

DUTIES OF THE JUDICIAL SYSTEM TO THE PRO SE LITIGANT

MARK ANDREWS*

ABSTRACT

Alaska courts have assisted unrepresented litigants in civil cases, explaining procedural technicalities to pro se litigants and applying more lenient standards to pro se pleadings. Although the origin of this policy is unclear, the Alaska Supreme Court in Breck v. Ulmer held that the trial court should advise pro se litigants of procedural requirements and hold pro se litigants to less stringent standards than attorneys. However, two recent cases, Greenway v. Heathcott and Wagner v. Wagner, have complicated Alaska's policy by adopting different approaches regarding when a court should advise a pro se litigant of procedural requirements. This Article proposes that, based on the State's recognition of a constitutional right to represent oneself, Alaska courts apply a due process analysis to judicial duties toward self-represented litigants to ensure that courts consistently recognize and protect pro se litigants' interests.

INTRODUCTION

Across the United States, an increased number of litigants have chosen to forego attorneys and instead represent themselves in court, particularly in civil matters. The State of Alaska has seen a similar upward trend in pro se litigants.¹ This is particularly obvious in fields such as family law. In an estimated twenty-five percent of contested domestic relations cases in Alaska, both parties have lawyers.² In the remaining seventy-five percent of cases, however, either one or both of the parties represent themselves.³ Among domestic relations cases that are uncontested or have post-judgment proceedings, ninety-five percent of litigants are unrepresented.⁴

Copyright © 2013 by Mark Andrews.

* J.D., Georgetown University Law Center, 1975. My thanks to two colleagues, who prefer anonymity, whose help was valuable in developing this essay.

1. Katherine Altener, *Literacy and the Courts*, 24 ALASKA JUST. F. 1 (2007).
2. *Id.*
3. *Id.*
4. *Id.*

Since deciding *Breck v. Ulmer*⁵ in 1987, the Alaska Supreme Court has held the pleadings of some pro se litigants to a less stringent standard than represented parties, even finding in some cases an affirmative duty of the trial court to explain to pro se litigants the technical points of procedure.⁶ In addition to increasing access to the courts, this policy of pro se leniency has promoted the resolution of disputes on their merits, rather than on technical errors made by an unrepresented party.

For twenty-five years, *Breck* served as a useful guidepost for dealing with the actions of pro se litigants. Within the last year, however, the Alaska Supreme Court has decided two cases that have rendered this policy of leniency in Alaska less clear.⁷ As a result, it has lost some of its force. *Wagner v. Wagner*⁸ and *Greenway v. Heathcott*⁹ not only bring the applicability of the pro se leniency policy into question, but they also create conflicting precedent in the Alaska court system.

This Article examines the question of what degree of procedural flexibility is owed to an unrepresented civil litigant¹⁰ in Alaska trial courts, and calls on the Alaska Supreme Court to resolve the issue to promote a coherent, consistent, and useful policy that protects the pro se party. First, this Article explores whether there is any grounding for the policy of leniency outside of case law. Next, it traces and summarizes the development of the pro se leniency policy in Alaska case law through 2012. Finally, the Article discusses the two most recent cases,

5. 745 P.2d 66 (Alaska 1987), *cert. denied*, 485 U.S. 1023 (1988).

6. *Id.* at 75.

7. *Wagner v. Wagner*, 299 P.3d 170 (Alaska 2013); *Greenway v. Heathcott*, 294 P.3d 1056 (Alaska 2013).

8. 299 P.3d 170 (Alaska 2013).

9. 294 P.3d 1056 (Alaska 2013).

10. This Article is limited to discussing the pro se civil litigant. There is no analysis of criminal cases or appellate procedure. Except where federal cases affect Alaska law, federal authority is not discussed. It is worth noting that there exists a group of cases where the accommodation granted to the pro se litigant in a civil case is the appointment of counsel. *See, e.g., In re Alaska Network on Domestic Violence & Sexual Assault*, 264 P.3d 835, 838 (Alaska 2011) ("This emphasis on fairness and equal advantage indicates that the right to counsel where the opposing party is represented by a public agency arises, at least in part, from the government's otherwise one-sided support for the party with an attorney supplied by a public agency."); *Flores v. Flores*, 598 P.2d 893 (Alaska 1979) (holding that the due process clause of State Constitution guaranteed wife, an indigent party, the right to court-appointed counsel in a private child custody proceeding in which her spouse was represented by Alaska legal services corporation). By and large, in these cases, the appointment of counsel is based on the court's recognition of the importance of the specific substantive issues in dispute, rather than any acknowledgment of a policy of leniency toward the pro se litigant. These cases grant the right of counsel when one might not otherwise be able to afford counsel, when the litigant is litigating against a public agency.

Wagner and *Greenway*, and highlights the confusion and uncertainty these decisions are likely to create.

I. THE POLICY OF PRO SE LENIENCY LACKS A CLEAR SOURCE IN ALASKA LAW

The unrepresented litigant in Alaska receives procedural leniency, but the initial source of such a policy is unclear. There is nothing explicitly requiring such treatment in the Alaska Constitution, the Alaska Statutes, the Code of Judicial Conduct, or the Rules of Professional Conduct.

There is ample authority that the Alaska Rules of Civil Procedure should be interpreted to promote the “just, speedy and inexpensive determination of every action and proceeding.”¹¹ The trial court may relax the Rules when “strict adherence to them would work a manifest injustice.”¹² But these Rules apply to every litigant. The Rules lack a policy that specifically covers civil litigants who are unrepresented. Due process protections within the United States Constitution may also provide some basis for the policy of pro se leniency. Recently, the United States Supreme Court held in *Turner v. Rogers*¹³ that the Fourteenth Amendment requires state assistance to the unrepresented civil litigant when the possible outcome includes incarceration.¹⁴ The required state assistance sometimes, but not always, extends to appointment of counsel.¹⁵ Even when state assistance does not go so far as to appoint counsel, the risk of incarceration still calls for some higher degree of due process protection. Accordingly, “the State must . . . have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question.”¹⁶

The Alaska Supreme Court has never cited *Turner v. Rogers*, and the opinion does not stand for any general constitutional right to leniency in favor of unrepresented parties. It is also, of course, narrowed by the fact that there must be a risk of incarceration to invoke its holding. Nonetheless, the case suggests that there is some foundation in the Fourteenth Amendment for a policy of pro se leniency, and Alaska courts should draw on this principle to extend due process to self-representation.

11. ALASKA R. CIV. P. 1 (“Scope of Rules – Construction”).

12. ALASKA R. CIV. P. 94 (“Relaxation of Rules”).

13. 131 S. Ct. 2507 (2011).

14. *Id.* at 2512.

15. *Id.* at 2518.

16. *Id.* at 2512.

II. DUE PROCESS PROTECTIONS SHOULD EXTEND TO THE RIGHT OF SELF-REPRESENTATION

Alaska recognizes a constitutional right to represent oneself. In *McCracken v. State*,¹⁷ the Alaska Supreme Court found that the right to self-representation was among the rights retained by the people under the Alaska Constitution.¹⁸

In *McCracken*, a prisoner filed a petition for writ of habeas corpus in the Juneau Superior Court and requested to represent himself.¹⁹ The Alaska Supreme Court held there was a right to self-representation under the Alaska Constitution, but that the right is not absolute.²⁰

For the Due Process Clause to apply, "an individual interest [must be] of sufficient importance to warrant constitutional protection."²¹ Following the decision in *McCracken v. State*, the right to represent oneself in court should be considered one such interest and thus should be entitled to due process protection.²² This interest is subject to the same analysis as any other under the Due Process Clause.²³ In 1977, in *City of Homer v. State*,²⁴ the Alaska Supreme Court adopted the federal due process analysis set forth in *Mathews v. Eldridge*²⁵ the previous year.²⁶ *Mathews* found that when a federal statute enacted Social Security

17. 518 P.2d 85 (Alaska 1974).

18. *Id.* at 91.

19. *Id.* at 87.

20. *Id.* at 91. The Court recommended a two-part test where: (1) the judge must ascertain whether a prisoner is capable of presenting his allegations in a rational and coherent manner, and (2) the judge must believe the prisoner understands precisely what they are giving up by declining the assistance of counsel. *Id.*

21. *Matson v. State, Commercial Fisheries Entry Comm'n*, 785 P.2d 1200, 1206 (Alaska 1990) (quoting *Nichols v. Eckert*, 504 P.2d 1359, 1362 (Alaska 1973)) (internal quotation mark omitted).

22. See *McCracken*, 518 P.2d at 91 ("The opportunity to present one's own position where liberty itself is at stake should not lightly be disregarded, and the right to counsel should not be used as a bar to self-representation.").

23. See *City of Homer v. State, Dep't of Natural Res.*, 566 P.2d 1314 (Alaska 1977) (applying due process analysis to a municipal corporation's claim to tidelands).

24. *Id.*

25. 424 U.S. 319 (1976).

26. *City of Homer*, 566 P.2d at 1319 (citing *Mathews*, 424 U.S. at 334-35) ("[T]he specific dictates of due process generally involve the consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.").

benefits, the statute created a property interest protected by the due process clause.²⁷ In Alaska the right to self-representation is secured by statute.²⁸ Later, in *In re Urie*, the Alaska Supreme Court similarly used the *Eldridge* test:

Under due process we will review the bar rule provision [relating to admissions] by considering three main factors: (1) the nature of the private interest affected, (2) the risk of erroneous deprivation of that interest by the procedures used, and the probable value, if any, of any additional or substitute procedural safeguards, and (3) the state's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.²⁹

Due process protects the right to self-representation from arbitrary denial. It ensures a pro se litigant's claim will be heard despite a litigant's potential lack of familiarity with procedure.³⁰ Due process, however, has its inherent limits: relaxed procedures must not deprive the opposing party of his own rights to due process, and must preserve the impartiality of the court.

Standing alone, the constitutional right to represent oneself is settled in Alaska law. However, the Alaska Supreme Court has never expanded *McCracken* to require a policy of leniency toward pro se litigants under the Alaska Constitution. The right to self-representation presents some distinct due process issues. Considerations unique to the policy of leniency make the due process analysis more difficult than in other scenarios. For example, other due process questions typically involve two adverse parties, with the court as a neutral decision maker. But as to pro se litigants, the court must also protect its role as a neutral decision maker. The Alaska Code of Judicial Conduct, which consists of five canons intended to establish standards for the ethical conduct of judges, emphasizes that a judge must be mindful of judicial integrity and must maintain the appearance of neutrality and fairness.³¹ All five judicial canons of conduct deal in some way with impartiality and the restraint on behavior that impartiality requires.³²

27. *Mathews*, 424 U.S. at 333.

28. ALASKA STAT. § 22.20.040(a) (2013).

29. *In re Urie*, 617 P.2d 505, 508 & n.5 (Alaska 1980).

30. See *Haines v. Kerner*, 92 S. Ct. 594, 596 (1972) (noting that pro se pleadings are held to a "less stringent standard" than "formal pleadings drafted by lawyers"). See also *infra* discussion Part III.

31. ALASKA CODE OF JUDICIAL CONDUCT Canon 3-4 (1998).

32. ALASKA CODE OF JUDICIAL CONDUCT Canon 1-5 (1998).

The trial court sometimes has an affirmative duty to advise pro se litigants about certain things, such as the need to include affidavits when opposing summary judgment³³ or the method by which a party may attempt to withdraw admitted statements.³⁴ When the trial court gives such advice, its own neutrality may become an issue. The Alaska Supreme Court has taken note of the trial court's sensitive role when giving advice to a pro se litigant, requiring trial courts to offer guidance when doing so would not constitute "open-ended participation by the court [that] would be difficult to contain."³⁵ At the same time, however, the Alaska Supreme Court has held that step-by-step assistance to the litigant is not permitted.³⁶ Such help might force the judge to become the advocate for one side.³⁷ Additionally, when considering the affirmative duty to advise the litigant, the court has also noted the judiciary's own interest in judicial efficiency.³⁸ Providing litigants step-by-step advice and help, in addition to prompting concerns over neutrality, also strains judicial resources.

Another due process issue unique to pro se litigants is what role the Rules of Civil Procedure should play. The Rules attempt to define a fair method of procedure,³⁹ but an unrepresented litigant seems to call for exceptions. In effect, courts liberally interpret the Rules to the benefit of pro se litigants. As described above, this is supported by Rule 1, which states that courts should consider the goals of fairness, speed, and cost,⁴⁰ and Rule 94, which allows the rules to be relaxed or dispensed with when necessary.⁴¹ However, the Rules also place a premium on uniform treatment. The Alaska Supreme Court has noted that the Rules were promulgated for the "specific purpose of giving fair and reasonable notice to all parties of the appropriate procedural standards that should be uniformly applied when any party, *including a pro se litigant*, seeks relief in [civil litigation]."⁴² Reconciling the preference for efficiency and

33. Breck v. Ulmer, 745 P.2d 66, 75 (Alaska 1987).

34. Genaro v. Municipality of Anchorage, 76 P.3d 844, 845-47 (Alaska 2003).

35. *Id.* at 847 n.12 (quoting Bauman v. State, Div. of Family & Youth Servs., 768 P.2d 1097, 1099 (Alaska 1989)).

36. See Shooshanian v. Dire, 237 P.3d 618, 624 (Alaska 2010) (quoting Bauman, 768 P.2d at 1099) ("[A] trial court is not required to 'instruct a pro se litigant as to each step in litigating a claim' because such involved assistance 'would compromise the court's impartiality in deciding the case by forcing the judge to act as an advocate for one side.'").

37. *Id.*

38. Greenway v. Heathcott, 294 P.3d 1056, 1071 (Alaska 2013).

39. See ALASKA R. CIV. P. 1 ("These rules shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding.").

40. *Id.*

41. ALASKA R. CIV. P. 94.

42. Bauman, 768 P.2d at 1099 (emphasis added).

fairness with the preference for uniformity creates problems when applying the Rules to pro se litigants.

Another source of difficulty stems from the diverse population of pro se litigants.⁴³ For the represented litigant, the judge can rely upon a set of expectations of what the attorney will know. With a pro se litigant, on the other hand, the judge is likely unaware of how much legal knowledge any particular pro se litigant has. Thus, it is unclear what degree of leniency is necessary to permit a fair result for a particular unrepresented party.⁴⁴

The Alaska Supreme Court has addressed this consideration by requiring pro se litigants to educate themselves during their case.⁴⁵ The pro se litigant has a duty to attempt to comply with the Rules of Civil Procedure.⁴⁶ In reviewing pro se cases, the Alaska Supreme Court regularly considers the degree to which the unrepresented litigant has participated in hearings.⁴⁷ Those pro se litigants who are engaged in their case are more likely to receive leniency.⁴⁸ The degree to which a litigant must be engaged, however, has recently become much less clear.⁴⁹

43. See Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 *FORDHAM URB. L.J.* 305, 319–61 (2002) (analyzing the parties, cases, and claims made in the federal pro se docket in the Southern District of New York and finding a diversity of parties).

44. In *McCracken v. State*, the court found “the trial judge should satisfy himself that the prisoner understands precisely what he is giving up by declining the assistance of counsel.” 518 P.2d 85, 91 (Alaska 1974).

45. See *Kaiser v. Sakata*, 40 P.3d 800, 803 (Alaska 2002) (“The litigant is expected to make a good faith effort to comply with judicial procedures.”); see also *Coffland v. Coffland*, 4 P.3d 317, 321 (Alaska 2000) (“A pro se litigant must make some attempt with the court’s procedures before receiving the benefit of the court’s leniency.”).

46. *Id.*

47. See *Coffland*, 4 P.3d at 320 (finding the trial judge only entered sanctions after the pro se litigant “demonstrated an unwillingness to cooperate” by not responding to motions, filing documents in a timely manner, and failing to appear at pretrial proceedings).

48. Compare *Genaro v. Municipality of Anchorage*, 76 P.3d 844, 845–47 (Alaska 2003) (allowing the pro se litigant procedural leniency in part because of her good faith attempt at procedural compliance), with *Coffland*, 4 P.3d at 321 (denying the pro se litigant procedural leniency because he made no effort to comply with the court rules and procedure).

49. See *Wagner v. Wagner*, 299 P.3d 170, 173–74 (Alaska 2013) (finding that a telephone request amounted to an implied request for continuance). *But see* *Greenway v. Heathcott*, 294 P.3d 1056, 1070 (Alaska 2013) (finding that repeated expressions of concern did not constitute a request for continuance).

III. DEVELOPMENT OF THE PRO SE LENIENCY POLICY IN ALASKA

The judicial policy of granting leniency to pro se litigants has a long history and first emerged at the federal level as early as the 1940s.⁵⁰ The modern expression of this policy, however, began in 1972 with *Haines v. Kerner*.⁵¹ In *Haines*, the federal district court dismissed a prisoner's pro se complaint without allowing him an opportunity to present evidence.⁵² In reversing the judgment, the United States Supreme Court held that the allegations, "however inartfully pleaded," were sufficient to raise a claim.⁵³ The Court further stated:

We cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁵⁴

Haines did not cite a source for its pronouncement of a less stringent standard for the pleadings of pro se litigants, and neither did it rest its result on the United States Constitution, the United States Code, or the Federal Rules of Civil Procedure. Instead, *Haines* rested on nothing but itself to create the foundation for the modern expression of the policy and its peculiar place in the law.

In 1974, two years after *Haines*, the Alaska Supreme Court found a constitutional right to self-representation in *McCracken v. State*.⁵⁵ Though the court did not expressly extend *McCracken* to require leniency toward pro se civil litigants under due process, the Alaska Supreme Court adopted a set of policies that favor the pro se litigant in its decision in *Breck v. Ulmer*.⁵⁶

In *Breck*, after filing a response to the defendants' answer, the pro se plaintiff learned that a reply pleading requires leave of court and subsequently filed a motion for such leave.⁵⁷ The motion was denied by

50. See *Dioguardi v. Durning*, 139 F.2d 774, 775-76 (2d Cir. 1944) (finding a pro se litigant's inartfully pleaded complaint was sufficient to withstand dismissal on the face of the complaint).

51. 404 U.S. 519 (1972) (per curiam).

52. *Id.* at 520.

53. *Id.*

54. *Id.* at 521 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The United States Supreme Court has since modified the "no set of facts" provision in *Conley*. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The Alaska Supreme Court has yet to address the modification.

55. *McCracken v. State*, 518 P.2d 85 (Alaska 1974).

56. 745 P.2d 66 (Alaska 1987).

57. *Id.* at 69.

the lower court.⁵⁸ While the Alaska Supreme Court upheld this denial, finding that the district court had not abused its discretion and that any error to the litigant was not prejudicial, the court did agree that more leniency should have been afforded to the pro se litigant.⁵⁹

Breck established two standards of leniency for pro se litigants. First, “the pleadings of pro se litigants should be held to less stringent standards than those of lawyers.”⁶⁰ Second, “the trial judge should inform a *pro se* litigant of the proper procedure for the action he or she is obviously attempting to accomplish.”⁶¹ *Breck* did not cite the Alaska Constitution or due process as the source of a judicial duty to advise pro se litigants, nor did it cite to *McCracken* for a constitutional right of self-representation. Similarly, *Haines* did not cite to the United States Constitution or consider due process concerns. Though pro se litigants have occasionally claimed a violation of due process as the source of trial court error,⁶² even when reversing the trial court, the Alaska Supreme Court has never stated that the Due Process Clause protects the actions of unrepresented litigants.⁶³

Since *Breck*, the court has modified its leniency policy to account for the variances in pro se cases. These modifications have reflected the court’s notion that pro se leniency is rooted in a sense of fairness. A pro se litigant must still meet some minimum level of competency before the court allows for procedural leniency.

For example, in *Bauman v. State, Division of Family & Youth Services*,⁶⁴ the court created a “common knowledge” exception to the rule of leniency.⁶⁵ In *Bauman*, the plaintiffs, appearing pro se, did not oppose the defendants’ motion for summary judgment.⁶⁶ After the motion was granted, the plaintiffs argued that they should have been notified of the requirements of the summary judgment procedure.⁶⁷ While acknowledging the notion of leniency established in *Breck*, the

58. *Id.*

59. *Id.* at 75.

60. *Id.* (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

61. *Id.*

62. *E.g.*, *Berry v. Berry*, 277 P.3d 771, 774 (Alaska 2012); *Willoya v. State, Dep’t of Corr.*, 53 P.3d 1115, 1124 (Alaska 2002).

63. *See, e.g.*, *Wagner v. Wagner*, 299 P.3d 170, 174 (Alaska 2013) (basing the reversal of the trial court on the leniency afforded to pro se litigants and the court’s failure to inform the litigant of the proper procedure); *Genaro v. Municipality of Anchorage*, 76 P.3d 844 (Alaska 2003) (basing the reversal of the trial court on the court’s failure to advise a pro se litigant on the proper procedure).

64. 768 P.2d 1097 (Alaska 1989).

65. *Id.* at 1099.

66. *Id.* at 1098.

67. *Id.*

court was unwilling to extend this leniency when the plaintiffs did not even file a defective pleading.⁶⁸ The failure of the pro se litigant in *Bauman* fell below the level of competency that the trial court should expect of a pro se party. In recognizing that it is “common knowledge that initiating and pursuing a civil lawsuit can be a difficult and complex procedure,” the court established a minimum “common knowledge” threshold for pro se litigants to meet.⁶⁹ In order to meet this threshold, it is up to the pro se litigant to “familiarize himself or herself with the rules of procedure.”⁷⁰

Since *Bauman*, the court has continued to require some minimum compliance with the Rules of Civil Procedure. First, when the pro se litigant is aware of the correct procedures, the trial court has no duty to advise the litigant further.⁷¹ Second, in *Coffland v. Coffland*,⁷² the court held that “[a] pro se litigant must make some attempt to comply with the court’s procedures before receiving the benefit of the court’s leniency.”⁷³

In *Coffland*, the pro se litigant repeatedly ignored discovery requests and motions, never made an effort to comply with the court’s procedures, and never asked for the court’s assistance.⁷⁴ The litigant’s failure to comply with procedures did not meet the expected minimum level of competency. In subsequent cases, this standard has been expressed as requiring “a good faith” attempt to comply.⁷⁵ *Genaro v. Municipality of Anchorage*,⁷⁶ decided in 2003, is one of the few cases where the Alaska Supreme Court has applied the *Breck* standard, holding that the trial court did not meet it. The court remanded the case because the trial court failed to adequately advise a pro se litigant.⁷⁷ Before *Genaro*, in order to receive leniency, a pro se litigant had to affirmatively ask for help⁷⁸ or file an obviously defective pleading.⁷⁹

68. *Id.* at 1099.

69. *Id.*

70. *Id.*

71. *Willoya v. State, Dep’t of Corr.*, 53 P.3d 1115, 1123 (Alaska 2002).

72. 4 P.3d 317 (Alaska 2000).

73. *Id.* at 321.

74. *Id.*

75. *See, e.g., Kaiser v. Sakata*, 40 P.3d 800, 804 (Alaska 2002) (holding that if a pro se litigant does not make a good faith effort to comply with the procedural rules a court may deny procedural leniency).

76. 76 P.3d 844 (Alaska 2003).

77. *Id.* at 847.

78. *See Coffland*, 4 P.3d at 321 (Alaska 2000) (noting that the pro se litigant never asked for assistance in complying with the court’s orders and therefore refusing to grant him leniency).

79. *See Bauman v. State, Div. of Family & Youth Servs.*, 768 P.2d 1097, 1099 (Alaska 1989) (refusing to extend pro se leniency to a situation in which the

Genaro, however, expanded a trial court's duty to advise a pro se litigant even when no proper pleading has been filed, as long as the litigant's intent is obvious.⁸⁰

Genaro rests on the unrepresented party's determined, if somewhat misplaced, efforts to litigate her case. After *Genaro* filed suit, a bankruptcy trustee was briefly given responsibility for her case.⁸¹ Once *Genaro* had been reinstated as plaintiff, the defendant sent *Genaro* requests for admissions which *Genaro* never answered.⁸² The defendant was granted summary judgment over *Genaro's* objection that the bankruptcy trustee had responded to the requests.⁸³ The court held the requests were admitted due to *Genaro's* failure to respond.⁸⁴

In reversing the lower court's decision, the Alaska Supreme Court held that even though *Genaro* never asked the superior court how to withdraw statements deemed admitted, *Genaro's* efforts in opposing and objecting to the defendant's motion were a signal to the trial court that she was attempting to withdraw the admissions.⁸⁵

Relying on *Breck, Bauman*, and *Coffland*, the *Genaro* court held that a trial court has a duty to advise. The court found that "it was an abuse of discretion not to inform *Genaro* of the proper procedure for the action . . . she [was] obviously attempting to accomplish."⁸⁶ The court took note of the technical nature of the Rules of Civil Procedure, in effect, finding that the particular procedure of withdrawing admitted statements was outside the common knowledge of what a litigant should be expected to know.⁸⁷

Genaro also began to define the scope of judicial neutrality. The court found that providing advice to a pro se litigant does not require "open-ended participation by the court [that] would be difficult to contain."⁸⁸ Similarly, the court found that informing the litigant of the "technical defects" in any pro se pleadings does not "compromise the superior court's impartiality."⁸⁹ *Genaro's* affirmation of the duty to advise, then, also suggests the limits of such duty. Any leniency that

plaintiffs did not file a defective pleading).

80. *Genaro*, 76 P.3d at 846.

81. *Id.* at 845.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 846.

86. *Id.* at 847 (citation omitted) (internal quotation marks omitted).

87. *See id.* at 846 ("[T]he rules of court may be models of clarity to one schooled in the law, [but] a pro se litigant might not find them so.") (citation omitted) (internal quotation marks omitted).

88. *Id.* at 847 (quoting *Bauman*, 768 P.2d at 1099).

89. *Id.*

would compromise the court's impartiality should not be granted.

Following *Genaro*, the Alaska Supreme Court continued to expand *Breck*. In 2012, in *Berry v. Berry*,⁹⁰ a pro se litigant argued that the superior court violated his due process rights by ordering an accelerated briefing schedule outside of the normal procedural rules.⁹¹ While the court did not reach the merits of the issue, the court cautioned in dicta: "[I]t would have been preferable for the court to explain in greater detail to this pro se litigant the consequences of accelerating the schedule."⁹² Thus, the court continued to emphasize the importance of providing leniency to pro se litigants.

IV. GREENWAY AND WAGNER CREATE AN UNCERTAIN FUTURE FOR THE ALASKA POLICY OF PRO SE LENIENCY

A. *Greenway* and *Wagner*: The Alaska Policy of Leniency Loses Clarity

In 2013, two cases significantly affected *Breck*: *Greenway v. Heathcott*⁹³ and *Wagner v. Wagner*.⁹⁴ Both cases decided what actions by a pro se litigant constitute a motion that the trial court must recognize. While both litigants failed to comply with court rules, the litigant in *Greenway* lost and the litigant in *Wagner* won. Together, the two conflicting opinions compromise the overall clarity of *Breck*. Furthermore, *Wagner's* expansion of *Breck* promises difficulties for the trial bench, for attorneys who face unrepresented parties, and for the parties themselves.

In *Greenway*, the pro se litigant frequently expressed her concern about the absence of a witness and the need for that person's testimony. Despite this, the court held these expressions did not constitute a request for continuance.⁹⁵ Her attempt to call a government agent as a witness was unsuccessful, as the United States quashed *Greenway's* subpoena.⁹⁶ On appeal, *Greenway* argued that the trial court should have granted her a continuance so that she could obtain the testimony of the witness and that the court should have inferred a request for relief by her "repeated exclamations" that the specific witness was needed.⁹⁷

90. 277 P.3d 771 (Alaska 2012).

91. *Id.* at 774.

92. *Id.* at 775 n.11.

93. 294 P.3d 1056 (Alaska 2013).

94. 299 P.3d 170 (Alaska 2013).

95. *Greenway*, 294 P.3d at 1070.

96. *Id.* at 1060-61.

97. *Id.* at 1070.

In finding there was no formal continuance request, the court considered whether Greenway's actions "conveyed an informal request that should have put the court on notice" that she wanted a continuance.⁹⁸ Effectively applying the "common knowledge" rule of *Bauman*,⁹⁹ the court observed that such a request is not "inherently complex."¹⁰⁰ In fact, Greenway had made similar continuance requests in the past.¹⁰¹ Ultimately, the court determined that "[n]either her actual words nor the tenor of her comments put the court on notice that Greenway was asking for relief, rather than expressing disappointment."¹⁰²

Given *Breck*, it is not clear why Greenway's actions were not accepted as a continuance request. Under *Breck*, the trial court should "inform a *pro se* litigant of the proper procedure for the action he or she is obviously attempting to accomplish."¹⁰³ Later cases, including *Genaro*, reiterated the court's affirmative role.¹⁰⁴ It is unclear why Greenway's "repeated exclamations" of her concerns were insufficient to show her intent. Even assuming her remarks were only expressions of disappointment,¹⁰⁵ Greenway's remarks, combined with her unsuccessful attempt to subpoena the federal witness,¹⁰⁶ should have made plain what she was "obviously attempting to accomplish."¹⁰⁷

A few weeks later after *Greenway* was decided, *Wagner* held that a telephoned request asking for continuance the day before trial, while not the proper procedure, could constitute a legitimate continuance request when the procedural error might have resulted from trial court error.¹⁰⁸ In *Wagner*, a *pro se* litigant telephoned the court clerk the day before trial to say that he could not appear.¹⁰⁹ The trial court did not inform Wagner that his method of requesting a continuance by telephone call was improper, even though Wagner had used this method twice

98. *Id.*

99. *Bauman v. State, Div. of Family & Youth Servs.*, 768 P.2d 1097, 1099 (Alaska 1989).

100. *Greenway*, 294 P.3d at 1070.

101. *Id.* at 1071.

102. *Id.* at 1070.

103. *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987).

104. *See, e.g., Genaro v. Municipality of Anchorage*, 76 P.3d 844, 847 (Alaska 2003) (holding that the court should have informed the *pro se* litigant of the proper procedure for the withdrawal of admissions when the litigant clearly indicated the desire to do so).

105. *Greenway*, 294 P.3d at 1070.

106. *Id.*

107. *Breck*, 745 P.2d at 75; *Genaro*, 76 P.3d at 846.

108. *Wagner v. Wagner*, 299 P.3d 170, 174 (Alaska 2013).

109. *Id.* at 172.

before.¹¹⁰ The court ruled that his absence was voluntary, denied a continuance, and held the trial without Wagner.¹¹¹ On appeal, the legal question was whether Wagner's actions constituted a motion that the court should have considered.¹¹²

Ultimately, the Alaska Supreme Court determined that the motion should have been considered.¹¹³ The court concluded that his "phone call the day before trial and his failure to file a motion or submit an affidavit as required by Civil Rule 40(e) constitute a lack of familiarity with the rules rather than gross neglect or lack of good faith."¹¹⁴

The court found that three factors supported this conclusion. The first was established under *Breck*: "the relaxed standards for pro se litigants."¹¹⁵ The second and third factors created the new duties of the trial court: the litigant "may have reasonably concluded that his earlier telephonic requests for continuances to the judicial assistant were acceptable"¹¹⁶ and he "was never ordered to cease calling for continuances and advised that he needed to file a motion for continuance."¹¹⁷ Thus, his telephone call constituted a "legitimate request for a continuance."¹¹⁸ *Wagner* greatly expanded the leniency granted to the pro se litigant. Today, the trial court must consider whether its own silence might have left a misimpression in the mind of the pro se litigant about proper procedure, and must consider pleadings with defects that may have arisen out of such misimpressions.

This creates a low threshold before the court has some duty to consider an implied motion. This duty may arise if the pro se litigant "may have reasonably concluded" that a procedure was correct.¹¹⁹ Once a duty has arisen, the trial court must analyze the history and impact of its own actions to assure that it might not have given the unrepresented person the wrong impression.¹²⁰

Although the outcome in *Wagner* differed from the recent decision in *Greenway*, only Justice Winfree dissented in *Wagner*:

The court today . . . apparently add[s] another rule for

110. *Id.* at 173.

111. *Id.* at 172-73.

112. *Id.* at 173.

113. *Id.*

114. *Id.* at 174 (citation omitted) (internal quotation marks omitted).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* Note that an actual erroneous conclusion is unnecessary. The reasonable probability of an erroneous conclusion suffices.

120. *Id.*

dealing with pro se litigants—implicit in today’s decision is a rule that a trial court must issue written orders explaining substantive rulings and procedural requirements to pro se litigants who decline both to attend a scheduled court hearing and to make an effort to determine what occurred at the hearing.¹²¹

Justice Winfree was likely correct in his assessment of the impact of the *Wagner* ruling. Among other things, the Alaska Supreme Court includes considerations of judicial efficiency when determining the degree of flexibility that the court provides to an unrepresented litigant.¹²² Although the caseload of the Alaska trial bench has remained remarkably constant in recent years,¹²³ the new affirmative duties under *Wagner* might further strain judicial resources. In *Wagner*, the court found an implied motion where the litigant had routinely failed to appear in court.¹²⁴ This type of hand-holding for litigants who are not engaged in their own cases could be detrimental to the adversary system and the impartiality of the court.

B. An Uncertain Future for Pro Se Leniency after *Greenway* and *Wagner*

Greenway and *Wagner* muddy waters that were clear under *Breck*, and today, the usefulness of *Breck* is less certain.

A due process analysis that recognized a protected interest in self-representation would have been the better tool to resolve these two cases, especially *Wagner*. A due process analysis would balance the constitutionally protected interests of both parties.¹²⁵ The first element examines the nature of the private interest.¹²⁶ The second element analyzes the risk of an erroneous deprivation of that interest and the necessity of additional safeguards to protect it.¹²⁷ In *Wagner*, as both litigants appeared pro se, the two parties each held a protected interest

121. *Id.* at 178 n.1 (Winfree, J. dissenting) (citation omitted).

122. *Shooshnian v. Dire*, 237 P.3d 618, 624 (Alaska 2010).

123. RYAN FORTSON & BRAD A. MYRSTOL, ALASKA JUSTICE STATISTICAL ANALYSIS CTR., UNIV. OF ALASKA ANCHORAGE, ALASKA TRIAL COURT CASE FILING STATISTICS, 2005-2012, (Apr. 2013), http://justice.uaa.alaska.edu/ajsac/2013/ajsac.13-04.trial_courts.pdf.

124. *Wagner*, 299 P.3d at 174.

125. *See In re Urie*, 617 P.2d 505, 508 (Alaska 1980) (citations omitted) (detailing the factors used to establish whether due process scrutiny has been satisfied).

126. *Id.* at 508.

127. *Id.*

in self-representation. The interests of one would have been affected by any remedy granted to the other. Under due process, the plaintiff's rights would have properly been considered alongside the defendant's. The third element of the due process analysis is the interest of the State.¹²⁸ In *Wagner*, the State's interest was maintaining an impartial and efficient judicial system. Thus, under due process analysis, the extensive affirmative duty created in *Wagner* imposes a heavy burden on the trial judge, who must preserve the impartiality of the court.¹²⁹

Prior to *Wagner*, under *Breck* and cases that followed, the trial court would listen to the unrepresented litigant or read the pleadings, then advise the litigant of any defects, and allow the opportunity to cure. *Wagner* changed that practice. Today the trial court must consider whether its own silence might be the source of the litigant's error.¹³⁰ The judge must estimate what the litigant could have been thinking—not necessarily what the litigant actually thought. The prior decision in *Greenway* complicates the *Wagner* holding: the litigant's energetic behavior might constitute no more than an "expression" that has not yet solidified into a "motion."¹³¹ If the trial court considers a motion the litigants did not intend, the court risks unfairness to the opposing party.

The lawyer who represents the opposing party faces related problems which affect the lawyer's duty to zealously advocate for her own client's position.¹³² In *Wagner*, a risk of mischaracterization was found the *day of trial*.¹³³ If the lawyer suspects that the court might have left an opposing pro se litigant with the wrong impression, the client's case might be delayed if the misimpression is discovered late in the proceedings. While not wanting the case to be delayed, the lawyer is hard-pressed to contact the unrepresented opponent, for fear of alerting the opponent to issues that might have not occurred to him.

CONCLUSION

Recognizing a protected interest in representing oneself is essential to preserving a workable policy of leniency toward pro se litigants. The judicial policy that favors leniency toward pro se litigants plays a valuable role in assuring access to the courts and the resolution of disputes on their merits. However, the policy must be anchored to something secure. At present, the policy lacks this security and thus is

128. *Id.*

129. ALASKA CODE OF JUDICIAL CONDUCT Canon 2, 3 (2012).

130. *Wagner v. Wagner*, 299 P.3d 170, 174 (Alaska 2013).

131. *Greenway v. Heathcott*, 294 P.3d 1056, 1070 (Alaska 2013).

132. ALASKA RULES OF PROF'L CONDUCT pmb. § 2 (2012).

133. *Wagner*, 299 P.3d at 174.

vulnerable to nominal flexibility and arbitrariness.

Given the different results in *Greenway* and *Wagner*, the current policy of leniency has little predictive value, thus depriving the trial court of guidance as to what procedures it must follow, and depriving the parties of notice about what they may reasonably expect. Tethering pro se leniency to due process will play an important role in promoting a coherent, consistent, and useful policy toward the unrepresented litigant.