

Model Code of Judicial Conduct Provisions on Self-Represented Litigation

Options for Alternative Comment Language Prepared in Support of Potential State Activity in Response to 2012 Resolution 2 of the Conference of Chief Justices and the Conference of State Court Administrators

*Prepared by the Self-Represented Litigation Network¹
March 2013*

I. Introduction

On July 25, 2012, the Conference of Chief Justices and the Conference of State Court Administrators passed *Resolution 2: In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Represented Litigants*.²

The key language of the Resolution is as follows:

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators recommend that states consider adopting Rule 2.2 [of the Model Code of Judicial Conduct] with the inclusion of the following emphasized wording:

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

(B) 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; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators suggest 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.

This memorandum, prepared by the Self-Represented Litigation Network, is offered to the states in support of the approach recommended in the second part of the Resolution.

¹ Copyright National Center for State Courts, 2012. Opinions expressed are not necessarily those of participant organizations in the Network or its Working Groups, nor of its hosting organization or funders, including the National Center for State Courts.

² <http://ccj.ncsc.dni.us/resol2Rule22ModelCode.html>. The full text appears as Appendix I to this memo.

It gives examples of language adopted by the states, provides some alternatives for consideration, and suggests ways that states might consider what language to develop and adopt. Appendices provide the full text of the CCJ/COSCA Resolution, the texts of already adopted state alternative language, options for access-facilitative steps not listed in that language, and a listing of resources.³

II. Review of State Approaches

At least thirteen (Arizona, Arkansas, Connecticut, Hawaii, Indiana, Minnesota, Nevada, North Dakota, Oklahoma, Tennessee, Utah, Washington, and Wyoming) have adopted the exact language in comment 4 of Rule 2.2 of the 2007 ABA Model Code of Judicial Conduct (except that Arizona and Nevada use the term “self-represented” rather than *pro se*.)⁴

Of the states that have adopted language significantly different from the exact ABA recommendation, Louisiana, Maine, Ohio, Washington DC, Iowa and Colorado have made specific suggestions for, to use the CCJ/COSCA wording, “specific actions judges can take to exercise their discretion in cases involving self-represented litigants.”

In addition, New Hampshire, Maryland and Montana, have added additional language highlighting the appropriateness of such actions, without listing them.

New Hampshire has chosen to highlight the self-represented litigant issue in black letter text of Rule 2.2, as now supported nationally in the Resolution.

Specifically, Colorado added the following Comment 2, including a list of “permissible” actions, to Rule 2.6:

³ It may be worth noting that the impetus for this approach has been underlined by the 2011 United States Supreme Court decision in *Turner v. Rogers*, 564 U.S. ___, 131 S.Ct. 2507 (June 20, 2011), approving, and indeed at least in some circumstances mandating, judicial engagement in self-represented cases.

⁴ In addition, Missouri uses very similar language: “*A judge may make reasonable accommodations to afford litigants the opportunity to have their matters fairly heard.*” (Not listed in Appendix II.) Nebraska’s Comment 4 to Rule 2.2 adds an additional caution: “*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. On the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage.*” New Mexico also includes a related caution: “*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 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.

Similarly, Washington DC added this Comment IA, including a listing of actions that judges might consider, to its Rule 2.6

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.

Ohio added the following language in its comment 1A to Rule 2.6:

[1A] 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.

Iowa added the following to the standard language of Comment 4 to Rule 2.4

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 a ruling; and (6) make referrals to any resources available to assist the litigant in the preparation of the case.

Louisiana added Comment 4 to its Canon 3 (Impartiality and Diligence) listing approaches as follows:

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:

- (1) making referrals to any resources available to assist the litigant in preparation of the case;*
- (2) providing brief information about the proceeding and evidentiary and foundational requirements;*
- (3) asking neutral questions to elicit or clarify information;*
- (4) attempting to make legal concepts understandable by minimizing use of legal jargon; and*
- (5) explaining the basis for a ruling.*

Maine, in its Comment 12 to Canon 3 B, is specific about only one such technique,

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 persons of free legal aid and similar assistance that is available in the courthouse or otherwise.

New Hampshire Comment 4 to Rule 2.6, while not referencing a specific list of actions, emphasizes the reasons for and need for judicial flexibility:

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 Montana expanded version of Comment 4, to Rule 2.5 (*Competence, Diligence and Cooperation*) underlines the need for such steps:

In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable

delays, and unnecessary costs. 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.

III. Questions for Consideration

States considering the implications of the counsel of the CCJ/COSCA resolution, and the state actions that preceded and presaged it, might consider the following questions:

- A. What discretionary actions might be listed in a Comment to Rule 2.2 or 2.6 and, if so, how might they most appropriately be described in a particular jurisdiction?
- B. Would any other language be helpful to judges as they consider which such actions are appropriate, and if and when other unlisted actions might be appropriate?
- C. Would it be useful to add language, of the kind used in the alternatives discussed above, to further highlight the relationship of access to justice to actions that might be taken by judges to facilitate the protection of the right to be heard?

IV. Analysis of Possible Language

A. Listing of Possible Discretionary Actions

Among the possible discretionary actions that might be considered to be listed in the Comments to a jurisdiction's Code are the following, which have already been referenced in at least one such Code:

1. *Construing pleadings to facilitate consideration of the issues raised (CO)*
2. *Providing brief information about the proceeding and evidentiary and foundational requirements (LA, OH, DC, CO, IA) See also ME (explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed.)*
3. *Attempting to make legal concepts understandable (CO)*
4. *Asking neutral questions to elicit or clarify information (LA, DC)*
5. *Modifying the traditional order of taking evidence (OH, DC, CO, IA)*
6. *Refraining from using legal jargon (LA, OH, DC, IA)*
7. *Explaining the basis for a ruling (LA, OH, DC, CO, IA)*

8. *Making referrals to any resources available to assist the litigant in the preparation of the case (LA, OH, DC, CO, IA) . See also ME (inform[ing] unrepresented persons of free legal aid and similar assistance that is available in the courthouse or otherwise.)*

The variation in the contents of the three states lists illustrates the value of the approach taken by Resolution 2, to encourage state-by-state flexibility.

Appendix III lists other possible such discretionary actions, not yet appearing in any state's Comments, but generally suggested and favored by the commentators and resources listed in Appendix V. A particular aid to discussion and perhaps education may be the article reprinted in Appendix IV that briefly explains fifteen of the ideas and the arguments for them.

B. Other Possible Language

It should be noted that the four jurisdictions that include lists of possible actions are explicit that these lists of possibilities are non-exclusive, using the following language of introduction:

Steps judges may consider in facilitating the right to be heard include, but are not limited to . . . (Washington DC, Comment 1A to Rule 2.6.)

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 . . . (Colorado, Comment 2 to Rule 2.6.)

By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard . . . (Ohio, Comment 1A to Rule 2.6.)

By way of illustration, a judge may. . . (Iowa Comment 4 to Rule 5.2.2.)

Some individuals involved in discussions about these issues have considered that it might be appropriate to make clear that these actions might have different applicability in certain cases, perhaps through language such as the following:

In jury cases, or those involving a burden of proof other than the preponderance of the evidence, such as criminal cases, some of these techniques may have less relevance, or may need to be used with more caution.

C. The Possible Need for Language on the Right to Be Heard

Finally, it should be noted that several jurisdictions have found it helpful explicitly to link such steps, regardless of whether or not the steps are explicitly listed, to the importance of the right to be heard.

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. (Washington DC, introductory sentence to Comment 4 to Rule 2.6, also cross-referenced in Comment IA to Rule 2.2.)

The steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited. . . (Colorado, beginning of introductory sentence to Comment 2 to Rule 2.6.)

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. (Montana, last sentence of Comment 4 to Rule 2.5.) See also Comment 5 to Rule 2.2.)

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. (Maryland, first sentence of Comment 4 to Rule 2.2.)⁵

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. (New Hampshire, Comment 4 to Rule 2.6, expanding upon black letter text in Rule 2.2 B, identical to the language for that rule recommended for consideration by the Chiefs and COSCA.)

Some of those involved in these discussions have considered that this process might provide an opportunity for additional comment language taking a slightly broader historical and access perspective. An amalgamation of these thoughts, based in large part on the full state variation in language above, might read as follows:

To perform judicial duties fairly, a judge exercises discretion consistent with the law and court rules to ensure that all litigants are heard. A judge's responsibility to promote access to justice, combined with the growth in litigation involving self-represented litigants, warrants more frequent exercise of such discretion using techniques that impact not the litigants' legal rights but the process of reaching final consideration of the case. While the appropriate scope of such discretion and how it is exercised will vary with the circumstances of case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality.

IV. Conclusion and Offer

⁵ The Maryland comment clarifies that judges are not obliged to make any particular accommodation, and that any accommodation must not “give the self-represented litigant an unfair advantage.”

The Self-Represented Litigation Network, including specifically its Best Practices in Judicial Education Working Group, which was responsible for the Harvard-launched Courtroom Curriculum on Self-Represented Litigation,⁶ stands ready to assist jurisdictions in whatever ways are most helpful. The group includes a wide range of highly experienced trial and appellate judges, academics, and experts on access in the courtroom.

It is our hope that the discussions triggered by CCJ /COSCA Resolution 2 will lead not only to focused and productive discussions at the state level about the most appropriate language for Comments to Rule 2.2 and 2.6, but also that these discussions will lead to enhanced understanding, new approaches and innovations, and additional educational programs across the country. Feel free to contact the Coordinator, Richard Zorza, at richard@zorza.net.

⁶ Self-Represented Litigation Network, *Judicial Curriculum for Access to Justice for the Self-Represented in the Courtroom* (2008), http://www.selfhelpsupport.org/library/folder.165143-Harvard_Judicial_Leadership_Conference_Nov_13_2007.

Appendix I

**Conference of Chief Justices
Conference of State Court Administrators**

Resolution 2⁷

**In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to
Reference Cases Involving Self-Represented Litigants**

WHEREAS, the Conference of Chief Justices and the Conference of State Court Administrators have long recognized the importance of access to justice for all; and

WHEREAS, access to courts extends both to lawyer-represented and self-represented litigants; and

WHEREAS, judges would benefit from additional guidance regarding their role in cases involving self-represented litigants; and

WHEREAS, Rule 2.2 of the 2007 ABA Model Code of Judicial Conduct on impartiality and fairness addresses a judge's role in cases involving self-represented litigants only in the "comments" section; and

WHEREAS, the Conferences agree that Rule 2.2 should specifically address cases involving self-represented litigants;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators recommend that states consider adopting Rule 2.2 with the inclusion of the following emphasized wording:

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

(B) 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; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators suggest 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.

Adopted as proposed by the Access, Fairness and Public Trust Committee at the 2012 Annual Meeting on July 25, 2012.

⁷ <http://cej.ncsc.dni.us/resol2Rule22ModelCode.html>.

Appendix II

Adopted State Alternatives to ABA Model Code of Judicial Conduct Provisions Dealing With Self-Represented Litigants

Most Relevant Provisions in Bold

A. District of Columbia⁸

Code of Judicial Conduct

Rule 2.2: Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

Comment

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] 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.

Rule 2.6: Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Comment

⁸ <http://legaltimes.typepad.com/files/2012-code-of-judicial-conduct.pdf>.

[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. 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.

(Comments 2-3 omitted)

B. Colorado⁹

Code of Judicial Conduct

Rule 2.2: Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

Comment

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] 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.

Rule 2.6: Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Comment

[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.

[2] 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

⁹ http://www.courts.state.co.us/userfiles/file/Code_of_Judicial_Conduct.pdf.

required to comply with the same substantive law and procedural requirements as represented litigants.

(Comments 3-4 omitted)

C. Iowa¹⁰

Code of Judicial Conduct

Rule 5.2.2

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

Comment

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this rule.

[4] 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. 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 a ruling; and (6) make referrals to any resources available to assist the litigant in the preparation of the case.

¹⁰ http://www.iowajqc.gov/wfdata/frame250-1017/#Rule51_2_2.

D. Louisiana¹¹

Code of Judicial Conduct

CANON 3

A Judge Shall Perform the Duties of Office Impartially and Diligently

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

- (1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall be unswayed by partisan interests, public clamor, or fear of criticism.
- (2) A judge shall maintain order and decorum in judicial proceedings.
- (3) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.
- (4) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, and shall not permit staff, court officials or others subject to the judge's direction and control to do so. 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.

COMMENTARY TO CANON 3A(4) (2013)

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:

- (1) making referrals to any resources available to assist the litigant in preparation of the case;**
- (2) providing brief information about the proceeding and evidentiary and foundational requirements;**
- (3) asking neutral questions to elicit or clarify information;**
- (4) attempting to make legal concepts understandable by minimizing use of legal jargon; and**

¹¹ <http://www.lasc.org/rules/supreme/cjc.asp>.

(5) explaining the basis for a ruling.

[amended effective March 18, 2013]

E. Maine¹²

CANON 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

....

B. Adjudicative Responsibilities.

....

(12) 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 persons of free legal aid and similar assistance that is available in the courthouse or otherwise.

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[http://www.courts.state.me.us/rules_adminorders/rules/amendments/Canon%203\(B\)\(12\)%20Amend.%205-14-13.pdf](http://www.courts.state.me.us/rules_adminorders/rules/amendments/Canon%203(B)(12)%20Amend.%205-14-13.pdf).

E. Maryland

Rule 2.6. ENSURING THE RIGHT TO BE HEARD

- (a) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.
- (b) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Comment

[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.

[2] 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.

F. Montana¹³

Code of Judicial Conduct

Rule 2.2: Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

COMMENT

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] A judge should manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.

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

RULE 2.5: Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

COMMENT

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

¹³ <http://supremecourtdocket.mt.gov/view/AF%2008-0203%20Other%20--%20Order?id={7F2426C5-4E87-4C48-AE15-3E8E997CF8FC}>.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. **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.**

G. Nebraska¹⁴

Nebraska Revised Code of Judicial Conduct.

§ 5-302.2. Impartiality and fairness.

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

COMMENT

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] 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. On the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage.

¹⁴ <http://www.supremecourt.ne.gov/rules/pdf/Ch5Art3.pdf>.

H. New Hampshire:¹⁵

Code of Judicial Conduct

Rule 2.2 : Impartiality and Fairness

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

(B) 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.

Comment

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] 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.

¹⁵ <http://www.courts.state.nh.us/rules/scr/scr-38-Canon%202-new.htm>

I. New Mexico¹⁶

21-202. Impartiality and fairness.

A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.

Committee Commentary.

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this rule.

[4] 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.

¹⁶ http://www.nmcompcomm.us/nmrules/NMRules/21-202_11-21-2011.pdf.

J. Ohio¹⁷

Code of Judicial Conduct

Rule 2.2: Impartiality and Fairness

A judge shall uphold and apply the *law*, and shall perform all duties of judicial office fairly and *impartially*.

Comment

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this rule.

[4] 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].

Rule 2.6: Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to *law*.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Comment

[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 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

¹⁷ <http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf>.

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.

(Comments 2 and 3 omitted.)

Appendix III

Additional Actions, Recommended by Commentators,¹⁸ But Not Yet Listed in Any Jurisdiction's Code, That Might be Considered for Inclusion or Discussion in Comment Language

1. *Starting the hearing with a quick summary of the case history and of the issues that will be addressed.*
2. *Explaining at the beginning of the hearing that you may be asking questions and that this will not indicate any view on your part. It will merely mean that you need to get the information to decide the case*
3. *Working through issues one by one and move clearly back and forth between the two sides during the exploration of each issue*
4. *Inviting questions about what has occurred, or is to occur.*
5. *Permitting narrative testimony.*
6. *Allowing parties to adopt their pleadings as their sworn testimony.*
7. *Asking questions to establish the foundation of evidence, when uncertain*
8. *If unable to do what a litigant asks because of neutrality concerns, explaining the reasons in those terms.*
9. *Announcing the decision, if possible, from the bench, taking the opportunity to encourage the litigants to explain any problems they might have complying.*
10. *Explaining the decision and considering acknowledging the positions and strengths of both sides.*
11. *Making sure, by questioning, that the litigants understand the decision and what is expected of them, while making sure that they know you expect compliance with the ultimate decision.*
12. *Where relevant, informing the litigants of what will be happening next in the case and what is expected of them.*
13. *Making sure, if practicable, that the decision is given in written or printed form to the litigants.*

¹⁸ These have been drawn from the materials listed in Appendix III.

14. Directing the parties to any resources that are available to assist with compliance or enforcing the order.

15. Thanking the parties for their participation and acknowledging their efforts.

Self-Represented Cases

15 Techniques for Saving Time in Tough Times

By Judge Mark A. Juhas, Judge Maureen McKnight, Associate Justice Laurie D. Zelon, and Richard Zorza

These are tough times in America's courtrooms. Even more than before, judges are faced with increasing caseloads, more self-represented litigants, and budget pressure to reduce courtroom staff.

Every judge will develop his or her own approaches. However, judges who have participated in and studied the research on courtroom dynamics conducted by the Self-Represented Litigation Network¹ suggest that the following techniques can increase courtroom efficiency. They are effective, will work in any financial environment, and do not undercut the underlying value of access to justice for all litigants.

Please note that while some of the suggestions may appear to require taking extra time at the beginning of the process, experience has shown they can result in an overall time saving, as well as more relaxed and more satisfied court staff and litigants.

1. Have courtroom staff check in litigants and give them orientation materials.

This helps save your time at the beginning of the hearing, helps filter out any litigants who are not ready, and helps litigants prepare to use their time more efficiently.

2. If possible, have available staff review the file before the hearing to highlight the most relevant papers and issues. In any event, review the file on your own and make a quick list of the issues to be addressed.

This review has been shown to significantly reduce the on-the-bench time taken at the beginning of the hearing and throughout the hearing. Regardless of whether the file has been pre-reviewed, your focus on the issues at the hearing will save time and convince the parties that you are on top of things and that they do not need to repeat everything. Research shows that many litigants are surprisingly sensitive to the judge's level of preparation and knowledge.

3. Start the hearing with a quick summary of the case history and of the issues that will be addressed.

¹⁹ As appearing in Juhas, McKnight, Zelon and Zorza, *Self-Represented Cases: 15 Techniques for Saving Time in Tough Times*, in *Courts in the 21st Century, the Access to Justice Transformation*, 49 JUDGE'S JOURNAL 18 (No. 1; Winter 2010), <http://www.zorza.net/21st-century.pdf>.

This summary similarly helps the litigants focus, helps you maintain control, makes it easier to avoid repetition, and thus saves bench time. It reassures litigants that their concerns will be addressed.

4. Explain at the beginning of the hearing that you may be asking questions and that this will not indicate any view on your part. It will merely mean that you need to get the information to decide the case.

This makes it much easier to ask questions. It also reassures litigants that you are thinking about their concern for fairness. Some judges also find it useful to explain key governing evidentiary rules, such as hearsay, that are likely to be applied in practice.

5. Make clear that you will hear all sides.

Research has shown how quickly most litigants respond to cues that they will be fully heard. They then feel less need to interrupt or to tell everything in one long narrative. It relaxes everyone, which also saves time.

6. Work through issues one by one and move clearly back and forth between the two sides during the exploration of each issue.

In the hearing itself, move back and forth between the parties, taking each issue one by one. This significantly helps the litigants focus their use of time and creates a sense of progress in the hearing.

7. Do not be afraid to ask questions and follow-up questions to focus the litigants and get the information you need to decide the case in a timely manner.

Self-represented litigants usually appreciate it when judges help them focus on the relevant issues. The time saving is obvious. If you have indicated at the beginning of the hearing that you may ask questions, it is often useful to remind the litigants of that earlier indication at the time that do you ask them.

8. Use body language to maintain control as you move back and forth between the parties and to signal to litigants to stop when they try to interrupt.

Many judges find that, once they have established the pattern, they can control this process through the use of body language, such as by turning from one party to the other and possibly also by opening one's hands in the same direction. This is obviously very time effective. (While using one's finger to move the focus of the hearing is effective, it may be culturally insensitive when used with some groups.)

9. Before making a decision on an issue, ask the parties if they have anything else to say.

Litigants report that this is very reassuring, particularly if the judge explains early that he or she will do this. The technique reduces litigants trying to cover everything at once and cuts back on their interrupting, thus reducing the time needed for the hearing.

10. Whenever possible, announce your decision from the bench simply and clearly, with explanation.

While some judges have been reluctant to issue decisions immediately, fearing outbursts or security problems, as a practical matter in most cases such complications do not occur. Rather, the announcement of the decision increases the chance of comprehension and the likelihood that litigants will understand their obligations. It also provides an opportunity to clear up any confusion or ambiguities and to resolve any problems that may be clear to the parties but not necessarily to the judge. This reduces time spent when the case returns to court.

11. Make sure that the litigants understand your decision, what they have been ordered to do, and the consequences of non-compliance.

Some judges specifically ask litigants to repeat their obligations. Others merely ask for confirmation of understanding. The more attention paid to this, the greater the likelihood of compliance and, thus, a reduction in the likelihood that a case will return to court for enforcement. For limited-English-proficiency litigants, there is a particular risk of noncomprehension, and therefore of unintentional, and devastating, noncompliance.

12. Put in place systems that provide litigants written orders without being required to take any additional steps.

Research in one court showed a 50 percent reduction in returns to court in cases in which the court provided a written order, rather than requiring the parties to submit a proposed post-hearing order. Such orders can be generated by software, by volunteers, or even by court staff or the judge writing on carbonless multi-copy paper.

13. Where appropriate, prepare the litigants for the next steps in the case, including future hearings and possible future orders.

When the judge tells the litigants what is generally going to happen at a future hearing and/or the overall direction the case is taking, the parties are able to prepare themselves for the hearing and for potential changes in their lives. This reduces hearing time and increases the chances of pre-hearing agreement.

14. Direct the parties to any resources that are available to assist with compliance or enforcing the order.

Such resources might include self-help services focused on compliance and enforcement, nonprofits that can help with jobs or counseling, or other informational and assistance resources.

15. Develop materials on compliance and enforcement that you or your staff can provide to litigants.

Such materials might include forms and software designed to assist in obtaining the courts enforcement assistance, as well as materials that make clear the consequences of failure to comply with the courts orders.

Many of these techniques are explained in the Judicial Education Curricula developed by the Self-Represented Litigation Network. These are available on www.selfhelpsupport.org. Many are also illustrated in two judicial education videos that accompany the curricula and research: Judicial Best Practices in Self-Represented Litigation in the Courtroom and Improving Courtroom Communications in Cases Involving Two Self-Represented Litigants. These videos are for judicial education use only and are available from the Knowledge and Information Service of the National Center for State Courts. For additional information, contact Greg Hurely at ghurley@ncsc.org.

We welcome additional suggestions and comments with regard to these ideas; your input should be directed to the coordinator of the Network, richard@zorza.net. This document was prepared in association with the Self-Represented Litigation Network. Opinions expressed are not necessarily those of the Network, the National Center for State Courts, or the Network's participants or funders. The document is copyrighted by the NCSC, but may be distributed with attribution and with these disclaimers for judicial education purposes.

Endnote

1. The research was conducted by John Greacen of Greacen Associates for the Network and the National Center for State Courts, with funding from the Administrative Offices of the Courts of California and Maryland, and the State Justice Institute. Effectiveness of Courtroom Communication in Hearings Involving Two Self-Represented Litigants: An Exploratory Study (2008), available at <http://www.selfhelpsupport.org/library/item.223587>.

Appendix V

Resources on Judicial Ethics and the Self-Represented

Articles and Bench Guides

Albrecht, Greacen, Hough, and Zorza *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES JOURNAL 16 (Spring 2003).

Engler, *The Toughest Nut: Handling Cases Pitting Unrepresented Litigants Against Represented Ones*, 62 NAT'L COUNS. JUV. & FAM. CT. JUDGES J. 10 (2011).

Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (2005), <http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf>.

Greacen Associates, *Effectiveness of Courtroom Communication in Hearings Involving Two Self-Represented Litigants: An Exploratory Study* (2008), [http://www.selfhelpsupport.org/library/item.202482-Judicial Communication Materials Effectiveness of Courtroom Communication i](http://www.selfhelpsupport.org/library/item.202482-Judicial%20Communication%20Materials%20Effectiveness%20of%20Courtroom%20Communication%20i). A video report summarizing this research is available from the National Center for State Courts, for judicial educational purposes only.

Juhas, McKnight, Zelon and Zorza, *Self-Represented Cases: 15 Techniques for Saving Time in Tough Times, in Courts in the 21st Century, the Access to Justice Transformation*, 49 JUDGE'S JOURNAL 18 (No. 1; Winter 2010), <http://www.zorza.net/21st-century.pdf>.

Judicial Council of California, *Handling Cases Involving Self-Represented Litigants: A Bench Guide for Judicial Officers* (2007), http://www.courts.ca.gov/partners/documents/benchguide_self_rep_litigants.pdf. A national, state customizable version is available as part of the Curriculum Package produced by the Self-Represented Litigation Network and listed below.

Zorza, , *A New Day for Judges and the Self-Represented, The Implications of Turner v. Rogers*, 50 JUDGES' JOURNAL 16 (No 4; Fall 2011), and, *A New Day for Judges and the Self-Represented: Toward Best Practices in Complex Self-Represented Cases*, 51 JUDGES' JOURNAL 16 (No 1; Winter 2012).

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 GEORGETOWN JOURNAL OF LEGAL ETHICS 423 (2004)

Curriculum

Self-Represented Litigation Network, *Judicial Curriculum for Access to Justice for the Self-Represented in the Courtroom* (2008), [http://www.selfhelpsupport.org/library/folder.165143-Harvard Judicial Leadership Conference Nov 13 2007](http://www.selfhelpsupport.org/library/folder.165143-Harvard%20Judicial%20Leadership%20Conference%20Nov%2013%202007). The curriculum includes Power Points, faculty notes, activity and resource materials, and video. The best practices video is available from the National Center for State Courts for judicial education purposes only.