 *See* Engler, *supra* note 5, at 2028 (proposing that the court assist the unrepresented litigant with procedure to be followed, presentation of evidence, and questions of law).

77 *See id.* ("[T]he court may call witnesses and conduct direct or cross-examinations. The court has a 'basic obligation to develop a full and fair record . . . .' Each of these duties is not only wholly consistent with the notion of impartiality, but also necessary for the system to maintain its impartiality." (second alteration in original) (footnotes omitted) (quoting Lashley v. Sec'y of Health & Human Servs., 708 F.2d 1048, 1051 (6th Cir. 1983))).

78 *See, e.g.*, Rhea v. Designmark Serv., Inc., 942 A.2d 651 (D.C. 2008); Bezdek, *supra* note 7; Engler, *supra* note 5; Greiner & Pattanayak, *supra* note 17; Sandefur, *supra* note 4; *infra* note 126; *see also* Shanahan, *supra* note 22 (analyzing data regarding unrepresented parties' use of pre-hearing procedures); *cf.* Wright-Taylor v. Howard Univ. Hosp., 974 A.2d 210, 218 (D.C. 2009) (noting, upon claimant's denial of appeal, that "[a] person reading this form as it now stands, perhaps short of a cautious and legally trained individual, could

navigate procedures that are simple for lawyers, but complex for unrepresented lay people.[79] Here, I use the term "procedures" broadly to include trial processes such as the order of testimony, written procedural rules, and evidentiary rules.

Across civil cases, pro se parties are challenged by procedures in a number of common ways. Before a party gets into the courtroom in many civil matters, their ability to manage discovery may determine what evidence is available or admissible. An insufficient pleading can be grounds for dismissal based on an oral motion by the other party. Once they get into the courtroom, pro se parties struggle to understand and navigate the process of a hearing and the presentation of evidence. Where pro se litigants have the burden of proof, they may be unable to articulate a foundation to admit key evidence. For defendants without the burden of proof, cross-examination is hardly an intuitive skill. Both sides will struggle to examine witnesses, present relevant and noncumulative testimony, and make evidentiary objections.

Advocates for reform argue that formal procedures should not be a barrier to the full presentation of evidence and have proposed changes to the traditional procedural regime in predominantly pro se courts. There are two schools of thought: one favors a system grounded in informality and judicial discretion, while another takes a more formalist approach and calls for a redesigned system of rules in pro se litigation. Choosing between these two visions, or finding a compromise position, is a critical project for the access to justice movement.

The prevailing view holds that informality is the key to access and fairness for pro se litigants. Reformers who support the informal approach want to ensure individual judges have discretion to make procedural accommodations where necessary to assist pro se parties.[80] This vision is often tied to the idea that courts of general jurisdiction should operate more like small claims courts and administrative hearing bodies,[81] which were generally designed to have fewer procedural rules and to give judges wide discretion to conduct trials in the manner they determine best promotes fairness and justice.[82] However, it is worth noting that there is evidence of a move toward greater formality in administrative courts over the past few decades.[83] That said, we

---

reasonably conclude that if she took the letter personally to a U.S. Post Office for mailing within the given time limit, she would have complied with the filing requirements").

79 *See* Sandefur, *supra* note 4, at 917, 924.

80 *See, e.g.*, GRAY, *supra* note 5.

81 *See* Engler, *supra* note 5, at 2016–17.

82 *See* Best et al., *supra* note 8, at 372–78 (noting that most small claims courts give judges discretion regarding the conduct of trials, and reporting the results of a study of a small claims court where magistrates varied substantially in how they conducted trials, including questioning witnesses, enforcing service of process requirements, and ruling on evidence).

83 *See* Phyllis E. Bernard, *The Administrative Law Judge as a Bridge Between Law and Culture*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 9–12, 18 (2003) (describing Social Security ALJs behaving like civil trial judges and noting that "[i]n many agencies today, administrative litigation is virtually indistinguishable from civil litigation").

lack empirical data to fully understand the levels of formality and informality in administrative courts, not to mention whether administrative law judges are any more adept than state court judges in dealing with pro se parties (and as I have noted throughout this Article, we also lack data on state civil courts).[84] As Part II will explain, the court that is the subject of this study is a relatively formal administrative court.

A radically different proposal, advanced by Jessica Steinberg, rejects the informal, procedural adjustment approach in favor of a new regime of procedural and evidentiary rules designed for pro se courts.[85] Steinberg argues for new rules that would place the burden of case processing and factual development on courts and judges rather than on parties. In this vision, courts would be responsible for advancing litigation by, for example, facilitating discovery and ensuring relevant information is put on the record during evidentiary hearings. Steinberg's proposal would turn the current system of party-driven adjudication on its head, from the inception of a complaint through the enforcement of a judgment. In the courtroom, her proposal would see pro se tribunals promulgate new rules allowing the admission of all evidence, except privileged evidence, and charging judges with an affirmative duty to make evidentiary determinations based on weight rather than admissibility.[86] Steinberg argues judges are well-equipped to assess reliability and relevance to determine the weight of evidence; where a judge has such a duty, pro se litigants will be relieved of the burden of formally introducing evidence or formally objecting to an opponent's evidence.[87]

2. Judges Explaining Law and Process

Most pro se litigants lack the legal expertise necessary to navigate a civil hearing. Thus, one obvious way to help pro se parties is to give them some of the information they lack via education about law, procedure, and the hearing process. During a civil hearing or trial, a pro se litigant without a lawyer or other advocate has, practically speaking, no source of information other than the judge.[88] Given this, the idea that judges should play a role in pro-

84 *See, e.g.*, Best et al., *supra* note 8, at 372–78 (finding wide variation in how individual small claims judges conduct trials).

85 *See* Steinberg, *supra* note 11, at 947–63; *see also* Steinberg, *supra* note 1.

86 *See* Steinberg, *supra* note 1, at 798–99.

87 *See id.* at 799. Steinberg's proposal also includes a duty for judges to develop the factual record, which I discuss separately below.

88 Russell Engler has noted, "How active a judge must be depends in part on how much assistance the litigant receives before appearing before the judge." Engler, *supra* note 15, at 386. Some courts offer pro se litigants self-help resources, such as form pleadings, clerks trained to assist pro se litigants, legal information and advice sources, and limited lawyer representation, to name a few. However, as a general matter, these resources are offered before, but not during, a court appearance. *See* Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295, 295–96 (2009); *see also* DEBORAH SAUNDERS ET AL., CTR. ON COURT ACCESS TO JUSTICE FOR ALL, ACCESS BRIEF: SELF-HELP SERVICES 1–3 (2012), http://cdm16501.contentdm.oclc.org/utils/getfile/collection/accessfair/id/263/filename/264.pdf. *See generally* SELF-REPRESENTED LITIG. NETWORK, BEST

viding information to pro se litigants is widespread in the access to justice literature and is often a starting point for conversations about a changed judicial role.

In the context of a civil hearing or trial, a judge might provide information about the process of the hearing, evidence, substantive legal rules, burdens of proof, and the issues to be decided in the hearing.[89] Of these, a fundamental practice cited in the literature is the judge's role in ensuring every party knows how the hearing will proceed, which might include the order of testimony, the type of evidence that will be considered, how to make an objection, and whether the judge will rule from the bench or in writing.[90]

The notion that judges can serve as sources of information for pro se parties is grounded in the idea that giving information does not constitute giving legal advice or serving as an advocate.[91] Of course, the line between legal information and legal advice is inevitably blurry and difficult (to say the least) for even judges to navigate.[92] Thus, reform proposals focus on a judge's role in explaining the rules of the game without suggesting what a party's next moves should be. For example, one compilation of best practices by the American Judicature Society suggests the following framework for a judge's role in explaining procedure: "Instruct a self-represented litigant how to accomplish a procedural action he or she is obviously attempting or direct them to resources that will provide instructions. Do not tell a self-represented litigant what tactic to use, but explain how to accomplish the procedural move he or she has chosen."[93]

Implicit in the recommendation that judges have a role to play in explaining law and process is the idea that a layperson will be able to take the information she is given and apply it in a useful way in presenting or defending her case. This notion has not been empirically tested and there is reason to question its soundness. First, we know that legal expertise is multifaceted and strongly built on experience and education, which a pro se party likely lacks by definition.[94] Second, research on lay advocates who are permitted to practice in certain court settings suggests that "while experienced nonlawyers

---

PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, ISSUES FOR EXPLORATION, EXAMPLES, CONTACTS, AND RESOURCES (2008), https://www.srln.org/system/files/attachments/SRLN%20Best%20Practices%20Guide%20%282008%29.pdf (listing court-based self-help services).

89 *See* ZORZA, *supra* note 5, at 75–76, 82; Baldacci, *supra* note 5, at 671–73.

90 *See* GRAY, *supra* note 5, at 26–28.

91 *Id.* at 2. Others have noted the lack of a meaningful distinction in doctrine and practice between legal advice (generally impermissible) and legal information (permissible). *See* Engler, *supra* note 5, at 1994 ("The ease with which courts announce the rule prohibiting advice-giving belies the difficulties in understanding and applying the rule.").

92 *See* Goldschmidt, *supra* note 5, at 613 (describing how the line between legal information and legal advice has become "blurred" in recent years).

93 *See* GRAY, *supra* note 5, at 32.

94 Legal expertise includes a substantive element (knowledge of formal law and procedure) and a relational element (ability to navigate relationships with people in the court), and these two elements combined constitute strategic expertise (a context-based synthesis

can help parties through their expertise with common court procedures and basic substantive legal concepts, they are not equipped to challenge judges on contested issues of substantive or procedural law in individual cases."[95] Finally, research on unbundling, or limited-scope assistance from a lawyer, presents a corollary example. In unbundling, a lawyer provides a client with a limited service, such as offering legal advice or preparing pleadings. The client then goes on to complete the case pro se. The limited research on unbundling suggests it may not help improve outcomes for pro se parties, though it does help promote pro se parties' senses of procedural justice.[96] An open question for future research is whether judges' explanations have any effect on party choices or experiences.

3. Judges Eliciting Information From Litigants

Pro se parties face a major barrier in not knowing what information is (and is not) legally relevant. Even a litigant educated about the elements of substantive law is unlikely to meaningfully appreciate how that law translates to facts. As a result, a layperson who finds herself in the midst of a civil matter may miss the opportunity to offer critical facts or may unwittingly introduce damaging facts because she does not know what is important as a matter of law.[97]

In response, some reformers argue that judges should play a role in eliciting information from pro se parties, particularly information that develops the factual record. This proposal reflects a key critique of judicial passivity; it risks cases being decided based upon incomplete information. Arguments in support of judges eliciting information stress the importance of deciding cases on the merits, as well as ensuring pro se parties are not unfairly prejudiced by their lack of knowledge about substantive law.[98]

All trial judges have discretion to ask questions of witnesses to develop facts; given that, the notion that judges should ask questions of pro se litigants should be relatively uncontroversial. Indeed, appellate courts have supported judges asking questions to develop the record, to clarify facts, and to authenticate evidence.[99]

---

of relational and strategic expertise). *See* Shanahan et al., *supra* note 3, at 489–92 (describing strategic expertise); *see also* Sandefur, *supra* note 4, at 911–12.

95 Carpenter et al., *supra* note 8, at 1.

96 *See* Steinberg, *supra* note 4; *see also* Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825 (2012) (offering a bibliography and three case studies on unbundling, and examining the unbundling movement).

97 *See* Steinberg, *supra* note 11, at 904–05.

98 *See* GRAY, *supra* note 5, at 2.

99 *Id.* at 34 (finding through a series of cases involving pro se parties that judges "may ask questions that clarify and develop the issues to be decided, identify or admit evidence and clarify issues for the self-represented litigant, clarify the litigant's own questions and witnesses' responses to them, and elicit material facts" (footnotes omitted)). Gray cites to several cases that illustrate a judge's "inherent" discretion to ask questions. *See, e.g.*, *id.* at 33–34 (first citing United States v. Pinkey, 548 F.2d 305, 308 (10th Cir. 1977); then citing

Prominent access to justice scholars, including Russell Engler and Deborah Rhode, have argued judges should assume responsibility for developing a full factual record.[100] Engler supports judges calling witnesses and conducting direct examinations where necessary and argues they should review pleadings to ensure the full range of possible claims and defenses have been asserted.[101] Steinberg takes these arguments a step further. She makes the case that judges should have an affirmative duty to develop the record in pro se cases.[102] Steinberg argues judges should be required to identify the legal issues to be decided in a case and to question parties and witnesses to develop the facts necessary for a legal determination.[103]

At this time, the literature on active judging is mixed. We do not have sufficient empirical data to make categorical statements about how judges behave in pro se cases, let alone studies that tell us about the effectiveness of particular active judging practices. Existing research suggests that jurisdictions, courts, and individual judges differ in meaningful ways in how they apply the law and enforce procedure as a general matter, as well as how they engage with pro se litigants. Given that research to date suggests variations in judicial behavior, even in areas as fundamental as the application of settled law, I expect to find some variation across the judges in this study, both in terms of which practices they engage in, as well as *how* they engage in those practices. It is possible the variations will be quite striking, given what other researchers have found in terms of intracourt differences among judges. The next Part, which describes the study site, including the court itself, the judges, and the law governing unemployment insurance appeals, offers further insights regarding expectations for the qualitative interviews, including expectations for the particular practices the judge might engage in and why. As the next Part explains, judicial ethics and appellate caselaw in the study site suggest that all three dimensions of active judging will likely be present in the court, with variations in whether and how those dimensions appear across the judges.

II. Data and Methodology

The preceding review of the literature suggests this study can contribute to our understanding of active judging by identifying how judges think about their role in pro se cases, whether they are implementing active judging, the

Simon v. United States, 123 F.2d 80, 83 (4th Cir. 1941); then citing State v. Hutch, 861 P.2d 11, 15 (Haw. 1993); then citing Lapeyrouse v. Barbaree, 836 So. 2d 417, 423 (La. Ct. App. 2002); then citing Paulding-Putnam Coop., Inc. v. Kuhlman, 690 N.E.2d 52, 56 (Ohio Ct. App. 1997); then citing Thaler & Thaler v. Rourke, 629 N.Y.S.2d 855, 857 (App. Div. 1995); and then citing State v. Mellen, 583 P.2d 46, 48 (Utah 1978)).

100 *See* Engler, *supra* note 5, at 2029; Rhode, *supra* note 5, at 901; *see also* Baldacci, *supra* note 5, at 697.

101 *See* Engler, *supra* note 5, at 2028–29.

102 *See* Steinberg, *supra* note 11, at 947.

103 *Id.* at 949–50.

nature of their practices, and the factors that shape those practices.[104] To answer these questions, this Article draws on semistructured qualitative interviews with administrative law judges who preside over a predominantly pro se docket of unemployment insurance appeals. The parties are workers seeking benefits and employers challenging workers' qualifications for benefits. This Article is part of a broader study of the District of Columbia Office of Administrative Hearings (OAH) that includes one of the largest data sets collected in a single civil justice setting in recent years. In addition to the qualitative interviews with judges presented in this Article, the broader study includes quantitative data from 5,150 unemployment appeals filed at OAH and qualitative interviews with the representatives who practice in the court.[105]

A. Data

This Section describes the study site, including the court, the parties, and the law and procedure of unemployment appeal hearings. This includes significant details about substantive law and procedure, as this information is essential to understanding the active judging practices used by judges in this court. This Section also includes information about District of Columbia judicial ethics, which provide more significant support for active judging compared to other jurisdictions. Finally, this Section covers District of Columbia appellate caselaw that supports active judging in unemployment appeals.

1. The Court

The Office of Administrative Hearings is an independent hearing body created in 2001 by the District of Columbia Council to streamline and improve the adjudication of cases arising from District agencies.[106] OAH's unemployment insurance appeals docket is the focus of this study. The adjudicators in these cases are appointed administrative law judges.[107]

104 For empirical studies of judging practices in lower courts, see *supra* note 7.

105 The broader study, of which this Article is a part, is informed by Professor Shanahan's and my experience representing clients in unemployment cases at OAH. Though we did not conduct formal observations of hearings for this study, we have five years of collective experience at OAH, including representing clients in more than 100 cases collectively. Our interest in conducting this study grew out of our experiences at OAH, and relationships with judges and staff formed during the course of that work that made the study possible.

106 OAH began operating in 2004. COUNCIL FOR COURT EXCELLENCE, OFFICE OF THE D.C. AUDITOR, ADMINISTRATIVE JUSTICE IN THE DISTRICT OF COLUMBIA: RECOMMENDATIONS TO IMPROVE DC'S OFFICE OF ADMINISTRATIVE HEARINGS 14 (2016).

107 Throughout this Article, I will refer to the study subject as judges. ALJs are appointed by the Commission on Selection and Tenure (COST), first for two-year terms and then for six-year terms. *See* D.C. CODE § 2-1831.08(c)(2) (2016).

COST consists of three voting members, with one member appointed by the Mayor, one member appointed by the Chairman of the DC Council, one member appointed by

The typical images of informality that come to mind when one thinks of an administrative court (adjudicators without robes, parties seated around a conference table) are not representative of OAH. Across the country, administrative hearing bodies vary in levels of formality with respect to physical appearance, professional culture, and adherence to legal processes.[108] As discussed earlier, some administrative courts, like OAH, are more similar in their procedural norms and culture to a court of general jurisdiction.[109]

In 2011, two years before this study began, a complete renovation of its physical space dramatically changed the functionality and appearance of the court. OAH judges now sit at daises in traditional-looking courtrooms. The judges wear formal robes, and parties sit at separate counsel tables. The hearing rooms include a gallery and witness box.[110] By contrast, many states' unemployment appeal hearings are held exclusively by telephone or in informal conference rooms.[111]

In addition to formality in appearance, unemployment hearings at OAH are also relatively procedurally formal. Unemployment hearings follow hearing processes outlined in District law and are subject to formal procedural rules.[112] Previous research has shown that procedures play an important role in unemployment appellate litigation, but that pro se parties are less likely to use procedures than representatives.[113]

In recent years, OAH has made changes to increase access to justice. OAH created a self-help Resource Center that provides "how to" materials, including materials on unemployment appeal hearings.[114] The court also

---

the Chief Judge of the Superior Court of the District of Columbia, and two non-voting members—the Chief ALJ and a representative appointed by the Attorney General. COUNCIL FOR COURT EXCELLENCE, *supra* note 106, at 16 (citation omitted); *see also* D.C. CODE § 2-1831.07(a).

108 Scholars have noted that ALJs and trial court judges face similar challenges in attempting to assist and navigate their role vis-à-vis pro se litigants, and that we lack empirical data on the relative formality of administrative courts and the ability of administrative law judges to skillfully manage pro se litigation. *See, e.g.*, Baldacci, *supra* note 5, at 447–48. For other studies of administrative courts, see KRITZER, *supra* note 17, at 24; Greiner & Pattanayak, *supra* note 17. For a previous study of OAH, see Portillo, *supra* note 7.

109 *See supra* notes 80–83 and accompanying text.

110 Nina Schuyler, *The Challenges and Rewards of an Administrative Law Judge*, S.F. ATT'Y, Spring 2010, at 39, http://www.sfbar.org/forms/sfam/q12010/administrative-law-judges.pdf.

111 *See generally id.*

112 *See* D.C. Mun. Regs. tit. 1, §§ 2980–99 (2016); *see also* Portillo, *supra* note 7, at 257 (concluding, based on a sociological study of forty-five unemployment insurance hearings at OAH that "the hearing runs like traditional courtroom litigation").

113 *See* Shanahan et al., *supra* note 3, at 470.

114 COUNCIL FOR COURT EXCELLENCE, *supra* note 106, at 51–55; OFFICE OF ADMIN. HEARINGS RES. CTR., UNEMPLOYMENT INSURANCE APPEALS, https://oah.dc.gov/sites/default/files/dc/sites/oah/publication/attachments/UI-What_to_Expect_at_a_Hearing-Booklet.pdf.; *OAH Resource Center*, DC.GOV, http://oah.dc.gov/service/oah-resource-center (last visited Oct. 20, 2017) (noting that the Resource Center has volunteers only part time during the week; parties are present at OAH throughout the week).

provides information about free legal services to all parties as part of the scheduling order.[115]

a. The Judges

Almost all judges in the sample have a background in litigation work, though the nature of that experience varies. Many come from small practices, some from large firms, and others from government service. Most worked exclusively in civil law, while some had criminal practice experience. Almost all confirmed during the interviews that they had experience appearing in court during their time in practice, and almost all engaged in litigation at some point in their careers prior to taking the bench. A few had prior experience as administrative law judges in other states before coming to OAH. Given the judges' litigation and trial experience, it is likely that their starting-point understanding of the judicial role was that of the traditional, passive judge.

b. The Parties

On one side of an unemployment appeal is a worker who has an obvious stake in the litigation because she has been separated from previous employment and is seeking unemployment benefits.[116] The other party is the worker's former employer who has an incentive to contest the request for benefits because the employer contribution to payroll taxes is based in part on the number of former workers who have received unemployment insurance.[117]

The majority of workers and employers at OAH have no representation, but workers are most likely to be without counsel. A full 82% of workers have no representation, compared to 58% of employers.[118] Looking at representation at the case level, neither party has representation in 49% of unemployment appeals.[119]

As self-representation rates suggest, workers are more likely to be the classic "one-shot" litigants and "have nots" first described by Mark Galanter, while employers are more likely to be "repeat players" and fall into Galanter's category of "haves."[120] Employer-parties include a full range of small and large businesses, nonprofit organizations, and government agencies.

115 OFFICE OF ADMIN. HEARINGS RES. CTR., *supra* note 114, at 2.

116 This study does not include demographic information about the parties. Pursuant to a confidentiality agreement with OAH, this study did not collect party names or any demographic information. However, it is possible to describe the parties in general terms based on research in other jurisdictions and observations based on my experience litigating unemployment appeals at OAH.

117 *See* D.C. CODE § 51-103 (2016).

118 *See* Carpenter et al., *supra* note 8, at 10.

119 *Id.*

120 *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–107 (1974) (classifying parties in civil litigation as "repeat players" or "one-shotters" and describing how better-resourced repeat players,

Though a worker from any industry or profession may seek unemployment benefits, workers in unemployment appeal cases are disproportionately low-income and people of color.[121] Workers in professional and higher-wage jobs have more stable employment prospects compared to workers in low-status, low-wage jobs.[122] Those in the latter group are more likely to be terminated or to leave their job due to work conditions, health conditions, family obligations, transportation problems, or other circumstances beyond their control.[123] They are also less likely to qualify for unemployment benefits and are disproportionately represented in the ranks of those who have their initial application for benefits denied and find themselves fighting for benefits in an appeal hearing.[124]

For the subset of workers and employers who have access to legal representation, options include fee-based and free programs. Worker representation tends to come from free legal services programs that include law school clinical education programs, a service run by the District of Columbia government called the Claimant Advocacy Program, and the Legal Aid Society.[125] The vast majority of employer representatives are nonlawyers who contract with human resources companies.[126] Some employers may use in-house

---

which he calls the "haves," gain advantage in litigation against one-shotters—the "have-nots"); Shanahan et al., *supra* note 3, at 484–89 (describing the balance of power in unemployment appeals at OAH).

121 AUSTIN NICHOLS & MARGARET SIMMS, URBAN INST., RACIAL AND ETHNIC DIFFERENCES IN RECEIPT OF UNEMPLOYMENT INSURANCE BENEFITS DURING THE GREAT RECESSION (2012), https://www.urban.org/sites/default/files/alfresco/publication-pdfs/412596-Racial-and-Ethnic-Differences-in-Receipt-of-Unemployment-Insurance-Benefits-During-the-Great-Recession.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, UNEMPLOYMENT INSURANCE: LOW-WAGE AND PART-TIME WORKERS CONTINUE TO EXPERIENCE LOW RATES OF RECEIPT (2007), http://www.gao.gov/assets/270/266500.pdf.

122 GREGORY ACS & AUSTIN NICHOLS, URBAN INST., LOW-INCOME WORKERS AND THEIR EMPLOYERS: CHARACTERISTICS AND CHALLENGES (2007), https://www.urban.org/sites/default/files/alfresco/publication-pdfs/411532-Low-Income-Workers-and-Their-Employers.pdf; VICTORIA SMITH & BRIAN HALPIN, CTR. FOR POVERTY RESEARCH, LOW-WAGE WORK UNCERTAINTY OFTEN TRAPS LOW-WAGE WORKERS, http://poverty.ucdavis.edu/sites/main/files/file-attachments/smith_cpr_policy_brief_employability.pdf.

123 *See* OXFAM AM., HARD WORK, HARD LIVES: SURVEY EXPOSES HARSH REALITY FACED BY LOW-WAGE WORKERS IN THE US (2013), https://www.oxfamamerica.org/static/media/files/low-wage-worker-report-oxfam-america.pdf; Christine Vestal, *An Unemployment Insurance Balancing Act*, STATELINE (June 1, 2010), https://web.archive.org/web/20140113030802/http://www.pewstates.org/projects/stateline/headlines/an-unemployment-insurance-balancing-act-85899374819 (finding low-wage and part-time workers are less likely to qualify for unemployment benefits than other workers).

124 *See* Vestal, *supra* note 123; *see also* Marc Lifsher, *Jobless Benefits Wrongly Denied*, L.A. TIMES (Feb. 26, 2014), http://articles.latimes.com/2014/feb/26/business/la-fi-edd-appeals-20140226 (highlighting the challenges California applicants wrongly denied benefits face in navigating the appeals process).

125 For more on worker representation, see Shanahan et al., *supra* note 3, at 476.

126 Nonlawyer representation is permitted by OAH's procedural rules. *See* D.C. Mun. Regs. tit. 1, § 2982.1 (2016).

counsel, in-house human resources staff, private attorneys, or the District's free Employer Advocacy Program.[127]

2. Unemployment Law and Procedure

Unemployment insurance is a joint federal-state program administered by the states and funded through employer payroll taxes. The Department of Labor (DOL) provides federal oversight over the program and the Department of Employment Services (DOES) is the District agency responsible for administering it.

A worker in the District of Columbia first applies for unemployment benefits by filing a claim with DOES, where a claims examiner makes an initial determination. In common unemployment law parlance, workers are known as "claimants" because they filed the initial application for benefits, but either party may appeal the DOES decision to OAH. Unemployment appeals at OAH are reviewed de novo; the judge must make factual and legal determinations without regard to the DOES determination.[128]

This study focuses on hearings involving one slice of unemployment insurance law: a worker's qualification for benefits.[129] A worker may be disqualified for one of two reasons: termination for misconduct or voluntary resignation without good cause.[130] Workers are presumed qualified for benefits regardless of who appealed the underlying determination. The employer always bears the initial burden of proving disqualification.[131]

a. Procedural and Evidentiary Rules

The procedural rules—including rules of evidence—that govern unemployment hearings are formalized in District law.[132] These rules govern prehearing, hearing, and post-hearing procedures. This discussion focuses on hearing procedures.[133]

A combination of District law and judicial discretion govern the hearing process in unemployment appeals. At the hearing, assuming both parties appear, the employer first presents its case-in-chief, followed by the worker,

127 For more on employer representation, including a comparison of lawyer and nonlawyer advocates at OAH, see Carpenter et al., *supra* note 8.

128 However, it is worth noting that the DOES determination is always part of the case file, and, as a practical matter, can be reviewed by the judge in advance of the hearing.

129 *See* D.C. Mun. Regs. tit. 1, § 2821.

130 *See* D.C. Code § 51-110(a)–(b) (2016).

131 *Id.*

132 In this article, I use the terms "procedure" or "procedural rules" to refer to OAH's written procedural rules, including those governing evidence.

133 For an empirical examination of prehearing procedures at OAH and their relationship to judging and access to justice, see Shanahan, *supra* note 22.

should the worker decide to present evidence.[134] The employer may offer a rebuttal case. Both parties have the right to cross-examine witnesses.[135]

Discovery is limited in unemployment appeal litigation, but parties must disclose affirmative evidence, including documents and witness lists, three days in advance of a hearing.[136] In the hearings, the Federal Rules of Evidence are advisory, not binding, and hearsay is admissible.[137] However, judges are required to make findings as to the weight of any hearsay evidence.[138] Witnesses with personal knowledge are critical in unemployment appeals because hearsay cannot serve as substantial evidence sufficient to sustain a judgment in the face of conflicting nonhearsay testimony.[139]

b. Burdens of Proof

Burdens of proof play an important role in unemployment litigation.[140] Given the legal standard, if a worker appears at the hearing and the employer fails to appear, the worker wins automatically without a hearing on the merits.[141] During a hearing, if the employer does not meet its burden, the judge may find for the worker at the close of the employer's case.[142]

As my coresearchers and I found in a previous article, the burden of proof can benefit workers if marshaled strategically, or it can harm them when the reverse is true.[143] We found that the use of procedures, including introducing evidence, correlates with better case outcomes for employers, while use of procedures correlates with worse case outcomes for workers.[144] Because workers are in a defensive posture, a worker who takes the stand and offers testimony or documentary evidence risks helping her employer meet its burden.[145]

---

134 *See* D.C. CODE § 51-111 (providing guidelines for hearing procedure); *see also* D.C. Mun. Regs. tit. 1, § 2822.4–.5.

135 *See* D.C. Mun. Regs. tit. 1, § 2821.5.

136 *See id.* § 2985.1 ("At least three (3) business days before a hearing in an unemployment compensation case, a party shall serve on all other parties and file with the Clerk the following: (a) A list of the witnesses, other than a party, whom the party intends to call to testify; and (b) A copy of each exhibit that the party intends to offer into evidence, other than exhibits to be used solely for impeachment or rebuttal.").

137 *See id.* § 2821.12–.13.

138 *See id.* § 2821.12.

139 *See* D.C. Mun. Regs. tit. 7, § 312.9–.10 (2016); *see also* Coal. for the Homeless v. D.C. Dep't of Emp't Servs., 653 A.2d 374, 377 (D.C. 1995).

140 *See* Shanahan et al., *supra* note 3, at 477.

141 *See* D.C. Mun. Regs. tit. 1, § 2822.4; *see also* Rodriguez v. Filene's Basement Inc., 905 A.2d 177, 180 (D.C. 2006).

142 *See* D.C. Mun. Regs. tit. 1, § 2822.5.

143 *See* Shanahan et al., *supra* note 3, at 509–10.

144 *See id.* at 497–505.

145 *See id.* at 509–10.

3. Active Judging in Unemployment Appeals

Two factors suggest this research will show OAH judges engaging in active judging and give us some hints about the particular practices they might employ. First, the findings of a 2010 study by a sociologist suggest OAH judges use active judging techniques when dealing with pro se litigants.[146] Second, controlling law, including judicial ethics, appellate decisions, and evidentiary rules, supports it.

In 2012, the District of Columbia followed the lead of the ABA, which revised the Model Code of Judicial Conduct to provide that a judge does not violate Rule 2.2's requirement of judicial impartiality if she makes "reasonable accommodations" to ensure pro se litigants have their cases fairly heard.[147] The "reasonable accommodations" language, at a minimum, permits judges to depart from the passive judicial norm, but provides no guidance on the proper scope and nature of such departures.[148] However, the District of Columbia went further than the ABA and other states through additional language on a judge's obligations in pro se matters. In a comment to Rule 2.6, which covers a judge's responsibility to ensure parties have the right to be heard, the District added language stating that a judge has an "affirmative" duty in this context.[149] The comment then repeats the "reasonable accommodations" language of Rule 2.2 and articulates what such accommodations might include: explaining the proceedings, procedural rules, and judicial rulings; asking "neutral" questions; adjusting the order of taking evidence; and avoiding legal jargon.[150] Thus, in the District, all judges have permission, as a matter of ethics, to engage in the three dimensions of active judging. That said, obvious questions still remain about the scope and nature of those practices.

Turning to appellate law, the District's highest court, the D.C. Court of Appeals (DCCA), has been active in refining unemployment law in recent years, including providing limited guidance on the permissible scope of judi-

146 Portillo, *supra* note 7. The study gives examples of the active judging practices the researchers observed in cases where both parties are unrepresented, including judges asking questions to elicit testimony, but does not give examples of how judges behaved in cases in which one party was represented and the other was not, beyond noting generally that judges "reigned [sic] in their discretion" and "took on a more passive tone" when one party was represented. *Id.* at 268. The nature of the study's reported observations make it difficult to say with any certainty what judges were actually doing in cases with imbalanced representation. The study does clearly suggest judges take at least *some* steps to assist pro se litigants as a general matter, and certainly in cases where both parties are unrepresented.

147 *See* CODE OF JUDICIAL CONDUCT Canon 2 R. 2.6, cmt. 1A (D.C. COURTS 2012). According to the American Bar Association, thirty-five states had adopted the Revised Model Code of Judicial Conduct as of August 22, 2016. *See State Adoption of Revised Model Code of Judicial Conduct*, ABA (Aug. 22, 2016), http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html.

148 *See, e.g.*, Engler, *supra* note 15, at 370; Jona Goldschmidt, *Judicial Ethics and Assistance to Self-Represented Litigants*, 28 JUST. SYS. J. 324, 327 (2007).

149 *See* CODE OF JUDICIAL CONDUCT Canon 2 R. 2.6, cmt. 1A.

150 *See id.*

cial interventions in pro se cases. Two aspects of appellate review in OAH appeals are unusual. First, OAH appeals go directly to the highest court of the District, without any intermediate review. Second, the fact that regular appellate court review is even possible in the District's unemployment cases is a remarkable thing in the world of poverty law. An emerging critique of lower courts considers the extent to which judges issue decisions that have no obvious connection to the controlling legal standard and are not required to put those decisions in writing, making decisions difficult both to interpret and to appeal.[151] Such practices have been documented in traditional areas of poverty law, such as rental housing cases and domestic violence cases.[152] In contrast, unemployment judges at OAH must issue written opinions stating the factual and legal basis for their decisions.[153] This requirement allows the appellate court to engage in meaningful scrutiny.

In three cases decided between 2008 and 2010, the DCCA acknowledged active judging practices in unemployment appeals. The issues addressed in these cases mirror the three dimensions of active judging discussed in Part I: adjusting procedures, explaining the law and hearing processes, and eliciting information from parties.

In the dimension of explaining law and process, the DCCA has instructed OAH judges to clearly describe the burden of proof and its implications to a pro se litigant.[154] In the same decision, the court was careful to note that it does not endorse judges giving parties "tactical advice," but it did

151 Though we lack empirical knowledge of the extent to which law does or does not guide the proceedings and decisions in lower courts, scholars have studied lower courts where law seems to play a limited role in judicial decisionmaking. *See, e.g.*, Bezdek, *supra* note 7 (finding that judges rarely ask questions establishing the required burden of proof but instead treat the hearings in a more summary fashion); Cotton, *supra* note 9, at 67 (describing a housing court where "the law seemingly played little role in how the judges disposed of these cases" and "[j]udges seldom made explicit reference to the law or explained their decision-making in terms of the law").

152 *See* Cotton, *supra* note 9, at 67.

153 *See* D.C. CODE § 2-509(e) (2016). The DCCA has repeatedly admonished the agency that in the conduct of its proceedings it must comply with the Administrative Procedure Act. *See* Wash. Times v. D.C. Dep't of Emp't Servs., 530 A.2d 1186, 1190 (D.C. 1987); Wallace v. Dist. Unemployment Comp. Bd., 289 A.2d 885, 886–87 (D.C. 1972).

154 *See* Beynum v. Arch Training Ctr., 998 A.2d 316, 320 (D.C. 2010); Berkley v. D.C. Transit, Inc., 950 A.2d 749, 758 (D.C. 2008); Rhea v. Designmark Serv., Inc., 942 A.2d 651 (D.C. 2008). In *Berkley*, the employer did not appear at the evidentiary hearing, a situation in which the worker bears no burden of proof and need not produce any evidence in order to prevail. 950 A.2d at 752. During the hearing, the judge made statements about the burden of proof that led the worker to believe she needed to put evidence on the record, including stating, "[I]f you choose to testify, you can meet your burden." *Id.* at 753. As a result, the worker testified, and in doing so, provided evidence that led her to lose the case. *Id.* at 755. The DCCA found that the judge prejudiced the worker through a "confusing and erroneous explanation of the burden of proof." *Id.* at 759. The court noted that the burden of proof "may well be incomprehensible to a *pro se* litigant." *Id.* at 757. In the decision, the court sent a clear message that OAH judges must accurately explain the burden of proof and its effect on pro se litigants. *See id.* at 758.

not define what might constitute such advice.[155] The court also gave OAH judges permission to elicit information from pro se parties where necessary to gather "material facts."[156] Finally, the court found that strictly applying "procedural technicalities" is not always appropriate in pro se litigation.[157]

In its decisions on active judging, the DCCA has focused on two key issues: the "remedial" nature of the unemployment statute and the reality of pro se litigation. The court found that these two issues place unemployment appeal hearings in a special category where some exceptions to traditional procedures may be appropriate.[158] In this context, the court emphasized that workers are usually the party bringing the fewest resources to litigation.[159] Yet the court takes pains not to articulate the full scope of a judge's role in assisting pro se parties, consistent with the cautious approach commonly taken by appellate courts.[160]

The court's decisions on active judging achieve two ends. First, they identify limited situations in which OAH unemployment judges are clearly permitted to intervene in pro se litigation. Second, they more broadly signal that while the appellate court has not considered every possible situation where active judging is permitted, and may not be ready to articulate a comprehensive doctrine on active judging, the door is open for OAH judges to assist pro se litigants in situations beyond those explicitly approved by the DCCA to date.

Finally, OAH's procedural and evidentiary rules incorporate elements of Steinberg's proposed reforms. Namely, the Federal Rules of Evidence provide guidance in unemployment appeals, but are not binding; hearsay evidence is expressly admissible; and judges are required to assess reliability to

155 *See Berkley*, 950 A.2d at 758.

156 *See Beynum*, 998 A.2d at 320. In *Beynum*, the DCCA explicitly instructed OAH judges to ask questions of pro se witnesses when needed. *Id.* The decision recognizes that most workers in unemployment litigation are pro se and states it would be unreasonable to set "too high a threshold" for these parties to articulate material facts. *Id.* The court ultimately instructs unemployment judges to, if necessary, "probe" witnesses for "further clarification of material facts." *Id.*

157 *Rhea*, 942 A.2d at 655–56. In *Rhea*, the court, largely in dicta, articulated the need for flexibility in the application of procedural rules to pro se litigants. *See id.* This case asked whether the OAH judge and the appellate court itself could properly consider an argument that was never raised by the pro se worker, where that argument, if accepted, was dispositive in favor of the worker. *Id.* at 656. The court answered this question affirmatively and explained that the unemployment compensation statute "relies largely on lay persons, operating without legal assistance, to initiate and litigate administrative and judicial proceedings" and stated the principle that "[p]rocedural technicalities are particularly inappropriate" in this statutory context. *Id.* at 655 (quoting Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1299 (D.C. 1990)) (internal quotation marks omitted).

158 *See id.* at 655 (noting that "the unemployment compensation statute is remedial in character").

159 *See id.*

160 *See* Engler, *supra* note 15, at 375–76; Engler, *supra* note 5, at 2013–14; Steinberg, *supra* note 11, at 927.

determine the weight of evidence and to articulate their findings.[161] This procedural framework gives judges the freedom to consider all available evidence and weigh its authenticity and reliability, and it places the burden of making such determinations squarely on the judge rather than relying on the parties to establish and argue the admissibility of evidence.

Taken together, the factors described above—past research, ethics rules, appellate court decisions, and the burden placed on judges to make evidentiary determinations—suggest the interviews will reveal a group of judges who engage in active judging and see it as part of their role when dealing with pro se parties. In addition, these factors suggest particular practices the judges might employ. The judges are likely to be flexible about procedures, adjusting them to accommodate pro se parties, as the appellate court has given them permission, albeit without any particular guidance on the bounds of this practice. They are likely to routinely help parties authenticate and articulate the relevance of evidence pursuant to the court's procedural rules. They will likely also explain law, procedures, and hearing processes to pro se parties, as this practice is approved by both the DCCA and the District's Code of Judicial Conduct. I expect the judges will place particular emphasis on explaining the burden of proof and its implications to pro se workers because the appellate court has specifically directed them to do so. I also expect most of the judges to ask questions to elicit factual information given that the DCCA and the Code of Judicial Conduct have allowed judges to do so when necessary.

Beyond this, I expect the judges will see themselves as having some room to experiment and try different active judging practices, given that the DCCA has repeatedly emphasized the importance of judges taking special care not to leave pro se parties to fend entirely for themselves. However, we also know that all of the judges worked in litigation before they took the bench, and that most have had courtroom experience. Inevitably, these experiences working within the context of the adversary system will influence their views of what is appropriate and fair in the judicial role. Finally, as discussed in Part I, I still expect to see some variations in whether, and in what ways, OAH judges engage with pro se litigants for two main reasons. First, the fact that previous research on lower courts shows wide variations in the application of law, judicial style, and treatment of pro se parties, even across judges in the same court, suggests variations will exist across judges at OAH. Second, though the District's judicial ethics and the DCCA have given more substantial guidance on judicial engagement with pro se parties than is available in most jurisdictions, much of this guidance is broad and flexible enough to be open to interpretation by individual judges. Perhaps the only exception is the DCCA's strong admonishment that unemployment judges must explain the burden of proof to pro se workers and ensure they understand it. Beyond this area, individual judges have discretion to decide when to adjust procedures; which procedures to adjust; how to, and the extent to which they

161 *See* D.C. Mun. Regs. tit. 1, § 2821.12–.13 (2016); *id.* tit. 7, § 312.9–.10.

should, explain law and hearing process; and when and how to elicit information from pro se parties.

B. Methodology

This study uses qualitative research methods; namely, semi-structured qualitative interviews. This approach is particularly appropriate because this research aims to understand not only whether judges engage in active practices, but more importantly, what practices they engage in and why.[162] As compared to survey or experimental data, qualitative interviews offer a more nuanced and comprehensive view of social relationships, processes, and meaning.[163] Qualitative studies, like this one, typically rely on small sample sizes and in-depth study of subjects.[164]

To identify subjects for the qualitative interviews, I limited the study sample to sixteen judges who heard unemployment appeals between January 2011 and June 2013, the period of data collection in the broader study. After obtaining permission from the Chief Administrative Law Judge and the Principal Unemployment Insurance Judge at OAH, I contacted all sixteen judges via email to request an interview. Twelve judges responded affirmatively.[165] All but two of the judges were still on the bench at OAH at the time of their interview, though not all were still hearing unemployment appeals. It is unlikely that the results of this study are subject to nonresponse bias. Of the four judges who were contacted but not interviewed, three did not respond at all. I have no reason to believe these three judges differ in meaningful ways from those judges who were interviewed. The fourth judge who was contacted but not interviewed was interested in being interviewed but was working at a new court that did not permit her to participate in the study.

My coresearchers, two research assistants, and I conducted an approximately hour-long telephone interview with each of the twelve judges who agreed to be interviewed.[166] Two researchers participated in each call, with one researcher interviewing and the other taking notes.

The interviews covered five broad topics: judicial style and philosophy, dealing with pro se parties, dealing with different representative types, the role of procedures in a predominantly pro se court, and the role of judges

162 *See generally* HANDBOOK OF QUALITATIVE RESEARCH (Norman K. Denzin & Yvonna S. Lincoln eds., 2d ed. 2000).

163 *See* MICHÈLE LAMONT & PATRICIA WHITE, WORKSHOP ON INTERDISCIPLINARY STANDARDS FOR SYSTEMATIC QUALITATIVE RESEARCH 4 (2005), http://scholar.harvard.edu/files/lamont/files/issqr_workshop_rpt.pdf.

164 *See id.*

165 Given that the qualitative interviews relied on convenience sampling, it is important to note that it is possible that those who agreed to be interviewed are different in some way from those who did not agree.

166 The research protocol was reviewed and approved by the University of Tulsa's Institutional Review Board (IRB). The research was exempt from full board review. Pursuant to IRB requirements, all interview subjects signed an informed consent form. They were not compensated for their participation.

and courts in access to justice efforts.[167] The same protocol was used for all interviews, but the specific issues discussed with each judge varied based on the judge's interests, the flow of the conversation, and the time available. As is true of all qualitative work, the interviews themselves were an iterative process where judges raised issues we had not predicted. In some cases, we chose to incorporate those issues in later interviews. Some issues came up in all or many interviews, while others came up in only a few, and I have indicated this where necessary to aid the reader's understanding. Where any theme was not commonly discussed, I have indicated this explicitly. In reporting the data, I have focused on providing representative quotations and on identifying similarities and differences in the themes the judges raised.

In the research protocol and in the reporting of data in this Article, I have made every effort to preserve the anonymity of the research subjects. In support of this goal, I use female pronouns exclusively and identify each judge using a number. The sample of judges includes both men and women.

III. Discussion and Findings

The findings are presented in three parts that respond to this study's whether, how, and why questions about active judging: (1) whether judges engage in active judging; (2) the variations in active judging practices; and (3) the sources of guidance that influence active judging.[168] Here, I briefly summarize the findings and then discuss them in greater detail.

First, this is a group of judges who clearly see themselves as playing a role in facilitating fairness and access for pro se parties. For all of the judges, this involves some form of active judging.

Second, while the judges share a commitment to assisting pro se litigants through some form of active judging, their views and practices vary across the three dimensions of active judging. In the first dimension, all are willing to adjust procedures to accommodate pro se litigants. In the other two dimensions, explaining law and process and eliciting information, judges' practices vary. The variations appear to be shaped by individual judges' senses of what is fair and also, importantly, by the burden of proof. The results suggest there is no single model of or approach to active judging, or even a one-dimensional spectrum of active versus passive judging. Instead, active judging may be best viewed as multidimensional (see Diagram 1 below). The findings also suggest the existing literature has paid insufficient attention to the needs of parties without the burden of proof and that fairness and fidelity to law may require different treatment for differently situated parties.

167 Given the breadth and depth of the data collected in these interviews, this Article focuses on a particular set of themes present in the data; future articles will explore other themes.

168 The findings are based on how judges describe conducting hearings where at least one pro se litigant is present. In the interviews, judges also spoke about how they conduct hearings when both parties are represented. Where I report how judges think about represented parties or hearings with any form of representation, I note it explicitly.

Third, the variations in active judging exist in this court despite the fact that the judges draw on the same three sources of guidance, namely, the DCCA, the DOL, and one another, through peer observations of hearings. The findings make clear that individual judges, and the bench as a whole, have evolved in their views and practices over time. The three sources of guidance have played a critical role by supporting active judging as a general matter. Yet differences in practice persist across the judges. The findings highlight the extent to which individual judges are left to make their own decisions about how best to facilitate fairness in pro se litigation. They also suggest consistency in active judging may be elusive, and, at the very least, may require more substantial guidance than that offered to judges in this court.

A. Whether to Engage in Active Judging

A baseline question of this study is whether the interview subjects see active judging as part of their role. The answer to this question is a resounding "yes." Each of the subjects described engaging in some form of active judging to ensure fairness for pro se parties. While there are important variations in practices across the judges, as discussed in Section III.B below, it is clear that none of the judges wholly subscribe to the traditional, passive judicial role. The judges used words and phrases like "guide," "intervene," "explain," "level the playing field," "balance the scales," and "more than a referee" in describing their role. Many judges described great sensitivity to the experience of pro se parties. Judge 5 said, "It's scary enough being in court with a lawyer. It's exponentially more scary being there without a lawyer. I want people not to be afraid."

Being an active judge was not the default position for the judges when they began work at OAH. Most described an on-the-job learning curve, both in how to be a judge as a general matter and in how to be a judge in pro se cases. Judge 6's response was characteristic of the group. When asked how she learned to be a judge, Judge 6 said, "By being one."

A number of judges recounted how they transitioned away from the traditional, passive conception of the judicial role toward a more active role. For these judges, the active role is not merely optional, but a necessary part of being a judge in a pro se court. Judge 12 described "unlearning what [I] learned in law school about what a judge is supposed to do" and went on to say that there is "no access to justice in sitting back silently and being a federal judge." Describing how she learned to work with pro se litigants, Judge 1 explained, "[When I started] I really tried—because of our litigants—to think about what it would be like for someone who knew nothing—about legal process, about the law . . . . [I]t was an exercise in imagination."

The DCCA and District judicial ethics allow, and in some situations, require, judges to assist pro se parties. Thus, it is not surprising that the judges at OAH see intervention, as opposed to passivity, as an appropriate part of their role. Given this, it also makes sense that most judges expressed sensitivity to the unique needs of pro se litigants. However, as discussed ear-

lier, these authorities offer limited instruction on the scope and details of judicial interventions.

What practices are appropriate and in what contexts? Should practices differ when both parties, as opposed to only one party, are unrepresented? What role do burdens of proof play? When can procedural rules be adjusted? What are the limits of judges' explanations? How should judges elicit testimony, and are there limits on this practice? What is the role of substantive law? As the next set of findings shows, for the most part, these are questions that individual judges are left to decide for themselves based on their own ideas and intuitions about what is fair and appropriate when dealing with pro se parties, and also by drawing on external guidance.

B. Variations in Active Judging Practices

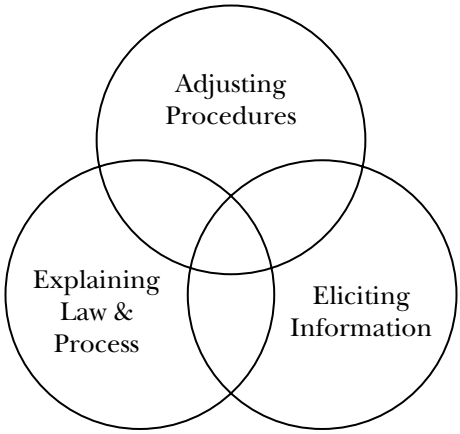
The second question is what judges are doing when they interact with pro se parties. The findings here are mixed, with similarities in some areas of practice and divergence in others. Though the judges universally expressed their willingness to intervene and engage in active judging to ensure fairness and access for pro se litigants, judges' views about what is fair and appropriate vary. The findings make clear that it may be one thing to speak generally about active judging in pro se litigation and another to examine the details of particular judging practices.

The interview data suggest judicial practice is not linear, but multidimensional, and should be conceptualized in terms of particular forms of judicial activity that individual judges might employ, rather than characterizing any one judge as wholly "active" or "passive." Earlier, I described three dimensions of active judging: adjusting procedures, explaining law and process, and eliciting information. In this Section, I use these three dimensions as a framework for analyzing the variations in judicial activity. Breaking a judge's work into these dimensions and examining the component parts of each allows for more nuanced thinking about what judges are actually doing in the courtroom.

To summarize, the area of greatest similarity across the judges is their willingness to adjust procedures for pro se parties. Judges report adjusting procedures by applying principles rather than following the letter of procedural rules. In the dimension of explaining, all judges explain basic hearing processes, but beyond this, they differ in two ways: the timing of explanations and, most importantly, whether to explain the elements of substantive law. Some judges believe explaining substantive law in detail risks tainting testimony and offers an unfair advantage to the employer, who bears the burden of proof. In the dimension of eliciting information, most judges said that asking questions to elicit information, including developing the factual record, is part of their role and reported routinely doing so, but some judges are much less inclined to ask questions than others. In addition, many judges intentionally treat workers and employers differently due to the burden of proof, choosing not to question workers where an employer has not

met their burden. The diagram below offers a visual representation of the multidimensional nature of active judging at OAH.

FIGURE 1: ACTIVE JUDGING DIAGRAM



1. Judges Adjusting Procedures

A critical dimension of active judging and judicial intervention concerns formal procedures and whether judges will ignore or alter procedural and evidentiary rules to assist pro se litigants. Here, the findings are consistent with expectations. The interviews revealed that adjusting procedures is an area of significant agreement and similarity among the unemployment judges. Every judge who discussed it said she supports the idea that procedural and evidentiary rules should not be applied strictly to pro se parties in most cases. Many also said that such rules should not stand in the way of getting relevant evidence on the record. The judges largely adhere to the "informal" approach to procedures advocated by many access to justice scholars and are thus willing to adjust procedural rules in pro se cases.

When dealing with pro se parties, most judges described relying largely on principles to determine whether and how to enforce procedural and evidentiary rules rather than following the letter of the rules. Judge 2's statement reflects the majority approach of applying principles over procedures in pro se cases: "Procedural rules cannot be a barrier to getting evidence on the record or testimony. I'm not going to let these rules get in the way. On the flip side, there are some issues with fundamental fairness that are rule based."

The judges err on the side of introducing evidence with the goal of ensuring that cases are, as some framed it, "fully heard." For example, Judge 12 noted that she goes "the extra mile to eliminate overly technical roadblocks in the process so [pro se parties] can get their story out." This "principles over procedures" approach is consistent with recommendations from the access to justice literature, which emphasizes a full hearing of the evidence and flexibility in applying procedural rules.

A particular OAH procedural rule is representative of how the unemployment judges adjust procedures for pro se litigants. Often called the "three-day rule," it requires parties to disclose documents and witness lists to the other party at least three days prior to a hearing.[169] Beyond this rule, there is no formal (or functional) discovery process in unemployment appeals. In the interviews, eleven of the twelve judges discussed their approach to this rule, which is of obvious importance to employer parties who are most likely to use documentary evidence to meet their burden of proof.

The judges who spoke about the three-day rule all described applying a principle-based approach when pro se parties fail to disclose evidence in advance of a hearing, rather than rigidly applying the disclosure rule and excluding the documents. These judges said they analyze the prejudice to the other party when determining whether to allow undisclosed evidence on the record. Most said that preventing prejudice is the underlying principle behind the three-day rule itself.[170]

Judge 6 described why she would allow evidence in despite a party's failure to meet the three-day requirement: "The purpose of the rule is to allow parties the opportunity to review the document and defend against it. So I'm not going to throw it out just because they didn't meet the three-day rule." Describing the reverse scenario, Judge 2 said, "Sometimes people come in with documents that the other side has never seen before . . . and I won't let them introduce the documents, and I'll rely on the [three-day] rule to do that."

The balance of power also plays a role in the enforcement of procedural rules. Potential power imbalances include an asymmetry of knowledge or an imbalance of representation. Here, judges described being lenient and adjusting procedures when pro se parties act in good faith but simply do not know the rules. For example, Judge 10 said she is inclined to admit undisclosed evidence "particularly when a [worker] comes in with a bunch of documents and they look at you like a deer in a headlight." In contrast, the judges take a dim view of sophisticated parties, or lawyers, who attempt to use procedural rules to gain advantage.

The judges described enforcing procedural rules when they perceive a party is acting in bad faith. Speaking about the three-day rule, Judge 5 said

169 *See* D.C. Mun. Regs. tit. 1, § 2985.1 (2016).

170 Though the judges' expressed views on applying procedural rules to pro se parties are strikingly similar, a few judges described themselves as "more liberal" than other judges, called other judges "more strict" or referred to a "split" among judges when it comes to enforcing the three-day rule. Of course, a clear line between "strict" and "liberal" practices is difficult to draw based on the interviews. Absent detailed information drawn from hearing observation, it is impossible to identify with any certainty which judges are in fact more or less "strict," and indeed, whether such a split actually exists. However, we do know that eleven of the twelve judges interviewed say they apply the prejudice principle when pro se parties bring undisclosed documents to a hearing, and we know some judges consider themselves to be more likely to let in undisclosed documents as compared to their colleagues.

that she would not let documents in if she perceived a party had been "deliberate" in withholding them. A number of judges explicitly noted that they hold employers, more likely to be the sophisticated party, to a higher standard. Judge 6, quoted above describing her willingness to adjust procedures, said, "If the employer doesn't disclose, nine times out of ten I won't take it because he should know and comply with the rules, period." Finally, Judge 12 offered an example of dealing with procedural rules and party sophistication:

> There have been times when I thought a litigant was going beyond the pale, times when more sophisticated litigants have sandbagged the other side. In one of the worst cases where I excluded witnesses and documents, I had a party come in with a half-dozen undisclosed witnesses and undisclosed documents. I had to do a reality check. Is that unfamiliarity with the system? I have to weigh protecting the other side. I won't tolerate intentional gamesmanship.

The judges also described resistance to representatives using procedures against pro se parties in cases with imbalanced representation. In this context, Judge 5 explicitly referenced access to justice principles and said that cases should be about evidence, not who "is a better strategizer." Judge 10, speaking about dealing with lawyers going up against pro se parties, said:

> I have never been a great fan of the adversary system—it works great when Microsoft and Google are fighting it out, but it does not work well when you have an imbalance between [pro se] parties and lawyers. I'm fairly interventionist . . . . [I]f [a] lawyer is being too aggressive I will frequently just overrule them rather quickly.

In their procedural decision making, the judges described erring on the side of hearing evidence and using an approach that balances the need to accommodate pro se parties with the need to prevent unfair advantage. Overall, the judges were remarkably consistent in their expressed willingness to be flexible and adjust the enforcement of procedural rules, preferring to use principles to guide their decisionmaking. Finally, the judges who discussed procedures and representation said they hold representatives, and thus their clients, to a different standard, including when representation is imbalanced in a case. Most described enforcing procedural and evidentiary rules more strictly when dealing with represented parties.

The findings here raise important questions about predictability, consistency, and the purpose of procedural and evidentiary rules in pro se litigation. Recall that the primary approach advocated by scholars to date has been one of flexibility and informality in applying procedural rules to pro se parties, an approach similar to that of inquisitorial proceedings in its emphasis on gathering facts. The "principles over procedures" approach used by the OAH judges is similar to that advocated by the bulk of the scholarly literature.[171] This approach has the obvious benefits of offering leniency to pro se

171 Jessica Steinberg has criticized the flexible or principle-based approach, arguing it promotes inconsistency and unpredictability. She proposes a rule-based regime that places

parties who lack legal expertise and helping to ensure that procedures do not (unnecessarily) stand in the way of putting facts on the record, but at what cost? Where judges make procedural adjustments, their actions may benefit pro se parties at the cost of predictability and consistency, both across the justice system and within individual cases.

An example drawn from a real unemployment case illustrates the point.[172] Both parties are represented by counsel. The employer alleges misconduct based on the worker testing positive for having marijuana in her system. At the hearing, the lawyer for the employer attempts to introduce a record of the drug test, a document prepared by the drug testing company. The contents and meaning of the record are not obvious to a layperson. The lawyer does not have a witness to lay a foundation for the document. Counsel for the worker objects on the grounds of authentication and relevance, and the judge sustains the objection. The employer has no additional evidence. The worker's lawyer moves for judgment as a matter of law, arguing the employer has not met their burden of proof. The judge grants the motion and the worker wins, a purely procedural victory.

Imagine the employer in this case had no representation. Should the judge let the drug test in because the employer did not know he needed to bring a witness to authenticate and explain the contents of the document? The principles over procedures or informality approach would counsel in favor of letting the drug test in were the employer pro se, a move that would almost certainly reverse the outcome of the case. Are we comfortable with this result? If we do what some scholars have suggested and create a partially or fully inquisitorial process, will we be comfortable with that process existing only for those who lack counsel? What then becomes of cases with imbalanced representation? Can we accept a system with one set of rules for those who have representation and one set of rules for those who do not?

2. Judges Explaining Law and Process

The judicial role in explaining various aspects of law and process to pro se parties is a key area of judicial intervention identified by scholars and, as discussed in Part II, the DCCA has called on judges to explain, in particular, the burden of proof to pro se workers. As expected, the judges reported willingness to engage in this active judging practice and universally described it as a critical part of their role. All judges said they explain basic hearing processes at the outset of the hearing, and all reported explaining procedural and evidentiary rules at some point during hearings. However, there is a significant split in two areas. First, between those who give lengthy explanations at the beginning of hearings and those who give information only as needed, and second, between judges who explain substantive law in detail and those who give only basic explanations.

---

the burden of case processing and fidelity to procedure on the court. *See* Steinberg, *supra* note 11, at 905.

172 This example is drawn from a case I handled at OAH.

a. Explaining Hearing Processes

The regulatory framework governing unemployment appeals includes standards for opening explanations in hearings—standards promulgated and enforced by the DOL, which oversees the unemployment insurance program.[173] The interviews indicate that the judges follow the standards set out by the DOL, which require judges to explain certain aspects of the hearing process. Thus, the fact and content of opening explanations are areas of relative consistency across the judges. Every judge said they give an opening explanation before taking evidence in a case. Judge 6 reported that she says "the same thing at the beginning of every hearing" and explains "how the process will go in the hearing room." All of the judges described giving, at a minimum, information about the process to be followed at the hearing. Many of the judges noted that they explain the order of testimony, the right to cross-examine witnesses, and the burden of proof; most said they welcome questions from the parties; and many referenced DOL requirements as a source of guidance in this area.

b. When and How Much to Explain

Some judges go further than explaining process and also explain procedural rules, evidentiary rules, or substantive law before taking evidence. This presents the first area of notable divergence across the judges: when to give information (beyond basic process explanations) to pro se litigants. The judges were evenly split on whether and how much to explain the law and the hearing process to pro se parties. One approach, used by half of the judges, is to give a detailed explanation of procedure, evidentiary issues, and (for those who choose to describe it in detail) substantive law at the outset of the hearing. The other practice is to give only limited information at the outset of the hearing and to fill in information on an as-needed basis while the hearing progresses. This split is clearly well known among the judges, as a few judges made a point of noting the stark differences in approach on the unemployment bench. A number of judges in the latter camp explicitly noted how their style differs from those in the former. In fact, some in the

173 *See* 42 U.S.C. § 503 (2012); *see also* U.S. DEP'T OF LABOR, ET HANDBOOK NO. 382: HANDBOOK FOR MEASURING UNEMPLOYMENT INSURANCE LOWER AUTHORITY APPEALS QUALITY (3d ed. 2011), https://wdr.doleta.gov/directives/attach/ETAH/ET_Handbook_No_382_3rd_Edition.pdf [hereinafter ET HANDBOOK]. The DOL's ET Handbook sets out criteria and an evaluation process for determining whether state unemployment insurance appeals processes offer an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3). As described in the ET Handbook, one of the evaluation criteria is whether judges should offer basic logistical information: identify the parties and witnesses, note the date and location of the hearing, provide the name of the judge, and list the issues to be considered at the hearing (such as whether a worker is qualified for benefits). ET HANDBOOK, *supra*, at 11–13. For history and analysis of the "fair hearing" in the welfare benefits context, as well as a theory of "adaptable due process," see generally Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309 (2012).

"as-needed" camp described how observing other judges' hearings taught them that long explanations were not useful.

The judges who give detailed information at the outset of the hearing reason that they want parties to be fully informed from the start about all aspects of a hearing. Judges who fall into the "as-needed" camp were critical of this approach for reasons relating to their views about litigants' emotions and ability to retain information, as Judge 9 stated: "More important with pro se litigants is explaining every little thing along the way and not frontloading with a lot of explanation that is over people's heads. . . . I think some ALJs frontload hearings with [a] lot of information that goes over the head of the person and makes them nervous."

Judge 12 described being influenced by other judges:

> I've listened to tapes of other judges from time to time. Very bright people. And their opening explanation will go on for twelve to fifteen minutes, and by then I'm lost. So my view is, keep it simple, and then at the end I do, in my most earnest tone, tell each side, "If you have questions about procedure, please don't be shy."

The questions of when and how much to explain to pro se parties are areas of divergent practice across the judges. It is clear that both camps believe their strategy is effective. Ultimately, in the absence of empirical guidance regarding how best to communicate hearing process information to pro se litigants, all of the judges, regardless of approach, are operating based on their experience, observations, and intuition.

c. Explaining

The judges are also split on the critical question of how in-depth their explanations of substantive law should be, a split that appears to be grounded in different notions of fairness. Interestingly, these differences are also well known among the judges. Unprompted, a number of judges explicitly stated that they did things differently than their colleagues and proceeded to compare and contrast the variations in practice among the judges. Thus, the OAH bench is keenly aware of internal differences in active judging practices.

All of the judges said they offer a basic explanation of substantive law. At a minimum, this includes naming the two ways a party can be disqualified (for misconduct or a voluntary quit without good cause) and the fact that employers bear the burden of proof.[174] For most of the judges, the explanation ends there. But four judges said they explain substantive law in detail by listing the elements of misconduct or voluntary quit and/or describing the types of proof that would meet those legal standards.

Those who give a detailed explanation appear to be motivated by a desire to give complete information to both sides of the case—they see this as being the fairest approach. In contrast, those who give only a basic explana-

174 Recall that employers have the burden of proof in unemployment cases, including the full burden in misconduct cases and the initial burden in voluntary quit cases.

tion say they do not want to give the party with the burden of proof (the employer) a "roadmap" on how to prove its case.[175] However, the latter group of judges do not simply leave gaps in the factual record and areas of law unaddressed; instead, they ask questions to elicit the information they need, as subsection III.B.3 discusses in greater detail below.

Many of those in the "basic explanation" group explicitly distinguished themselves from their colleagues in the "detailed explanation" group, noting that there is a split view on the bench; the reverse was not true. Both groups of judges said that the choice of how to handle explanations of substantive law is based on principles of fairness and access, yet the two approaches have markedly different implications. This suggests a fundamental difference in judges' views about what is fair in this context.

Turning first to the judges who give detailed information, one judge described her approach to explaining substantive law using the example of intent, an element required for a finding of misconduct.[176] Intent is not a particularly intuitive concept for a layperson and is challenging to prove, as it must be established by circumstantial evidence barring an admission by the worker. Thus, it is easy to imagine an unrepresented employer neglecting to address the issue of intent during their case-in-chief. On this point, Judge 10 said:

> As part of the introduction [at the beginning of the hearing], I will describe what they're required to do. I will say that misconduct requires intentional disregard of an employer's expectations or rules, and I explain gross versus simple misconduct and go into considerable detail, and by that I mean I just simply make clear that this is what you have to do. Negligence is not misconduct. I am looking for evidence of intentional disregard . . . . I spend some time on who has the burden of proof—what they're responsible for doing in the hearing. What would I want to know if I were in their situation? If you have questions, I can't give you legal advice, but I can answer questions about anything that is confusing.[177]

Those who do not explain substantive law take the position that a judge's explanation of the elements of misconduct, such as intent, crosses an inappropriate line into assisting parties with strategy, as opposed to process. These judges believe that explaining law in detail is fundamentally unfair to the worker because it risks benefitting the employer, who bears the burden of proof, by telling the employer how to make its case. Judge 12, who does not

175 Interview with Judge 12.

176 *See* Hamilton v. Hojeij Branded Food, Inc., 41 A.3d 464, 478 (D.C. 2012) (finding no misconduct because the worker was fired for excessive absences caused by circumstances beyond her control and, thus, no intent was found); Gilmore v. Atl. Servs. Grp., 17 A.3d 558, 565 (D.C. 2011) (finding no misconduct by a worker fired due to absences from unforeseen incarceration); Odeniran v. Hanley Wood, LLC, 985 A.2d 421, 430 (D.C. 2009) (holding that ordinary negligence does not constitute misconduct).

177 There are two forms of misconduct under D.C. law. A worker found to have committed gross misconduct in the course of his separation from employment will be completely disqualified from benefits, while a worker who is found to have committed simple misconduct will be disqualified for only eight weeks. *See* D.C. CODE § 51-110(b) (2016).

explain substantive law, mentioned the intent element and compared herself to her colleagues who choose to explain it:

> I don't explain substantive law. Other judges go down the road of explaining the need to show intent, rather than the need to show generally unacceptable behavior [on the part of the worker], some go as far as explaining [the difference between] gross and simple [misconduct]. I avoid this for a number of reasons. For pro se litigants, that sort of explanation can get bogged down in minutiae. They get distracted. The second problem, in my view, is that it is a roadmap on how to win rather than [an explanation of] how to put on evidence . . . . [I]t is not fair to give the employer my best advice on how to put on winning case. Or [to give advice on] the best defense . . . . I am guiding process, not strategy.

Judge 9 also raised concerns about fairness and the risk of giving strategic advice, saying,

> I'm afraid if I give them substantive law, they will color testimony or craft the presentation so that it may not be as candid as I'd like it to be. I tell them there are two kinds of cases—misconduct and quit. I explain who has [the] burden of proof. But I don't tell them what they need to prove . . . . I know other ALJs go into more depth, such as the difference between gross and simple [misconduct]. I don't think it's necessary and it's counterproductive. And it's unfair to the party without the burden of proof. I don't want legal arguments from parties, I want the facts.

The division between those who explain substantive law and those who do not is an area where judges with similar professed goals and concerns about pro se litigants achieve those goals using very different practices. Judges who do not explain substantive law strongly believe that doing so would be unfair to workers by giving employers a roadmap on how to win their case. Of course, there is no reason to believe that those judges who choose to explain substantive law intend to give an advantage to the party with the burden of proof. They are surely doing so because they hold a conflicting opinion: explaining the law is the fairest approach.[178] Here again, absent guidance on whether, when, and to what extent to explain law and the

178 Judge 2 raised a different example of how this practice can play out in an area of misconduct law known as a rule violation. D.C. law holds that where an employer fires a worker for violating a company policy or rule, that worker cannot be disqualified from unemployment benefits unless the employer can prove the worker knew of the rule, the rule was reasonable, and the rule was enforced consistently. *See* D.C. Mun. Regs. tit. 7, § 312.7 (2016). A pro se employer without previous experience in unemployment law would have no way of knowing that each of these three prongs must be met and that at least one (consistent enforcement) is also not necessarily intuitive. In fact, this judge has clearly learned from experience that pro se employers miss addressing the three prongs of a rule violation. Discussing her approach to rule violation cases, Judge 2 said:

> Judges in trial courts at the start of cases explain the law, and I do . . . . [L]et me put it this way, the D.C. Court of Appeals wants us to be an active court. So, I explain the law before we start . . . . [P]ro se parties shouldn't lose because they don't understand which questions they need to answer in order to prevail. For example, in a rule violation [case], the employer has to follow certain steps—

hearing process to parties, individual judges determine their own approaches based on their best judgment. The result is a substantial divergence in practices across this group of judges when it comes to explaining law and process to pro se parties.

These findings point to the need for a more nuanced discussion of a judge's role in explaining substantive law. The literature to date has assumed that judges' explanations of process, procedure, and law are all presumptively neutral practices that do not benefit either party.[179] This research upends those assumptions and suggests access to justice scholars should engage in a deeper exploration of the interaction between active judging and burdens of proof.

3. Eliciting Information

When it comes to eliciting information from parties, a final area of judicial intervention drawn from the literature, the interviews revealed two key findings. First, asking questions of parties is a relatively uncontroversial and common practice among the judges. Though two judges are reluctant to ask questions—one of which asserts she almost never does so—the vast majority of judges elicit information through questioning as matter of routine. Here, the DCCA plays a pivotal role in giving the judges permission to ask questions and develop facts. Second, substantive law, and in particular the burden of proof, is critically important in how and whether judges elicit information in unemployment hearings. For example, most judges will not elicit information from a worker unless the employer has met their burden of proof.

a. Active vs. Passive Approach to Eliciting Information

All of the judges in the sample expressed some level of willingness to intervene and ask questions to obtain background information (such as years on the job or job title) and to clarify confusing testimony. When it comes to eliciting relevant factual information, only two judges expressed strong reservations about asking questions, indicating that they do so only rarely. One of these, Judge 7, said, "Even if there are questions I want to ask, I try not to do that." The other, Judge 8, seemed a bit more ambivalent, saying, "I think my role is to be as neutral as I can. That's why I will ask questions only to clarify what has been said. But, I might violate this from time to time . . . if one of the elements is missing, I might ask about that." The other ten judges said it is part of their role to develop the factual record and they routinely ask questions to elicit such information.

Judge 10's description of her approach succinctly captures the majority view: "My job is to find out what happened. I do that by letting parties put on [the] case and then asking questions to get what I need." As Judge 10's state-

including [proving that] the employee knew the rule. Employers also trip over consistent enforcement, and I'll explain that.

179 *See generally* GRAY, *supra* note 5; Albrecht et al., *supra* note 5; Steinberg, *supra* note 7, at 25–30; Zorza, *supra* note 5.

ment suggests, most of the judges who actively develop the record allow parties to present their cases for a period of time before intervening. Only one judge described taking almost complete control of the presentation of evidence as a rule, by asking questions of witnesses starting at the very beginning of their testimony.

Many judges described how their views on asking questions, and those of their colleagues on the unemployment bench, evolved over the years to embrace a more active role. A number of judges noted that when OAH and the unemployment docket first began in 2004, court leadership encouraged judges not to ask questions because doing so was not a "neutral" practice. This evolution tracks broader shifts in awareness of access to justice issues among the judiciary, and it also reflects changes in the law. Notably, a number of judges said the DCCA supports eliciting information in unemployment appeals. As Judge 3 said:

> I've always taken the position that I have to develop the record so I can make an informed and reasonable decision . . . . I think the Court of Appeals supports that position. I know that's a fine line, I can't be an advocate for either party, but if I have a situation where I know what the issues are and I do not see where there's evidence addressing that and I need more information, I try not to interrupt the parties, but at the end of their cases, if I have questions, I'll ask specific questions. A lot of times, especially with pro se parties, they may not know how to present the evidence and themselves in the best light.

Another important theme involves how to elicit facts—namely, whether to frame questions in terms of the law or to ask open-ended questions. This raises similar considerations to those that arise in the context of providing information about substantive law. Some judges said that when they ask questions, they do not explicitly name the element or legal issue they are looking for (for example, asking an employer to talk about intent) but instead use hypotheticals and open-ended questions to obtain relevant information. The concern is that naming the legal element will shape the testimony too directly, in the same way that describing elements of substantive law may have that same effect. Judge 9 described this concern and her approach. Her statement below is in response to a question about whether she would ask an employer about consistent enforcement, one prong of a rule violation misconduct case, if the employer had not discussed it:

> I used to not ask. Then, I thought, they don't know what they're doing. But I don't ask the question directly; I don't say, "Do you enforce the rule consistently?" That's going to elicit a "yes." I do hypotheticals: "Have you had similar situations with other employees? What happened in those cases?" I beat around the bush, but I get a sense of whether this was enforced solely against this person.

The balance of power between the parties, which includes imbalances in representation status, also comes into play in the context of eliciting information. A few judges stated that they have higher expectations of employers in terms of their abilities to present their cases, given that they tend to have

more resources. A few said they take special steps to assist pro se workers in defending their cases because they are typically the less sophisticated party, the party with the least resources, and the party least likely to have previous experience in unemployment cases. As Judge 2 said:

> Most of the time, but not always, employers have a lot more resources than former employees. So, with [workers], I might ask more questions and prod them to give information they might not otherwise know to give. For example, if you get fired for time and attendance problems, why you were late becomes an issue. Was public transport not picking you up? Did your house burn down? Was your child sick? I'll make sure that the nuance of those questions is fleshed out. Because employers have more resources, I rely on them to know a little bit more, to be better prepared.

Judge 2's approach raises obvious questions about fairness and neutrality. Should she be eliciting defenses to misconduct from workers? Is it acceptable only if she similarly elicits relevant facts from employers? Or is it permissible for a judge to "correct" for an imbalance of information or sophistication? Does it matter what is at stake for each party? In the background of these questions is the real-world effect of winning or losing on workers as compared to employers. Workers who lose an appeal will lose their only immediate source of income, whereas employers who lose face an increase in unemployment taxes at some point in the future. Should these differences matter in how a judge intervenes in an unemployment case?

b. Role of Substantive Law and Burdens of Proof

An assumption pervasive in the literature is that a full airing of the facts, or the need to get the "full story"[180] is an important goal in pro se litigation, and implicitly, in all litigation. This is often framed in terms of pro se parties' right to "hav[e] the full opportunity to present their case"[181] and in terms of a judge's duty to develop a full factual record, with some scholars placing more or less emphasis on the inquisitorial model.[182]

In this context, the interview data raises a critical question that has not been fully addressed in the literature: what role does the burden of proof play in how judges elicit information in pro se cases? The data in this study show that substantive law, and in particular the burden of proof, leads some unemployment judges to treat parties differently, which is driven by explicit goals of fairness. The burden of proof shapes how judges approach eliciting information; specifically, it shapes whether and how they elicit information from workers. And here again, the appellate court plays an important role.

180 *See, e.g.*, Baldacci, *supra* note 5, at 479; Pearce, *supra* note 5, at 976; Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 865 (2013) ("Research has shown the value and appropriateness of judicial questioning and engagement in ensuring full information is before the court.").

181 *See* Zorza, *supra* note 5, at 443.

182 *See* GRAY, *supra* note 5, at 89; Baldacci, *supra* note 5, at 696; Engler, *supra* note 5, at 2029; Rhode, *supra* note 5, at 901.

A number of judges noted that putting factual information on the record generally benefits the employer and that asking questions of workers runs the risk of prodding them into a potentially harmful admission. In two concrete ways repeatedly mentioned during the interviews, a judge's attentiveness to the burden of proof will determine whether or not the judge gathers any information *at all* from a worker. One situation arises when an employer fails to appear for the hearing, and the other, when an employer fails to meet the burden of proof during its case-in-chief.

In unemployment hearings, either party may fail to appear. As a number of judges noted, when an employer does not appear, many pro se workers want to testify and tell their side of the story, and many enter the hearing room assuming they *must* do so. Of course, workers in this situation are not obligated to testify; in fact, the only way a worker can lose is by putting evidence on the record.

All five judges who spoke about this situation said they advise workers about the burden of proof and attempt to point out that the worker will win if he or she does nothing at all. The judges said they will continue to advise a worker about the burden of proof in increasingly strong terms, short of telling them expressly what to do, until the worker realizes what is in their best interest. One mentioned, "Some people ignore this advice," but most said they will continue to press until it clicks.

This activity is arguably in the gray area between what is and is not legal advice, and the judges seem to be aware of the tension. A number of the judges noted, as Judge 10 did, that the DCCA has "practically admonished" the unemployment bench to take great care in clearly explaining the burden of proof and its implications in an employer no-show situation.[183] Judge 10 described her approach this way:

> I explain the burden on the employer to prove misconduct, that you have the right to testify, but you have the right not to, and if you testify and you say something that leads me to believe misconduct is the reason you were fired, I will hear that. If someone says that they want to testify, I will say, "Wait, let me explain again." After the third time, they will usually get the idea.

A second situation where burdens affect whether judges hear a worker's testimony is when an employer presents its case-in-chief but does not make a prima facie case for disqualification. Seven judges discussed this situation, and one expressed strong reservations about intervening, but the other six said they have ruled on a sua sponte motion for judgment or issued a directed verdict in this situation.[184] Judge 11 framed the issue in terms of judicial economy, "To save the court's time and resources . . . when the employer has presented their case and they have not proven any reasons that constitute misconduct, I absolutely rule sua sponte."

---

183 *See supra* notes 154–155, 179 and accompanying text.

184 One judge said she does this even when a claimant is represented by counsel where counsel has not made a motion.

The vast majority of the unemployment judges are clearly comfortable in the active judging role of eliciting factual information, and most believe they have an affirmative obligation to do so. For many judges, the duty to develop the factual record is also mediated by the burden of proof and influenced by the DCCA's "admonishment" not to mislead workers into testifying.[185] These judges are not seeking "the truth" in an inquisitorial fashion; they are following the letter of the law and requiring the employer to make a prima facie case before they will gather any information from the worker. For these judges, active judging is not just about eliciting information, it is also about intervening to stop or prevent evidence from coming into the record when it is no longer necessary as a matter of law.

These findings challenge and complicate common themes in the literature, which suggest the interests of justice are best served by a full hearing of the facts. Yet, we know that in unemployment cases workers often harm their cases by offering evidence, as this evidence may help to carry the employer's burden.[186] Previous research in this court has shown that introducing evidence is associated with lower win rates for workers and higher win rates for employers.[187] When examining a judge's role in eliciting information, we must ask, is it fair to let pro se workers testify even if the employer's case is deficient? If truth seeking is the goal, perhaps fairness does call for workers to testify, even if it harms their case. But what about the burden of proof? In a case where both parties have representation and the employer's case is deficient, the worker may never have to testify because her lawyer would advise her not to. Are we comfortable with allowing the substantive law to drive the presentation of evidence only in cases with representation, and not in those without? The majority of judges at OAH have a clear stance on this issue: they are not willing to implement a fully inquisitorial system, one that would require workers to testify no matter the strength of the employer's case; instead, they view this as fundamentally unfair. However, research suggests that their approach is not necessarily consistent with those of other courts. A recent study found that judges in many court settings do not follow the law with respect to burdens of proof and instead treat cases summarily.[188] This suggests the need for more exploration into the relationship between pro se ligation, active judging, and burdens of proof.

C. Sources of Guidance on Active Judging

An important goal of this research is to begin to ascertain what forces might shape a judge's approach to pro se litigation. For a judge who is decid-

185 Berkley v. D.C. Transit, Inc., 950 A.2d 749, 756–57 (D.C. 2008).

186 *See* Shanahan et al., *supra* note 3, at 501, 509–12.

187 *See id.* at 501.

188 *See* Sandefur, *supra* note 4, at 925 ("Observers in [some court settings] report that judges often shortcut the law: they do not hold landlords to statutory burdens of proof, [and] they fail to examine eviction notices to confirm their validity and proper service. . . . Judges often do not require landlords to rebut self-representing tenants' defenses to eviction or do not recognize their defenses." (citations omitted)).

ing whether or how to use active judging strategies, where does she find guidance? If the judges have similar sources of guidance, why do we see such notable variations across the judges?

The literature review tells us there is no single, authoritative source of guidance on whether and how to implement active judging, even for administrative law judges. Broadly speaking, judges are left to reconcile and operationalize the duty of impartiality with permission to offer "reasonable accommodations" to pro se parties. But in the OAH context, judges have additional sources to draw on. We know that the DCCA has issued decisions supportive of certain active judging practices, and that the DOL, which regulates unemployment appeals, requires certain active judging practices. The findings have already shown that the judges reference both as sources of guidance. We also know the judges are aware of one another's practices, including the differences between them. This Section explicitly looks at these three sources of guidance for OAH judges and how they influence active judging practices in the court.

To summarize, the interviews reveal three categories of guidance that shape the active judging practices of OAH judges. First, DCCA decisions allow (or push, depending on a judge's baseline view of the need for passivity) OAH judges to actively explain law and process, elicit factual information, and adjust procedural rules. Second, a DOL peer review requirement, where judges observe and grade one another's hearings on a quarterly basis, offers a source of comparative information about how other judges handle pro se cases. The existence of this peer review requirement explains why variations in active judging practices are common knowledge among the judges. Third, DOL requirements specifically shape the practice of providing information about hearing processes at the beginning of a hearing.[189]

189 Another interesting feature of the unemployment bench is an internal peer review system for final written orders. Though it is not a source of guidance on active judging, it is an important consistency and accountability tool in other ways. Under this system, before a judge issues a final order in an unemployment case, the order must be reviewed and approved by two other unemployment judges. The goals of the system include reviewing both substance (including the interpretation of controlling law and the application of law to the evidence in the record) and style (including everything from catching grammatical errors to clarity of language). The judges emphasized that peer review plays an important role in training new judges on the application of substantive law, clarifying the meaning of appellate court rulings, and simplifying language to make orders more understandable for pro se parties. Judge 7 called it "very important and a great learning tool." Judge 11 said:

> If it were not required, I would do it voluntarily. We do not have law clerks so there is no one else to put a set of eyes on it before it goes out except another judge in the [peer review] system. A lot of it is just picking up grammatical errors and a better way to say it. Or you did not adequately address this issue. Or mentioning facts that you did not find in the case . . . . I find it very helpful and also a good way to help the individual judges improve and hone their skills. You may see the way a judge approaches an issue, so you keep it in mind for the future.

1. Appellate Court

The interviews make clear that the DCCA has played a critical role in shaping active judging at OAH. As Judge 3 put it, "The D.C. Court of Appeals wants us to be an active court." In fact, without prompting, most of the judges discussed the importance of the appellate court. According to the judges, the DCCA has shaped their practices in two ways: by permitting judges to assist pro se parties as a general matter and by approving specific active judging practices. In fact, most judges expressed the sense that they are not only permitted to be active, but that it is expected. As Judge 1 said, "The Court of Appeals tells us to not let people flounder around—that's not consistent with access to justice principles or good practice as a jurist."

The appeals court's specific guidance in two areas, explaining the burden of proof and eliciting factual information, came up most often in the interviews. First, the judges have clearly internalized the importance of the burden of proof and the need to ensure pro se parties (workers, in particular) understand its implications. Speaking about the need to communicate the burden of proof to pro se workers, Judge 10 said she and her colleagues are "practically admonished" to do so by the DCCA. The appellate court's ruling on this issue appears to play a significant role in permitting judges to grant sua sponte motions for judgment when employers have not made a case, and to dissuade pro se workers from testifying when the employer fails to appear.

Second, when it comes to eliciting facts, the judges described an evolution on the OAH bench, one facilitated by the court of appeals. A number of judges said, in the early days of OAH, lead judges on the unemployment bench emphasized passivity and opposed eliciting information. Judge 9 said, "Initially, [OAH leadership] instructed us to just let parties present evidence and we weren't supposed to be prodding and questioning because then we weren't neutral." She then described how the DCCA allowed her to change her approach: "We got a D.C. Court of Appeals case that instructed us to act like hearing examiners and ask important questions. I felt more comfortable that way because I don't like decisions by trick." Judge 9 now feels free to elicit facts, as needed, from pro se parties.

Finally, though the DCCA has spoken on the issue of adjusting procedures, holding that "procedural technicalities" are not always appropriate in pro se litigation,[190] the judges did not reference the appellate court as a source of guidance in this dimension of active judging. One potential explanation is that the court is an important source of guidance on this issue, but the judges simply neglected to mention it. Another possibility is that the idea of judges adjusting procedures has gained a level of acceptance such that judges do not feel the need to turn to the DCCA for support. Given that adjusting procedures is such a fundamental and widely accepted activity in the literature, the latter seems quite likely.

190 Rhea v. Designmark Serv., Inc., 942 A.2d 651, 655–56 (D.C. 2008).

2. Department of Labor

The DOL oversees all state unemployment benefits programs[191] and, as part of its regulatory role, requires quarterly and annual reporting on hearing practices. In this reporting process, OAH judges review and grade their colleagues' case files and recorded hearings using DOL-provided criteria.[192] This process offers judges guidance on active judging practices in two ways that came up repeatedly in the interviews: by giving judges an opportunity to observe and learn from one another and by requiring that judges give particular information in their opening statements at the beginning of each hearing.

a. Peer Review

In the DOL peer review process, OAH must randomly select twenty cases per quarter for review. Each is reviewed by a judge who listens to the hearing recording, examines exhibits, reads the final order, and scores the case based on a comprehensive set of thirty-one criteria. Items to be scored include whether the judge gave a prehearing process explanation, allowed parties to cross-examine witnesses, spoke in clear language, asked noncompound questions, took control over any interruptions, exhibited bias, and issued an understandable written decision.[193] The possible scores include "good," "fair," "unsatisfactory," and "did not occur." The purpose of each criterion is clearly defined and explained.

Interestingly, none of the judges complained about the requirement of reviewing one another's hearings, a necessarily time-consuming process. Instead, they described the review process in positive terms. Judge 10 did note that some reviewers take the process more seriously than others in terms of the quality of their reviews, but she added, "most are conscientious" and make substantive written comments in addition to scoring the hearing.

In the interviews, the judges were never asked explicitly whether they learned from their colleagues, nor were they asked to compare themselves to their colleagues, yet the judges raised these two points repeatedly and unprompted. Eight of the twelve judges mentioned that they learned from listening to other judges' hearings. They reported seeing things that worked,

191 42 U.S.C. § 503(a)(3) (2012). The Social Security Act provides that the federal government will not fund states' unemployment insurance programs unless certain criteria, including an opportunity for a fair hearing, are met. *Id.*

192 *See* ET HANDBOOK, *supra* note 173, at 6–10.

193 The DOL uses thirty-one different criteria to review the quality of state unemployment insurance appeal hearings. *See id.* at 11–62. Five of the criteria are specifically used to determine whether hearings meet the basic requirements of a "fair hearing" and "due process," including: (1) the opportunity to confront witnesses and hear all evidence presented by opposing parties; (2) the opportunity to cross-examine opposing witnesses; (3) a hearing limited to the issues set forth in the hearing notice (barring the consent of all parties to add additional issues); (4) a fair and impartial adjudicator; and (5) a final decision that includes findings of fact and conclusions of law. *See id.* at 5.

which they would incorporate into their own hearings, as well as things that did not work, which they sought to avoid.

b. Opening Explanations

The purpose of the DOL peer review process is to ensure a minimum level of consistency in how judges handle hearings. The interview data suggest the process accomplishes this goal most effectively in one area: the opening explanation. The elements individual judges said they include in their opening explanations were consistent across the interviews in terms of their minimum content, as discussed earlier in the findings. Several judges referred to the DOL requirements as the basis of their opening patter, and some said that listening to other judges' hearings through the peer review process gave them ideas to incorporate into their opening statements.

Given the lack of empirical studies of active judging, there are no other case studies to which we can compare these findings. That said, the limited information available suggests OAH judges likely have access to more sources of guidance on active judging than do judges in other administrative courts or courts of general jurisdiction. The literature review suggests the DCCA's positions on active judging are unusual in terms of providing baseline support for active judging and offering specific guidance on particular practices, as few other appellate courts have done so. In addition, the guidance provided by the DOL is unique to unemployment appeals courts.

Yet, despite these shared sources of guidance, we still see meaningful variations across OAH judges. In many ways, this is not surprising. In the area of greatest consistency, the opening explanation, the guidance available to the judges is concrete, detailed, and clear. It is also an area where the judge is mostly focused on transmitting information, rather than navigating interactions with parties in the courtroom. The DOL requires a basic patter, provides a list of items to cover, and it is simple enough for all judges to implement this requirement.

In another area of notable consistency, the DCCA has advised judges about the importance of explaining to pro se workers the role and impact of the burden of proof. This guidance is relatively straightforward and concrete. As a result, the judges who spoke on this issue all indicated they follow the DCCA's guidance consistently.

Things become more complicated in other areas where the guidance is less concrete and lacks detail, and where the judge is not merely transmitting information but navigating interactions with parties in the courtroom. For example, the DCCA has instructed OAH judges to, where necessary, "probe" witnesses for "material facts" to develop the record, but the DCCA has not offered a framework for understanding the situations in which such fact gathering is necessary or the most appropriate way to gather such information. Thus, we see in the interview data that asking questions of parties is common among the judges, but that there is notable variation in *how* the judges elicit information. Some judges frame their questions explicitly in terms of the legal issue at hand (such as "Do you enforce the rule consistently?"), while

others use hypotheticals or ask questions in a way that does not directly point to a legal issue.

Finally, in an area where there is no official guidance from the DCCA or DOL, whether and how to explain substantive law, the judges' only source of information is one another and we see significant variations in practice. Some judges believe explaining the law is essential, while others believe it unfairly benefits the party with the burden of proof. These views are strongly held and well known among the judges.

Where does all of this leave us? Without similar studies as comparison points, it is not possible to say with any certainty whether OAH is a relatively cohesive and consistent court or a relatively inconsistent court in terms of active judging practices. This study shows meaningful variations in practice within OAH, but we cannot know empirically whether this level of variation is more or less than we would expect to see in other courts. It does appear that guidance from the DCCA and DOL, particularly guidance that is concrete and detailed, drives consistency at OAH, while general guidance or a lack of guidance supports greater variations in practices—a result that makes intuitive sense. It is also likely that peer reviews play a role in supporting consistency, as judges reported altering their practices based on observing their colleagues. These findings suggest that consistency in active judging practices may be an elusive goal and that it may depend in large part on the presence of meaningful guidance from authorities such as appellate courts, regulatory bodies, and other judges.

IV. Implications

This study offers new insights into active judging practices and the forces that shape those practices. It also raises new questions. In this Part, I will address some potential implications of this research and suggest directions for future study of active judging and pro se litigation.

One study alone cannot satisfy the many unanswered questions about how to respond to the massive pro se crisis in America's civil courts. But this research has offered much-needed insights into the nature of active judging practices on the ground. We learned that this group of judges is willing to adjust procedures to accommodate pro se parties, though this practice raises critical questions about the justice system's consistency. We discovered that explaining law is an area of great variation across the judges, with some viewing it as essential and others viewing it as fundamentally unfair to the party without the burden of proof. We found that all of the judges believe they have a duty to elicit facts, but that their approaches vary—some judges ask questions framed in terms of the law, while others would never do so. These differences persist though the judges share sources of guidance about active judging practices and though they routinely observe one another's work as part of a mandatory peer review process.

Based on this study alone, we cannot quantify or explain the effects of the variations in active judging practices we observed in this court. Instead, we can recognize these differences exist, attempt to understand why they

exist, and suggest implications for reform of the civil justice system. Much more research is needed to understand whether and how other courts and judges are responding to the pro se litigation crisis and to understand how different approaches to active judging affect individual litigants and our justice system as a whole.

This study points to the need for more research into how state court judges are responding to the pro se crisis and to the need for more research into state civil courts more broadly. This research analyzed active judging across three dimensions, with the goal of promoting conceptual clarity in how we think about what it is judges are "doing" when they interact with pro se parties. More work could be done to understand each of these dimensions. Is one dimension more important than others in ensuring fairness, or in ensuring pro se parties understand court proceedings and perceive them as fair? What other dimensions might exist? Future studies might examine more deeply the sources of guidance judges rely on as they learn to manage pro se cases, including which sources are most influential and which judges find most useful.

A. The Role of Substantive Law and Burdens of Proof

The findings suggest that the legal context of a case, particularly the burden of proof, is a critical mediating factor in active judging. This point has not yet been addressed by the scholarly literature. Much of the existing conversation about active judging focuses on the importance of judges helping parties put facts on the record in a variation of the inquisitorial model. The emphasis of most active judging literature is on the need for a full airing of the facts, whether by a judge explaining law or eliciting information. The literature takes for granted that the goal of fact gathering is a presumptively neutral practice that does not benefit either party.[194]

Yet, in this study, most OAH judges are not seeking the truth in an inquisitorial fashion; they are following the letter of the law and requiring the employer to make a prima facie case before they will gather any information from the worker. For these judges, active judging is not solely about eliciting information for the sake of having all of the facts on the record, it is also about intervening to stop or prevent evidence from coming into the record when it is no longer necessary as a matter of law. Thus, the burden of proof mediates active judging in this context.

This research reveals the extent to which existing scholarship emphasizes the needs of parties who bear the burden of proof, as opposed to those in a defensive posture, and calls into question whether eliciting information is in fact an inherently neutral practice. Might fairness in active judging require judges to treat plaintiffs and defendants differently, given the role of substantive law and burdens? This question is particularly critical given that we now know the vast majority of unrepresented parties in nonfamily state

194 *See generally* GRAY, *supra* note 5; Albrecht et al., *supra* note 5; Steinberg, *supra* note 7, at 25–33; Zorza, *supra* note 5.

court cases are defendants and that many of those defendants will face a lawyer on the other side of the case.[195]

This suggests the need for a context-based exploration of the interaction between substantive law, burdens, and active judging practices. If we impose a fact-finding duty on judges, perhaps we must also fashion clear rules to guide the process of fact finding, such that pro se parties in a defensive posture are not forced to carry their opponent's burden of proof. Future studies could look into other areas of law to understand how substantive legal context affects active judging and the experiences of pro se litigants.

B. Rules of the Game

There is an unavoidable awkwardness in the reality of pro se parties operating within the adversary system and attempting to wield its tools. Nowhere is this more apparent than in the context of civil procedure. The findings in this study raise the question, can we live with a system that formally applies different rules to pro se litigants? In a way, we have answered this question in the affirmative already. As we see in this study and others, many judges already apply procedural rules differently, or not at all, when dealing with pro se litigants.[196] Thus, an informal two-tiered regime already exists.

The informal solution we appear to have settled on has its risks, and it is not clear that those risks have been systematically and intentionally assessed. Recall the earlier example of the admissibility of a drug test report, a dispositive piece of evidence. In a two-tier system, where pro se parties need not authenticate documents, but represented parties must, we would see different case outcomes in this example. Is this something we are willing to accept? If so, which set of rules should be followed in cases with imbalanced representation?

These and other pressing questions about the rules of the game hang over the access to justice conversation. To date, the most common response has been to suggest that judicial intervention and "court simplification" will allow us to maintain the existing system while accommodating pro se litigants,[197] though some have challenged this idea and suggested new or modified rules,[198] or a wholesale reworking of the system.[199] Whatever our

195 *See, e.g.*, NAT'L CTR. FOR STATE COURTS, *supra* note 3.

196 Steinberg, *supra* note 11, at 906.

197 *See id.* at 905 ("Scholars have celebrated the accommodation approach for injecting a measure of flexibility into the judicial role, but in fact, it papers over the depth of adversary process failure in the civil trial courts.").

198 *See* Engler, *supra* note 5, at 2022–23 ("The challenge to the adversary system, however, should not lead to an abandonment of its goals. The adversarial system purports to promote fairness and justice. Yet, the rules currently operate as barriers preventing unrepresented litigants from participating meaningfully in the legal system and thereby frustrate the goal of dispensing fairness and justice. Given a choice between clinging to the rules at the expense of the goal, or modifying the rules to further the goal, the rules must be modified." (footnote omitted)).

normative views, the findings of this study confirm that individual judges are forced to answer these difficult questions every single day, and often with little in the way of meaningful guidance.

If our goal is to maintain an adversary system, we either have to accept that pro se parties will be tripped up by procedural rules, or we have to accept ad hoc practices and the informal application of procedural rules. Alternatively, if we find this dichotomy is unsatisfying and unfair, we may instead need to engage in a wholesale rethinking of our goals. If the goal is ensuring fairness and equal access to the courts, then perhaps we need to reverse engineer a system designed to promote these values given the actual users of the system (laypeople), as opposed to the aspirational users (lawyers). Surely, the time has come to engage in such a project, and fortunately, some have already begun this work in earnest.[200] To support reform projects, we should know more about the interaction of active judging, pro se parties, and procedural rules.[201] More research in this area could shed light on the question of how the rules and structure of our system should be changed given the new pro se majority.

C. Consistency and Accountability

This research also raises questions about accountability, consistency, and transparency in pro se courts and in active judging. As my coresearchers and I have argued elsewhere, in courts where lawyers are scarce, there are few to no mechanisms to check or influence judicial discretion.[202] In such a setting, is there a need for a different set of mechanisms to check judicial behavior? Is a peer review system, such as that at OAH, sufficient for this purpose? Without that system, might we see judging practices with even greater variation?

Questions of accountability and transparency are particularly critical in courts where hearings are not routinely recorded and decisions are not rendered in writing, with full findings of law and fact, as these factors make appeals difficult, if not impossible.[203] But what of judicial discretion and independence? In a world where judges need training and guidance to manage pro se litigation, how do we create a system that ensures best practices are followed, while maintaining judicial independence? Does the independence of the judiciary become less important in courts that lack skilled advocates to check judicial discretion? Future research and theoretical work could explore these questions across a range of civil court settings.

---

199 *Id.* at 2023.

200 *See* Engler, *supra* note 5; Steinberg, *supra* note 11; Steinberg, *supra* note 1.

201 *See* Shanahan, *supra* note 22.

202 *See* Carpenter et al., *supra* note 8; Shanahan et al., *supra* note 21, at 1376.

203 *See supra* notes 56–58 and accompanying text.

CONCLUSION

We face an incredibly challenging moment in American civil justice. Given that a majority of those who appear in our state civil courts are without counsel, we know our courts are not living up to the ideal of equal justice under law. It is clear the status quo must not persist. Inevitably, the path to resolving our access to justice crisis will be long and winding. To find meaningful solutions, we need a range of creative approaches and a willingness to experiment on the part of all involved in the civil justice system and civil legal services.

This Article offers a window into a small slice of the civil justice system, a single court where a group of judges are doing their best, with the tools at their disposal, to handle pro se cases fairly and impartially while also helping those parties navigate the complexities of civil litigation. Where they have authoritative guidance, they do their best to follow it. Where they lack guidance, they make choices guided by principle and focus on being consistent from case to case. Their approaches are not monolithic, though they are guided by shared values. Most seem to recognize that they are imperfect and working within an imperfect system.

Speaking with this group of judges gave this author some hope for the future of our civil justice system. The judges interviewed for this study are principled people who approach their job with great seriousness, but many are also willing to learn and to change when necessary. The challenge for all of us—judges, scholars, advocates, or policymakers—is to keep asking the tough questions, gathering critical information, and sharing what we learn with one another. Those of us in the academy have much to offer by engaging in research and scholarship aimed at understanding the operation of civil justice in America. The judges who are on the front lines of our civil justice system every single day need and deserve our support, as do the people they serve.