



STATE OF NEW YORK  
**UNIFIED COURT SYSTEM**  
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**A. GAIL PRUDENTI**  
Chief Administrative Judge

**JOHN W. McCONNELL**  
Counsel

**MEMORANDUM**

January 24, 2013

**TO:** All Interested Persons

**FROM:** John W. McConnell

**RE:** Proposed amendment of New York's Code of Judicial Conduct (22 NYCRR §100.3(B)(12)), relating to a judge's role in facilitating the ability of unrepresented litigants to have their matters fairly heard.

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The Administrative Board of the Courts has approved for public comment the following proposed amendment of section 100.3 of the New York Code of Judicial Conduct ("A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently"), adding a new section (B)(12) (Exhibit A):

(12) It is not a violation of this Rule for a judge to make reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard.

The proposed amendment is derived from a recommendation of the Task Force to Expand Access to Civil Legal Services (Exhibit B) and is based on ABA Model Judicial Code Rule 2.2, comment 4 (Exhibit B). It is intended to clarify that judges may accommodate unrepresented litigants to a reasonable extent without compromising judicial neutrality. According to the Task Force, 25 states have adopted similar language.

Persons wishing to comment on this proposal should e-mail their submissions to [OCARule100-3-B-12@nycourts.gov](mailto:OCARule100-3-B-12@nycourts.gov) or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004.

Comments must be received no later than March 25, 2013.

**EXHIBIT A**

**Section 100.3 A judge shall perform the duties of judicial office impartially and diligently.**

\* \* \*

**(B) Adjudicative Responsibilities.**

(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(2) A judge shall require order and decorum in proceedings before the judge.

(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 shall 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 against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.

(6) 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. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:

(a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out

the judge's adjudicative responsibilities or with other judges.

(d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.

(e) A judge may initiate or consider any ex parte communications when authorized by law to do so.

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(8) A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not:

(a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(b) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(12) It is not a violation of this Rule for a judge to make reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard.

**EXHIBIT B**



**TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK**

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**OFFICE OF THE  
CHIEF ADMINISTRATIVE JUDGE**

May 31, 2012

Hon. Jonathan Lippman  
Chief Judge of the State of New York  
230 Park Avenue, Suite 826  
New York, New York 10169

Dear Chief Judge Lippman:

As you know, concerns were raised at the hearings you held in all four Appellate Departments by judges regarding unrepresented litigants that appear before them. The testimony revealed that the judges are uncertain as to how far they can go to accommodate an unrepresented litigant without at the same time compromising their neutrality.

To address these concerns, the Task Force has reviewed the American Bar Association Model Judicial Code Rule 2.2 which states, in part, that "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure unrepresented litigants the opportunity to have their matters fairly heard." Eleven (11) states have adopted identical language, thirteen (13) states have adopted similar language, and one (1) state has included different language to the same effect.

Our recommendation is to include the following language in the New York Code of Judicial Conduct (Rules of the Chief Administrative Judge, 22 NYCRR Part 100) as §100.3(B)(12): It is not a violation of this Rule for a judge to make reasonable accommodations for unrepresented litigants to have their matters fairly heard.

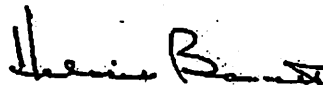
This will bring New York in line with the 25 other states that have an explicit recognition that judges can help to some degree. As you will note, we have modified the language slightly from the ABA Model Rule. By eliminating the word "ensure," the proposed language removes any concern judges may have about the mandatory nature of the language in the ABA Rule and also removes the risk that this language might encourage litigation by unrepresented litigants who believe they have been denied certain accommodations. While the proposed Rule honors judicial discretion, the Task Force recommends that the Administrative Board and court administration urge judges to be sensitive to and to make reasonable accommodations for the needs of unrepresented litigants.

**We believe this recommendation is only a first step. We suggest the issuance of guidelines, including specific examples, that will help judges better understand the appropriate boundaries.**

**Accordingly, on behalf of the Task Force, I am writing to request that the Unified Court System consider proceeding with implementing the new language into the rules as soon as practicable. As always, the Task Force is available to assist you in connection with this recommendation and the drafting of potential guidelines.**

**Thank you for your consideration.**

**Sincerely,**

A handwritten signature in black ink, appearing to read "Helaine Barnett", written in a cursive style.

**Helaine Barnett**

**Copy for: Hon. A. Gail Prudenti**

**EXHIBIT C**



**AMERICAN BAR ASSOCIATION  
CPR POLICY IMPLEMENTATION COMMITTEE**

**COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS**

<b>RULE 2.2 Impartiality and Fairness</b>	
<p><b>A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*</b></p> <p><b>COMMENT</b>                      [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.</p> <p>Ten (10) states have identical language (AR, CT, CO, IN, MN, NV, OK, TN, WA, and WY)                      Fourteen (14) states have similar language (AZ, DC, HI, IA, KS, MD, MO, MT, NE, NH, NM, ND, OH, and UT)                      Two (2) states have different language (DE, SD)</p>	
<b>AL</b>	
<b>AK</b>	
<b>AZ Effective 9/1/2009</b>	[3]: deletes first sentence. Replaces “Errors of this kind do” with “A good faith error of fact or law does.” Adds “However, a pattern of legal error or an intentional disregard of the law may constitute misconduct” to end [4]: replaces “pro se” with “self-represented”
<b>AR Effective 7/1/2009</b>	Identical
<b>CA</b>	
<b>CO Effective 7/1/2010</b>	Identical
<b>CT Effective 1/1/2011</b>	Identical
<b>DE Effective 11/1/2008</b>	Same as first sentence of 1990 Model Code Canon 3B(2) but replaces “shall” with “should.” Comments omitted
<b>DC Effective</b>	[4] Replaces “pro se litigants” with “litigants who do not have the assistance of counsel;” Adds at the end: “See Comment [1A] to Rule 2.6.”

<b>1/1/2012</b>	
<b>FL</b>	
<b>HI</b> <b>Effective</b> <b>7/1/2010</b>	Adds Comment [5]: <i>[5] It is not a violation of this Rule for a judge to sanction a lawyer by permitting the lawyer to provide pro bono legal services to persons or organizations of the lawyer's choosing that are described in Rule 6.1(a) of the Hawai'i Rules of Professional Conduct, or to make a monetary contribution to such organizations.</i>
<b>ID</b>	
<b>IL</b>	
<b>IN</b> <b>Effective</b> <b>1/1/2009</b>	Identical
<b>IA</b> <b>Effective</b> <b>5/3/2010</b>	[4] Replaced language after "to ensure" with: "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 to the preparation of the case.
<b>KS</b> <b>Effective</b> <b>3/1/2009</b>	Deletes [4]
<b>KY</b>	
<b>MD</b> <b>Effective</b> <b>7/1/2010</b>	Changes "fairly and impartially" to "impartially and fairly;" [3] Replaces "pro se" with "self-represented."
<b>MA</b>	
<b>MI</b>	
<b>MN</b> <b>Effective</b> <b>7/1/2009</b>	Identical
<b>MO</b> <b>Effective</b> <b>1/1/2012</b>	Adds "promptly, efficiently" before "fairly and impartially" [1] Adds to the beginning: "In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary costs or delay." [3] Replaces "this Rule" with "this Rule 2-2.2" [4] Replaces text with: "A judge may make reasonable accommodations to afford litigants the opportunity to have their matters fairly heard."
<b>MS</b>	
<b>MT</b> <b>Effective</b> <b>1/1/2009</b>	Adds [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]: similar to Model Code [4] but replaces "It is not a violation of this Rule for a judge to" with "A judge may" and "pro se" with "self-represented"
<b>NE</b> <b>Effective</b> <b>1/1/2011</b>	[4] Adds to end: "On the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage"

<b>NV</b> <b>Effective</b> <b>1/19/2010</b>	Identical
<b>NH</b> <b>Effective</b> <b>4/1/2011</b>	Adds (B): <i>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.</i> [4] Replaces with: <i>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 hears.</i>
<b>NJ</b>	
<b>NM</b> <b>Effective</b> <b>1/1/2012</b>	[4] Reads: "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."
<b>NY</b>	
<b>NC</b>	
<b>ND</b> <b>Effective</b> <b>7/1/2012</b>	Inserts ", including administrative duties," after "office" in the Rule; [4] Replaces "pro se" with "self-represented"
<b>OH</b> <b>Effective</b> <b>3/1/2009</b>	Identical Comment [4]: deletes language through "accommodations," replaces "pro se" with "self-represented," adds: "a judge may make reasonable accommodations to a self-represented litigant consistent with the law. See also Rule 2.6, Comment [1A]" to end
<b>OK</b> <b>Effective</b> <b>4/15/2011</b>	Identical
<b>OR</b>	
<b>PA</b>	
<b>SD</b> <b>Effective</b> <b>1/1/2006</b>	Model Code Rule 2.2 corresponds to the introductory paragraph of SD Canon 3. ABA Rule replaces "diligently" with "fairly," leaving competence for Rule 2.5.
<b>TN</b> <b>Effective</b> <b>7/1/2012</b>	Identical. [4] Changes "pro se" to "self-represented".
<b>TX</b>	
<b>UT</b> <b>Effective</b> <b>4/1/2010</b>	Deletes [1]
<b>VT</b>	
<b>VA</b>	
<b>WA</b> <b>Effective</b> <b>1/1/2011</b>	Identical
<b>WV</b>	
<b>WI</b>	

As of April 10, 2012

<b>WY</b> <b>Effective</b> <b>7/1/2009</b>	Identical
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