

Canon 3B(7) [Rule 2.08]
Ensuring the Right to be Heard
Richard Zorza, Esq.
December 5, 2003

Mr. Zorza submits written testimony in support of his oral comments to the Commission about the implications of the growth of pro se litigation on the Model Code of Judicial Conduct. Pro se litigation is becoming the norm rather than the exception, leading to significant innovation in court systems to help pro se litigants. In Mr. Zorza's view, parallel, but publicly unrecognized innovation is also underway in the courtroom, and judges are without effective guidance about how to proceed. While judges are looking for ways to counteract risks to equality of access to justice that occurs with pro se litigants, they also fear that efforts to assist pro se litigants will be viewed by the public and opposing litigants as inconsistent with the appearance of neutrality.

Mr. Zorza urges the Commission to modify the Code of Judicial Conduct to make clear that judges need not fear violation of the Code when their actions are non-prejudicial and are aimed at obtaining the information needed for a decision. The tension between the needs of access to justice and the fears of the perception on non-neutrality can be remedied by additional comment making clear that judges are not prohibited from taking the steps they feel are needed to ensure that all parties are fully heard regardless of their representation status. Mr. Zorza offers the following new comment to Canon 3B(7) [Rule 2.08]. (Additions underlined.)

When one or both parties is proceeding pro se, non-prejudicial and engaged courtroom management may be needed to protect the litigants' equal right to be heard. This may include questioning witnesses, modifying the traditional order of taking evidence, providing information about the law and evidentiary requirements, and making referrals to agencies able to assist the litigant in the preparation of the case. A careful explanation of the purpose of this type of management will minimize any risk of a perception of biased behavior.

Canon 3B(5) [Rule 2.05]
Bias and Discrimination
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Mr. Zorza suggests the following new comment to Canon 3B(5) [Rule 2.05] as guidance to judges who preside over matters involving pro se litigants. (Additions underlined.)

When a litigant is appearing pro se, affirmative, engaged and non-prejudicial steps taken by a judge who finds it necessary to take such steps, as described in the Comment to Canon 3B(7), to make sure that all appropriate evidence is properly before the court, are not inconsistent with the requirements of Canon 3B(5).

**Canon 3C(1) [Rule 2.13]
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Mr. Zorza notes an apparent reluctance in some jurisdictions of judges becoming involved in pro se innovation programs such as the design of self help centers, development of litigant friendly court forms, development of collaborations with community groups, and design of enforcement mechanisms. To bolster understanding of the importance of these programs and lessen any belief that the judicial role requires or permits aloofness from such programs, Mr. Zorza suggests the following added text to Canon 3C1. (Additions underlined.)

A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business including in improvements in access to justice.

Mr. Zorza suggests the following new comment to Canon 3C(1) to accompany the added black letter text. (Additions underlined.)

The rapid increase of pro se litigation, and the increasing awareness of the significance of the courts' role in providing access to justice have led to additional administrative requirements upon the judiciary, including particularly participation in the creation of innovations designed to facilitate the right to be heard described in Canon 3B(7).

**Code of Judicial Conduct
Reporters' Notes
Richard Zorza, Esq.
December 5, 2003**

Mr. Zorza notes for the Commission's consideration the following problems that courts face as a result of the growth of pro se litigation. Mr. Zorza suggests that the Commission consider addressing these issues through additional black letter, commentary or possibly for attention in Reporters' Notes:

- *Judicial approval of unconscionable settlements.* The Commission might consider inclusion of language suggesting greater scrutiny of agreements when one party is pro se.
- *Attorney communications with the unrepresented.* The Commission might consider whether language suggesting the appropriateness of heightened judicial scrutiny of such communication is appropriate when one party is pro se, particularly when there is suggestion that an unrepresented party is relying on representation from counsel for an opposing party.

- *Judicial role in enforcement of court orders.* The Commission might consider language that would make clear that judicial and court support of and management of the enforcement process is not inconsistent with judicial neutrality.