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## Self-represented litigants and the code of judicial conduct

Rule 2.2 of the 2007 American Bar Association *Model Code of Judicial Conduct* provides that “a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” New comment 4 to that rule adds a caveat: “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.”

In 2012, the Conference of Chief Justices and the Conference of State Court Administrators passed a resolution (<http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07252012-Support-Expanding-Rule-ABA-Model-Code-Judicial-Conduct-Self-Representing-Litigants.ashx>) recommending that states consider adding a new section to Rule 2.2 that would state: “A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.” The resolution also suggested “states modify the comments to Rule 2.2 to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants.”

34 jurisdictions (33 states and the District of Columbia) have added a version of comment 4 to their codes of judicial conduct. Only 1 state (Delaware) and the U.S. Judicial Conference have adopted new codes of judicial conduct after reviewing the 2007 model code without including any reference to pro se litigants (in general, the new Delaware and federal codes adopted very few of the other 2007 ABA changes). Delaware has, however, adopted *Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants* (<http://courts.delaware.gov/Supreme/AdmDir/ad178guidelines.pdf>).

14 state supreme courts have adopted the exact language in comment 4 — Arizona, Connecticut, Georgia, Hawaii, Indiana, Minnesota, Nevada, North Dakota, Oklahoma, Tennessee, Utah, Washington, West Virginia, and Wyoming (except that Arizona and Nevada use the term “selfrepresented” rather than “pro se”). Pennsylvania added

“impartially” to the end of the comment so in its version accommodations are “to ensure pro se litigants the opportunity to have their matters heard fairly and impartially.” New Jersey adopted a variation that reads: “A judge may make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard.”

18 jurisdictions have revised and expanded the model provision.

- The **Arkansas** code states, “A judge may make reasonable accommodations, consistent with the law and court rules, to facilitate the ability of all litigants to be fairly heard.” A comment explains:

The growth in litigation involving self-represented litigants and the responsibility of courts to promote access to justice warrant reasonable flexibility by judges, consistent with the law and court rules, to ensure that all litigants are fairly heard. Examples of accommodations that may be made include but are not limited to (1) making referrals to any resources available to assist the litigant in the preparation of the case; (2) liberally construing pleadings to facilitate consideration of the issues raised; (3) providing general information about proceeding and foundational requirements; (4) attempting to make legal concepts understandable by using plain language whenever possible; (5) asking neutral questions to elicit or clarify information; (5) modifying the traditional order of taking evidence; and (6) explaining the basis for a ruling.

- After the comment that states the “obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge’s obligation to dispose of the matters fairly and with patience,” the **California** code adds, “for example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard.”

- The **Colorado** code includes the model version of comment 4 to Rule 2.2 but adds a new comment 2 to Rule 2.6 that provides:

The steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.

- The **District of Columbia** version of comment 4 states: “It is not a violation of this Rule for a judge to make reasonable accommodations to ensure litigants who do not have the assistance of counsel the opportunity to have their matters fairly heard. See Comment [1A] to Rule 2.6, which describes the judge’s affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard.” Comment 1A to Rule 2.6 states: “The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. Pursuant to Rule 2.2, the judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person; however, in the interest of ensuring fairness and access to justice, judges should make reasonable accommodations that help litigants who are not represented by counsel to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law. In some circumstances, particular accommodations for self-represented litigants may be required by decisional or other law. Steps judges may consider in facilitating the right to be heard include, but are not limited to, (1) providing brief information about the proceeding and evidentiary and foundational requirements, (2) asking neutral questions to elicit or clarify information, (3) modifying the traditional order of taking evidence, (4) refraining from using legal jargon, (5) explaining the basis for a ruling, and (6) making referrals to any resources available to assist the litigant in the preparation of the case.”

- The **Idaho** code includes the model comment but adds:

A judge’s ability to make reasonable accommodations for self-represented litigants does not oblige a judge to overlook a self-represented litigant’s violation of a clear order, to repeatedly excuse a self-represented litigant’s failure to comply with deadlines, or to allow a self-represented litigant to use the process to harass the other side.

- **Iowa** includes the model comment but also adds, “By way of illustration, a judge may: (1) provide brief information about the proceeding; (2) provide information about evidentiary and foundational requirements; (3) modify the traditional order of taking evidence; (4) refrain from using legal jargon; (5) explain the basis for ruling; and (6) make referrals to any resources available to assist the litigant in the preparation of the case.”

- A comment to Rule 2.2 of the **Kansas** code of judicial conduct states:

It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard. On the other hand, judges should resist unreasonable demands of assistance that might give an unrepresented party an advantage. If an accommodation is afforded a self-represented litigant, the accommodation shall

not relieve the self-represented litigant from following the same rules of procedure and evidence that are applicable to a litigant represented by an attorney.

A comment to Rule 2.6 of the Kansas code states:

Increasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A judge's obligation under Rule 2.2 to remain fair and impartial does not preclude the judge from making reasonable accommodations to ensure a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an advantage. If the judge chooses to make a reasonable accommodation, such accommodation shall not relieve the self-represented litigant from following the same rules of procedure and evidence that are applicable to a litigant represented by an attorney.

- The **Louisiana** version states add that "a judge may make reasonable efforts, consistent with the law and court rules, to facilitate the abilities of all litigants, including self-represented litigants, to be fairly heard, provided, however, that in so doing, a judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person." New commentary states:

Steps judges may consider in facilitating the right of self-represented litigants to be heard, and which (they might find) are consistent with these principles include, but are not limited to: making referrals to any resources available to assist the litigant in preparation of the case; providing brief information about the proceeding and evidentiary and foundational requirements; asking neutral questions to elicit or clarify information; attempting to make legal concepts understandable by minimizing use of legal jargon; and explaining the basis for a ruling.

- The **Maine** version, which is in the text of the rule, provides "A judge may take affirmative steps, consistent with the law, as the judge deems appropriate to enable an unrepresented litigant to be heard. A judge may explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed. A judge may also inform unrepresented individuals of free or reduced cost legal or other assistance that is available in the courthouse or elsewhere."
- The **Maryland** code provides: "Increasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A

judge's obligation under Rule 2.2 to remain fair and impartial does not preclude the judge from making reasonable accommodations to protect a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an unfair advantage. This Rule does not require a judge to make any particular accommodation."

- The **Massachusetts** code (effective January 1, 2016) states in the text of Rule 2.6(A): "A judge may make reasonable efforts, consistent with the law, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard." Comments state:

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[1A] The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. In the interest of ensuring fairness and access to justice, judges may make reasonable accommodations that help self-represented litigants to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law. The judge should be careful that accommodations do not give self-represented litigants an unfair advantage or create an appearance of judicial partiality. In some circumstances, particular accommodations for self-represented litigants are required by decisional or other law. In other circumstances, potential accommodations are within the judge's discretion. By way of illustration, a judge may: (1) construe pleadings liberally; (2) provide brief information about the proceeding and evidentiary and foundational requirements; (3) ask neutral questions to elicit or clarify information; (4) modify the manner or order of taking evidence or hearing argument; (5) attempt to make legal concepts understandable; (6) explain the basis for a ruling; and (7) make referrals as appropriate to any resources available to assist the litigants. For civil cases involving self-represented litigants, the *Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants* (April 2006) provides useful guidance to judges seeking to exercise their discretion appropriately so as to ensure the right to be heard.

In addition, Massachusetts has adopted *Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants* (<http://www.mass.gov/courts/court-info/trial-court/exec-office/ocm/jud-institute/jg-self-rep.html>).

- The **Missouri** version provides "A judge may make reasonable accommodations to afford litigants the opportunity to have their matters fairly heard."

- The **Montana** Supreme Court adopted a version of Comment 4, Rule 2.2 that provides:

A judge may make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.

The Montana comment to Rule 2.5, which requires competent diligent disposition of judicial and administrative duties, includes:

In accomplishing these critical goals in the increasing number of cases involving self-represented litigants, a judge may take appropriate steps to facilitate a self-represented litigant's ability to be heard.

- **Nebraska** includes the model comment but adds, "on the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage."
- In the text of Rule 2.2, the **New Hampshire** code states: "A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard." It adds a new comment that:

The growth in litigation involving self-represented litigants and the responsibility of courts to promote access to justice warrant reasonable flexibility by judges, consistent with the law and court rules, to ensure that all litigants are fairly heard.

- The **New Mexico** version states: "When pro-se litigants appear in court, they should comply with the rules and orders of the court and will not be treated differently from litigants with counsel. It is not a violation of this rule, however, for a judge to make reasonable accommodations to ensure all litigants the opportunity to have their matters fairly heard."
- The **Ohio** Supreme Court adopted a version of Comment 4, Rule 2.2 that provides:

To ensure self-represented litigants the opportunity to have their matters fairly heard, a judge may make reasonable accommodations to a self-represented litigant consistent with the law. See also Rule 2.6, Comment [1A].

Comment 1A to Rule 2.6 (which requires that a judge accord to every person who has a legal interest in a proceeding the right to be heard according to law) in the Ohio code provides:

The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard. By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making referrals to any resources available to assist the litigant in the preparation of the case.

- The **Wisconsin** Supreme Court amended the state's code of judicial conduct to add a provision that states: "A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard." In addition, the Court published but did not adopt a new comment, stating it "may be consulted for guidance in interpreting and applying the rule."

A judge may exercise discretion consistent with the law and court rules to help ensure that all litigants are fairly heard. A judge's responsibility to promote access to justice, combined with the growth in litigation involving self-represented litigants, may warrant more frequent exercise of such discretion using techniques that enhance the process of reaching a fair determination in the case. Although the appropriate scope of such discretion and how it is exercised will vary with the circumstances of each case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality. Reasonable steps that a judge may take in the exercise of such discretion include, but are not limited to, the following: 1. Construe pleadings to facilitate consideration of the issues raised. 2. Provide information or explanation about the proceedings. 3. Explain legal concepts in everyday language. 4. Ask neutral questions to elicit or clarify information. 5. Modify the traditional order of taking evidence. 6. Permit narrative testimony. 7. Allow litigants to adopt their pleadings as their sworn testimony. 8. Refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order. 9. Inform litigants what will be happening next in the case and what is expected of them.