American Bar Association
Joint Commission on the Evaluation of the Model Code of Judicial Conduct

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The Implications of the Growth of Pro Se Litigation for the Model Code of Judicial Conduct

This written testimony is submitted in support of my oral comments. While I work with a number of access to justice organizations, these comments are submitted on my own behalf.

As is well known, at least in the last few years, pro se litigation in the US has become as much the norm as the exception. To give some examples of recent research:

- In 1999, 65% of Florida's family law cases started with at least one person without a lawyer.[2]

- In California, 81% of evictions had at least one party without a lawyer,[3]

While we know remarkably little about this phenomenon, we do know, at least in general, the following:[4]

- The majority of self represented litigants are low income

- The majority are not hiring a lawyer because they can not afford one

- The phenomenon is particularly concentrated in family courts

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[1] I am an independent consultant on access to justice issues. Information and publications are available at www.zorza.net.

[2] Office of the State Court Administrator, *Report to the Florida Legislature on Family Court Self Help Programs*, (1999).

[3] Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know*,7 (Center for Families, Children and the Courts; 2002) online at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatweknow.pdf

[4] The best summary of the data is in Greacen, supra, note 3, at 1-3.

- Small claims courts and landlord tenant cases are another area of focus

While there has been significant innovation in court systems that help pro se litigants prepare for court,[5] this innovation has generally not been matched by equivalent publicly recognized innovation in the courtroom,[6] notwithstanding the explicit call from COSCA for appropriate protocols, Conference of Chief Court Administrators, *Position Paper on Self Represented Litigants* (2000) (Recommendation 10: "COSCA should identify strategies and protocols to assist trial court judges in managing cases and in conducting proceedings including self-represented litigants with special attention to cases in which only one of the parties is represented") and the attention to the issue in the joint Report issued by the Conference of Chief Justices and the Conference of State Court Administrators, *Final Report of the CCJ COSCA Joint Task Force on Pro Se Litigation* (2002).

It is my belief that there is in fact substantial innovation proceeding in the field. driven, if by nothing else, by the overwhelming need of possibly millions of cases a year in which litigants are appearing without lawyers, and judges are without effective guidance as to how to proceed.

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[5] . American Judicature Society, *A National Conference on Pro Se Litigation: A Report and Update* (2001) (Report of November 1999 national conference on *pro se*, that focused mainly on court preparation and support); Garcia, *Litigants without Lawyers: Courts and Lawyers Meeting the Challenges of Self-Representation*, (2002) (ABA "Road Map" including descriptions of programs and resources that again focus on activities outside the courtroom); Goldschmidt, Mahoney, Solomon, and Green ,*Meeting the Challenge of Pro Se Litigation: A Guidebook for Judges and Court Managers* (1998) (which includes a listing of programs then in place, most of which did not affect the courtroom itself); Greacen, *No Legal Advice from Court Personnel: What Does that* Mean, 34 JUDGES JOURNAL, 10 (1995)(the seminal line-drawing article that addresses the role of clerks and non-judicial staff); Henschen, *Lessons from the Country: Serving Self Represented Litigants in Rural Jurisdictions* (2002) (rural focus, programs outside the courtroom). Owen, Staudt and Pedwell, *Access to Justice: Meeting the Needs of Self-Represented Litigants* (2002) (Study of how technology can redesign the process, focus is on extra-courtroom aspects); Particularly influential have been the Position Paper issued by the Conference of Chief Justices and the Conference of State Court Administrators, Conference of State Court Administrators, *Position Paper on Self Represented Litigatns* (2002)

See specifically the changes proposed and adopted by the Ethics 200 Process to the Model Rules of Professional Conduct, particularly changes to Rule 1.2 and the new rule 6.5, http://www.abanet.org/cpr/e2k-report_home.html (last visited November 25, 2003) and by parallel changes in the states, as tracked at http://www.abanet.org/cpr/jclr/state_contact_list.doc (last visited November 25, 2003).

[6] Among the limited literature is Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks*, 67 FORDHAM LAW REV. (1988); Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAMILY CT. REV. 36 (2000); Albrecht, Greacen, Hough and Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES JOURNAL, 16 (Winter 2003), Zorza, *The Self Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers*, (2002). Particularly noteworthy in offering an early comprehensive state-focused approach to several aspects of the problem is Althoff, *Ethical Considerations for Lawyers and Judges When Dealing with Unrepresented Persons*, WASHINGTON STATE BAR NEWS, (January 2000) available at http://www.wsba.org/media/publications/barnews/archives/2000/jan-00-ethics.htm

Based on conversations with judges, I believe that they feel deeply torn between their strong desire to find ways to counteract risks to equality of access to justice that occurs when litigants do not have representation, and their fear that whatever they do to assist in making sure that the right to be heard is real will be viewed by the public, and opposing litigants as inconsistent with the appearance of neutrality. As the *Final Report of the CCJ COSCA Joint Task Force on Pro Se Litigation* puts it:

> *Equally problematic as the administrative burden on courts is the ethical dilemma that self-represented litigants pose for judges. Judicial canons of conduct require that judges maintain impartiality toward all parties, which many judges interpret as a prohibition on providing self-represented litigants with assistance during court hearings, especially for cases in which the opposing party is represented. The dilemma for judges stems from the judicial canon that requires judges to "accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Many judges find it difficult to reconcile the requirement for providing self-represented litigants with an opportunity for a fair hearing with prohibitions on helping litigants meet the technical requirements for presenting evidence in court (footnotes omitted)".*[7]

Judges, for example, often find that they need to ask questions to clarify testimony given by a litigant. They may decide that they need to change the order of testimony in order to make it clearer to those in the courtroom and the parties what is going on, and the relationship of the different parts of the case to each other. They may find that a party can only proceed effectively if they have been informed of the underlying law or the procedural requirements.

But at the same time an inner voice (and perhaps the outer voice of an objection) cautions then that each of these steps may be viewed as non-neutral, as "leaning over the bench," or "putting the finger on the scales of justice." While this is not the place to go into detail into how a judge can best manage the courtroom as a whole to minimize the risk of such misperceptions, and to maximize the chance that he or she hears all competent evidence,[8] it is important that the Code be modified to make clear that

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[7] *Final Report of the CCJ COSCA Joint Task Force on Pro Se Litigation* at 2. The *Report* further notes: "To secure the cooperation of the trial bench in these endeavors, judges should be given adequate tools (e.g., judicial guidelines, recommended practices and procedures) with which to structure their interactions with self-represented litigants in the courtroom. This may require a fundamental reexamination of the ethical framework of judicial neutrality and objectivity in the context of self-represented litigation in the same way that court staff previously reconsidered the meaning of legal information and legal advice. This discussion has only just begun in a handful of states, and to date there is no clear consensus of where the lines should be drawn between appropriate and inappropriate judicial assistance for self-represented litigants. The sooner that the topic is placed on the table for discussion, the sooner that judges can begin to formulate concrete ideas for improving the in-court experience of self-represented litigants (footnote omitted)." *Report* at 7-8.

[8] Some ideas on how to achieve this goal are laid out at Albrecht, *et al*, *supra*, note 6

provided the judge's actions are nonprejudical, and are aimed at obtaining the information needed for a decision, they not now, and indeed never have been in violation of the code.

Therefore the apparent tension between the needs of access to justice and the fears of the perception of non-neutrality can be simply remedied by additional comment language that makes clear that judges are not prohibited from taking the steps they feel they need to take to ensure that all parties are fully heard regardless of their representation status. This could be done, for example, by adding the following Comment to Canon 3B(7):

> *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.*

This could be underlined by a similar new comment to Canon 3B(5) which would read:

> *When a litigant is appearing* pro set*, 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).*

To the extent that some might feel that the authorization of judicial engagement is inconsistent with neutrality, I would suggest that it is useful to understand that our tendency to consider neutrality and passivity as equivalent is an oversimplification. In fact as the table below[9] shows, engagement versus passivity and neutrality versus non-neutrality are best seen as independent dimensions. A judge's behavior can fit into any of the cells in this table, and we should not equate neutrality with passivity, or non-neutrality with engagement.

[9] This table, as well as material in some footnotes, is taken from an early draft of an article in preparation by the author, and currently planned for publication in the Spring 2004 issue of the Georgetown Journal of Law and Ethics.

	Engaged	Passive
Neutral	Creates an environment in which all the relevant facts are brought out, Engages the parties, *as needed*, to bring out these facts, and their foundation Ensures neutrality by making sure that each side gets their side fully out[10]	Leaves it to the parties to get their evidence and foundations before the court, Does not engage the parties, but rules on motions and objections, Relies on the balance of the system to ensure neutrality
Non-Neutral	May intervene to deter or prevent one side getting story before court May also allow bias to cloud how evidence is seen.	Acts as above but allows bias to cloud whether and how evidence is admitted and seen.

[10] Cases in support of a duty of engagement include: *Breck* v. *Ulmer*, 745 P. 2d 66 (Ak. 1987)(trial judge has "explicit" duty to advise self-represented litigant of right and procedure for opposing summary judgment motion; omission here held not prejudicial); *Keating* v. *Traynor*, 833 P. 2d (Ak. 1992) (similar duty to inform one seeking to intervene of proper procedure); *Collins* v. *Arctic Builders*, 957 P.2d 980 (Ak. 1998) (reversal of dismissal of appeal for procedural defect; count "not concerned that specificity in pointing out technical defects in pro se pleadings will compromise the superior court's impartiality); *Lombardi v. Citizens National Trust and Savings Bank of Los Angeles*, 137 Cal.App.2d 206, 210 (2nd Dist. 1955) ("It is the duty of a trial judge to see that a cause is not defeated by 'mere inadvertence' (*Hellings v. Wright,* 29 Cal. App. 649) or by 'want of attention' (*Bare v. Parker,* 51 Cal. App. 106) and 'to call attention to omissions in the evidence or defects in the pleadings' which are likely to result in a decision other than on the merits (*Farrar v. Farrar,* 41 Cal. App. 452) and 'within reasonable limits' by proper questions 'to clearly bring out the facts so that the important functions of his office may be fairly and justly performed' (*Estate of Dupont,* 60 Cal.App.2d 276.) He is not, however, required to act as counsel for a litigant in the presentation of his evidence"; here no error in failure to assist given complexity of deadman's statute and fact the non-neutral advocate role the judge would have had to adopt to assist self-represented litigant); *Gannet* v. *Blanchard*, 91 Cal App 4d 1276 (2001) (judicial obligation to make sure that court's communications are not prone to misunderstanding by the self-represented); *Oko* v. *Rogers*, 466 N.E. 2d 658 (Ill. App 3d 1984) (no error in judge's role in the case, including fact that "[w]henever necessary, the trial judge would make his own brief and limited examination of a witness in order to clarify the testimony. The court also guided the defendant through parts of his own testimony in order to avoid a long narrative on irrelevant matters") . See also, *Advisory Opinion 1-97* of the Indiana Commission on Judicial Qualifications, opining that it would be a judge's duty in a non-adversarial situation to point out a technical omission, the remedying of which would make possible the granting of relief ("Neither the interests of the court nor of the litigant are served by rejecting the petition on the basis of this type of deficiency.")

A second, and perhaps less urgent problem is an apparent reluctance in some jurisdictions, notwithstanding the urgings in the COSCA Position Paper cited above, of judges to become involved in *pro se* innovation programs such as the design of self help centers, the development of litigant friendly court forms, the development of collaborations with community groups, and design of enforcement mechanisms. This reluctance may reflect a lack of understanding of the importance of these programs, or a belief that the judicial role requires or permits aloofness from them.

While caution may be appropriate in certain situations, such blanket aloofness is, in my opinion, ultimately inconsistent with the judicial obligation with respect to the administration of justice. I therefore suggest the text be added so that Canon 3C(1) would read:

> *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 <u>including in improvements in access to justice</u> (Proposed change underlined).*

I would also suggest a Comment that would read as follows:

> *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).*

Finally, I would like to draw briefer attention to three problems that the Joint Commission might want to consider as appropriate for additional language, or possibility for attention in *Reporters Notes*.

<u>The problem of judicial approval of unconscionable settlements.</u> There are persistent reports that some attorneys are obtaining from pro se litigants agreements to unconscionable or illegal settlements, and that these agreements are being enforced by the judiciary, usually without their knowing of their illegality. Such a situation occurs, for example, if an attorney obtains an agreement of a tenant to leave an apartment, even though, as a matter of law, the landlord has not stated a cause of action that would justify an eviction. The Joint Commission might include some language suggesting greater scrutiny of agreements when one party is pro se.

<u>Attorney Communications with the Unrepresented</u>. While the Model Rules of Professional Conduct regulate attorney communications with the unrepresented, there is evidence that attorneys are in fact acting inappropriately in their communications with the

unrepresented, including by giving legal advice (although not in the interest of the unrepresented person) and overbearing the will of the unrepresented party. The Joint Commission might consider whether language suggesting the appropriateness of heightened judicial scrutiny of such communication would be appropriate when one party is pro se, particularly when there is suggestion that an unrepresented party is relying on a representation from counsel for an opposing party.

Judicial Role in the Enforcement of Court Orders. As of yet, as pointed out in the COSCA Position Paper, little has been done to assist the self-represented with the enforcement of their orders. One justification for the judicial and court administrative reluctance to take steps to assist in the enforcement of orders is the apparent belief that such activity is inconsistent with the neutrality of the court. This view under values the importance of courts' acting to protect the integrity of their orders by making sure that they take effect, and wrongly treats the post-decision procedural context as identical to the pre-decision context. The Joint Commission might consider language that might make clear that judicial and court support of and management of the enforcement process is not inconsistent with judicial neutrality.

I would be happy to submit proposed language if there is interest.