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## MEMORANDUM

To: Mark I. Harrison, Chair, ABA Commission on Evaluation of the Model Code of Judicial Conduct

From: Hon. Lora J. Livingston, Chair, ABA Standing Committee on the Delivery of Legal Services  
William Whitehurst, Chair, ABA Standing Committee on Legal Aid and Indigent Defendants

Date: September 8, 2005

RE: Comments on the Draft Revisions to the Model Code of Judicial Conduct

On behalf of the Standing Committee on the Delivery of Legal Services and the Standing Committee on Legal Aid and Indigent Defendants, we applaud the efforts of the Commission on Evaluation of the Model Code of Judicial Conduct. Obviously the conduct of the judiciary is integral to our system of justice and the ABA's obligation to clarify the propriety of that conduct is among the most important functions we can provide.

Having reviewed the submissions to the Commission and the draft revisions, we write at this time to join those who have encouraged the Commission to speak directly to issues involving the judge's role in pro se litigation.

The Standing Committee on Legal Aid and Indigent Defendants (SCLAID) addresses the administration of justice as it affects the poor. The mission of the Standing Committee on the Delivery of Legal Services (Delivery) is to increase access to justice for those of moderate income. Both committees are dedicated to the achievement of the Goal II of the ABA, "to promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition."

In pursuit of our missions, our committees have a history of research and analysis into issues involving pro se litigation. As a result of our work, we have come to several conclusions about the status of pro se litigants. In some areas of law, such as traffic, small claims, misdemeanors, and housing, people appear in court without a lawyer as the norm. In family law, we are seeing a dramatic shift from a time when the predominate number of people were represented, but now tend to appear pro se. While some people freely make the choice to appear without representation, too often people self-represent because they cannot afford a lawyer and legal aid and pro bono programs lack the resources to provide them with full assistance.

While proceeding pro se as a matter of economic limitations is difficult and intimidating for many individuals, those difficulties are accentuated when the person faces a lawyer on the opposing side of the case. This, of course, is always the case in traffic and misdemeanor matters. It is frequently the case in housing court and recently an increasing circumstance in domestic relations cases.

Not only do pro se litigants face difficulties of their own, they also present challenges to judges dedicated to the pursuit of a just outcome. As reported in research done by the American Judicature Society, "When judges were asked about the specific problems that arise when one party is self-represented...most judges said that the primary challenge is maintaining their impartiality...Judges who assist a pro se litigant, or, conversely, who rule in favor of an attorney, find themselves on the horns of a dilemma."<sup>1</sup>

As you are aware, policies clarifying positions regarding pro se litigants have been adopted by the ABA and others. These policies have addressed the conduct of both practitioners in various settings and judges.

While the ABA Model Rules of Professional Conduct generally anticipate situations where parties are represented<sup>2</sup>, recent changes in the rules have addressed issues of limited scope representation. Model Rule 1.2(c) was amended as part of the Ethics 2000 initiative to clarify that a lawyer can provide a limited scope of services to an otherwise self-represented client if the representation is reasonable and the client gives informed consent to the scope of the representation. At the same time, Model Rule 6.5 was added to clarify the lawyers' responsibilities when providing short-term limited scope services in pro bono and non-profit settings.

Over the past five years, a growing number of states have gone further than the ABA in this regard and adopted additional changes to their rules of professional conduct and changes to their rules of evidence that address issues of document preparation, limited appearances and communications with opposing counsel.<sup>3</sup> These changes are all designed to provide clarification needed because of the dynamics resulting from the increases in pro se litigation.

Currently SCLAID is considering the relationship between legal aid lawyers and programs with pro se litigants as it undertakes a revision of its "Standards for Providers of Legal Services to the Poor."

More significant to your work is the fact that the ABA and others have adopted policies that directly speak to the judiciary's obligations when facing pro se litigants. In the ABA Standards Relating to Court Organization, Standard 2.23 states, "When litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to insure a fair trial." When examining the propriety of the court's engagement to achieve this standard, the commentary states, "[I]t is ultimately the judge's responsibility to see that the merits of a controversy are resolved fairly and justly. Fulfilling that responsibility may require that the court, while remaining neutral in consideration of the merits, assume more than a merely passive role in assuring that the merits are adequately presented." The commentary concludes, "Where litigants represent themselves, the court in the interest of fair determination of the merits should ask such questions and suggest the production of such evidence as may be necessary to supplement or clarify the litigants' presentation of the case."<sup>4</sup>

The Conference of State Court Administrators (COSCA) and the Conference of Chief Justices (CCJ) have collaborated to embrace policies that both assist pro se litigants and assure the judiciary that judges do not violate their obligation to retain impartiality when they become engaged in cases that include pro se litigants.

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<sup>1</sup> Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers, Goldschmidt, et al, American Judicature Society, 1998, at 52-53.

<sup>2</sup> Note, for example, in the Preamble, at paragraph 8, "[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assure that justice is being done." Neither the preamble nor the rules explicitly address the lawyer's obligation in this regard when the opposing party is not well represented.

<sup>3</sup> See "An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants: A White Paper" by the ABA Standing Committee on the Delivery of Legal Services, April 2005, at <http://www.abanet.org/legalservices/downloads/delivery/prosewhitepaperfeb2005.pdf>

<sup>4</sup> Standards Relating to Court Organization, ABA Judicial Administration Division, 1992, at 37-38, at [http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=member&role=abanetmo&url=/jd/mo/standards/trial\\_courts.pdf](http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=member&role=abanetmo&url=/jd/mo/standards/trial_courts.pdf)

A 2000 position paper by COSCA states, "When a litigant is self-represented, the most critical and difficult issue is how to preserve the impartiality of the judge, both in terms of reality and perception. What is the judge's role where a self-represented litigant is involved? Can the judge 'assist' the self-represented litigant without impacting on the court's ethical obligation to be neutral and impartial? Does the Code of Judicial Conduct adequately address the ethical considerations faced by judges presiding in cases with self-represented litigants? While courts must be mindful of these issues and strive to preserve their neutrality, they must also be cognizant of their obligation to ensure equal access to justice."<sup>5</sup>

This position paper served as the basis for a joint task force between COSCA and CCJ. The task force drafted and both entities adopted a resolution that included recognition "that courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts, regardless of representation status."<sup>6</sup>

Notwithstanding Standard 2.23 of the ABA Standards Relating to Court Organizations and the COSCA/CCJ Resolution 31, no single document carries the weight and authority on judicial conduct as much as the ABA Model Code. Therefore we write to encourage the Commission to include explicit direction within the Code that clearly signals to judges their ability to be engaged in matters before them involving pro se litigants without compromising their impartiality. The American Judicature Society has submitted comments to the Commission earlier that address this issue. We embrace and advocate its position.

We encourage the Commission to include, as part of the commentary to Canon 2.04, the following statement, previously recommended by AJS:

A judge may make procedural accommodations to provide diligent pro se litigants the opportunity to have their cases fully heard. Such an exercise of judicial discretion does not raise a reasonable question about the judge's impartiality. Reasonable accommodations include liberally construing pleadings, explaining the basis for a ruling, refraining from using legal jargon, questioning witnesses for clarification, freely allowing amendments of pleadings, and explaining general matters such as the burden of proof and what types of evidence may and may not be presented.

We again thank you for the opportunity to advance this critical issue and for your further consideration of it.

CC: Standing Committee on the Delivery of Legal Services  
Standing Committee on Legal Aid and Indigent Defendants  
Rich Cassidy  
Rosemary Giuliano  
George Kuhlman  
Aimee Skrzekut-Torres  
Debra Taylor  
Terry Brooks  
William Hornsby

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<sup>5</sup> Position Paper on Self-Represented Litigation, Conference of State Court Administrators, August 2000, at page 2, at <http://cosca.ncsc.dni.us/PositionPapers/selfreplitigation.pdf>

<sup>6</sup> Resolution 31 In Support of the Leadership Role for CCJ and COSCA in the Development, Implementation and Coordination of Assistance Programs for Self-Represented Litigants, adopted August 1, 2002, at <http://ccj.ncsc.dni.us/resol31AsstPgmsSflLitigants.html>