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To: ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct

From: Richard Zorza, Esq.

Re: Comments on Proposed Draft of New Canons One and Two

Date: July 8, 2004

I write to comment on the current proposed draft of new Canons One and Two.

In particular I write to urge that the drafts should be changed so that the Comments to the Canons should address the judicial role in protecting the right of access to justice of pro se litigants. As before, I write as an individual, albeit one with extensive involvement and writings one the issue.

I. The Commission Should Address Pro Se Issues

I believe it is crucial that the emerging draft address pro se issues. To fail to do so would leave unaddressed a large range of issues that play a significant role in the life of the typical state court judge, that impact greatly on the public perception of courts, as well as the reality of access to justice.

As shown by the data collected in note 1 on page my article, *The Disconnect Between the Requirements of Neutrality and Those of the Appearance of Neutrality When Parties Appeal Pro Se,* 17 Georgetown Journal of Legal Ethics, 423, 423 (2004), in many courts over 50% of cases move forward with at least one party pro se. These cases are the cases that proceed in the "people's courts", evictions, small claims, and family matters, and as such have an immense impact on the way that the public as a whole perceives the legal system and its legitimacy. (This paper is attached.)

Moreover, despite this importance, judges are currently forced to handle the tensions that come from this role with almost no guidance. The problems and difficulties that come from the scale of the situation and the lack of guidance are highlighted in the explicit language of approval in August 2002 of the Conference of Chief Justices (CCJ)and the Conference of State Court Administrators in their Resolution 31[1] of the

[1] The substance of the Resolution is that CCJ and COSCA:
"1. Recognize that courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts, regardless of representation status;
2. Endorse the recommendations proposed in the COSCA Position Paper on Self-Represented Litigation;
3. Urge its members to take a leadership role in their respective jurisdictions to encourage the expansion of successful pro se assistance programs, to identify and develop programs to address unmet needs, and to coordinate the delivery of program services effectively and efficiently; and
4. Support the establishment of court rules and policies that encourage the participation of judges, court staff, legal services agencies, state and local bar associations, and community organizations in the implementation and operation of assistance programs for self-represented litigants."

2000 Conference of Chief Court Administrators, *Position Paper on Self Represented Litigants* for appropriate protocols, (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), which led to Resolution 31 (see especially page 9 of the *Final Report*, recommending protocols.

Indeed this approach is endorsed in Resolution 31 itself: "CCJ and COSCA [should] identify strategies and protocols to assist trials judges in meeting the needs of self-represented litigants." (All of these documents are attached and are of course worthy of careful study and consideration by the Joint Commission; I would suggest that the Commission should consider inviting CCJ to weigh in on this issue; the Chiefs' views should surely be given great weight).

The Joint Commission should also be aware that the importance of the issue to the judiciary and the legal system as a whole is underlined by the significant number of initiatives underway to research the need, develop strategic responses, and generate tools that for judges that will assist in providing access to justice for those proceeding pro se. The projects (many of which are funded by SJI) include the following:

- **American Judicature Society Research and Curriculum** AJS is developing a paper, protocol, and education module that will provide resources for judges to use to examine their role in cases involving self-represented litigants and provide guidance in ensuring that the judicial response to the challenge of pro se litigants is consistent with the code of judicial conduct.

- **American Judicature Society Research on State Level Innovation in Pro Se Assistance.** AJS, is conducting a review of the status of innovation in all states.

- **California Judicial Council Benchbook.** The California Judicial Council is developing a pro se cases bench book. The bench book will address best practices, non-verbal behavior, and race and ethnic sensitivity issues.

- **California Pro Se Program Assessment.** These assessments will include courtroom evaluation and comparison of the impact on courtroom processes of those who have been assisted b the programs. .

- **National Center for State Courts Pro Se Summit.** The National Center is planning, a summit on pro se for the early spring of 2005.

The Full resolution is at http://ccj.ncsc.dni.us/resol31AsstPgmsSlfLitigants.html

- **Trial Court Research and Innovation Consortium Pro Se Program Assessment Processes.** TCRIC is conducting a significant number of assessments of pro se programs in several states, including Maryland, Minnesota, and Alaska. While the assessments are focusing initially on the pro se assistance programs, rather than the courtroom, they are providing important lessons about the relationship between these programs and change in the courtroom.

It is critically important that the Joint Commission add its weight and its wisdom to this cluster of initiatives. Indeed, at this moment in time, silence on the part of the Joint Commission might well be interpreted as a lack of endorsement of what is becoming a major theme in court innovation.

II. Proposed Language for Changes to the Comments

The direction that I am urging could be achieved, for example, by adding a new Comment 2 between the currently proposed Comments 1 and 2 to the new Canon 2.08:

> *Given the judge's important role in protecting the litigants' equal right to be heard when one or both parties is proceeding pro se, non-prejudicial and engaged courtroom management may be appropriate to protect this right. Such management 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 emphasize that this judicial engagement is in support of the right to be heard.*

This could be underlined by a similar additional comment to the Proposed Canon 2.05 which would read:

> *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 2.08, to make sure that all appropriate evidence is properly before the court, are not inconsistent with the requirements of Canon 2.05.*

With respect to administrative responsibilities in support of access to justice, the need for which is also explicitly addressed in the CCJ/COSCA Resolution 31,[2] I also suggest that text be added so that the new Canon 2.13 would read:

> *<u>Administrative Competence and Diligence.</u> A judge shall discharge the judge's administrative responsibilities without bias or*

[2] Indeed, the Resolution is explicit that there is bench and bar resistance to programs in support of the self-represented: "WHEREAS, the Task Force also found that continued bench and bar resistance to such programs could pose a major obstacle to future development and expansion of promising pro se assistance programs. . ."

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 from Commission Draft underlined).

I would also suggest an additional Comment to this Canon 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 2.08.